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NO. 65565-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re Dependency of K.D.S., A Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

DEREK GLADIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

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BRIEF IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

(Appellant's Brief)

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Errors</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	4
C. <u>ARGUMENT</u> .....	10
I. THE EVIDENCE WAS NOT SUFFICIENT TO PROVE THAT CONTINUATION OF THE PARENT AND CHILD RELATIONSHIP CLEARLY DIMINISHES K.S.'S PROSPECTS FOR EARLY INTEGRATION INTO A STABLE AND PERMANENT HOME.....	10
II. BECAUSE THE RECORD DOES NOT SUPPORT A FINDING OF CURRENT PARENTAL UNFITNESS, GLADIN WAS DENIED DUE PROCESS. ....	17
III. THE COURT ERRED WHEN IT FOUND THAT TERMINATION WAS IN K.S.'S BEST INTERESTS.....	19
IV. THE TRIAL COURT FAILED TO RECOGNIZE AND, THUS, EXERCISE ITS EQUITABLE POWER TO ORDER THE <u>LESS</u> RESTRICTIVE ALTERNATIVE TO TERMINATION WHICH IT CONSIDERED TO BE THE BEST RESOLUTION OF THIS CASE.....	21
V. RCW 13.34.190 VIOLATES DUE PROCESS BECAUSE IT IS VAGUE AND LACKS THE NECESSARY GUIDANCE FOR UNIVERSALLY EQUITABLE APPLICATION. ....	28
D. <u>CONCLUSION</u> .....	36

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Bailey v. Allstate Ins. Co.</u> , 73 Wn. App. 442, 869 P.2d 1110 (1994) .....	17
<u>City of Seattle v. Williams</u> 128 Wn.2d 341, 908 P.2d 359 (1995) .....	17
<u>Davis v. Dep't of Licensing</u> 137 Wn.2d 957, 977 P.2d 1231 (1999) .....	16
<u>Dependency of K.R.</u> 128 Wn.2d 129, 904 P.2d 1132 (1995) .....	11
<u>In re Custody of Smith</u> 137 Wn.2d 1, 969 P.2d 21 (1998) .....	10, 31
<u>In re Dependency of A.C.</u> 123 Wn. App. 244, 98 P.3d 89 (2004) .....	20, 24
<u>In re Dependency of B.R.</u> ___ Wn. App. ___, ___ P.3d ___ (2010) .....	19
<u>In re Dependency of J.C.</u> 130 Wn.2d 418, 924 P.2d 21 (1996) .....	15, 16
<u>In re Dependency of K.S.C.</u> 137 Wn.2d 918, 976 P.2d 113 (1999) .....	16, 24, 25, 26
<u>In re FM</u> 163 P.3d 844 (2007).....	28
<u>In re Parentage of C.A.M.A.</u> 154 Wn.2d 52, 109 P.3d 405 (2005) .....	35
<u>In re Parentage of L.B.</u> 155 Wn.2d 679, 122 P.3d 161 (2005).....	21

## TABLE OF AUTHORITIES (CONT'D)

	Page
<u>In re Sumeey</u> 94 Wn.2d 757, 621 P.2d 108 (1980) .....	11
<u>In re T.R.</u> 108 Wn. App. 149, 29 P.3d 1275 (2001) .....	12
<u>In re Welfare of A.B.</u> 168 Wn.2d 908, 232 P.3d 1104 (2010) .....	17, 18, 19
<u>In re Welfare of Aschauer</u> 93 Wn.2d 689, 611 P.2d 1245 (1980) .....	28
<u>State ex rel. Dole v. Kirchner</u> 182 Kan. 622, 322 P.2d 759 (1958) .....	14
<u>State v. Flieger</u> 91 Wn. App. 236, 955 P.2d 872 (1998) .....	27
<u>Vaughn v. Chung</u> 119 Wn.2d 273, 830 P.2d 668 (1992) .....	23
<u>FEDERAL CASES</u>	
<u>Duchenease v. Sugarman</u> 566 F.2d 817 (2nd Cir. 1977) .....	28
<u>Furman v. Georgia</u> 408 U.S. 238, 92 S.Ct. 2726. 33 L.Ed.2d 346 (1972) .....	30, 31, 33
<u>Grayned v. City of Rockford</u> 408 U.S. 104, 92 S.Ct. 2294 (1972) .....	29
<u>Gregg v. Georgia</u> 428 U.S. 153, 96 S.Ct 2909 (1976) .....	29, 30, 33
<u>Interstate Circuit, Inc. v. City of Dallas</u> 390 U.S. 676, 88 S.Ct. 1298 (1968) .....	31

## **TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Santosky v. Kramer</u> 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) .....	10
<u>Small Co. v. American Sugar Ref. Co.</u> 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925) .....	29

### **OTHER JURISDICTIONS**

<u>In re Hayes</u> 79 Ohio St.3d 46, 679 N.E.2d 680 (1997) .....	28
<u>In re K.A.W.</u> 133 S.W.3d 1 (Mo.2004) .....	28
<u>State v. Edwards-Peecher</u> 218 Or. App. 311, 179 P.3d 746 (2008) .....	14
<u>Tammila G. v. Nevada</u> 148 Nev. 759, 148 P.3d 759 (2006) .....	28

### **RULES, STATUTES AND OTHER AUHTORITIES**

D. Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J.Fam.L. 213 (1977-78) .....	31
Former RCW 13.34.180 .....	15, 16
Former RCW 26.09.240 (6) .....	34
Jill Cochran, Courting Death: 30 Years Since Furman, Is The Death Penalty Any less Discriminatory, 38 VALULR 1399 (2004) .....	30
Laws 2010, ch. 272, § 16 .....	23
RCW 13.34.030 .....	24

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 13.34.180.....	11, 14, 15, 17, 34, 36
RCW 13.34.190.....	1, 3, 19, 22, 28, 31, 32, 33, 34, 35, 36
RCW 13.34.230 .....	26
RCW 13.34.231.....	23
RCW 13.34.232 .....	24
Stan Thomas Todd, Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts, 26 Stan. L. Rev. (1974)...	32
U.S. Const. amend. V.....	10
U.S. Const. amend. XIV .....	10
Wash. Const. art. I, § 3.....	10
Webster's Third New Int'l Dictionary 420 (unabridged ed. 2002)...	14

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the trial court's finding that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

2. Appellant was denied due process when the trial court failed to enter an explicit finding of current parental unfitness and the record does not support an implied finding.

3. There was insufficient evidence to support the trial court's finding that termination was in the child's best interest.

4. The trial court abused its discretion when it failed to recognize and exercise its equitable powers to order the alternative remedy it believe most appropriate in this case.

5. RCW 13.34.190 is unconstitutional because it lacks the necessary guidance for universally equitable application.

6. The court erred in entering findings of facts 2.13 - 2.15 and Conclusions of Law 3.3, 3.4, and 3.6.<sup>1</sup>

Issues Pertaining to Assignments of Errors

1. Appellant's daughter has extensive developmental delays and mental health problems which manifest in extreme

behavior problems. As a result, she is placed in a long-term, institutional single-occupant residence with multiple professional caregivers attempting to meet her daily needs. The trial court concluded there was no chance the child would be adopted; but rather, she would remain in a professional residential setting throughout her life. Although the trial court speculated the child's prospects might improve 5% if the parent-child relationship were terminated, it contrarily concluded the child "is in as stable and permanent a home now as she'll ever be in."<sup>2</sup> Did the trial court err in ruling the State had proven clearly, cogently, and convincingly that continuation of the parent-child relationship clearly diminished the child's prospects of integration into a stable and permanent home?

2. Due process requires that before a trial court may terminate a person's parental rights, it must find that person is currently unfit to parent his child. The trial court failed to make an explicit finding as to whether appellant is currently unfit to parent his daughter. And such a finding cannot be implied

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<sup>1</sup> CP 4-10.

<sup>2</sup> RP at 544.

given the trial court's inconsistent findings. Was appellant denied due process?

3. Was there insufficient evidence that termination was in the child's best interest, where the evidence showed she was in a long-term institutional placement committed to caring for her permanently, there was no tangible chance of her being adopted or placed in any other setting, and visits with her father were not harmful to her and enjoyed by both?

4. Courts have equitable powers to shape a unique remedy when a statute is incomplete -- especially when to do so would further family interests. Here, the trial court identified two viable alternatives to termination which it would have ordered, but for the fact that the Legislature did not provide it the authority to do so within the termination statutes. Did the trial court fail to recognize and exercise its equitable power to order a less restrictive alternative to termination?

5. RCW 13.34.190 directs trial courts to terminate parental rights if it is in the best interest of the child. The statute provides no guidelines directing a court's discretion in this matter. Does RCW 13.34.190 violate due process because it does not

provide even minimal guidelines to minimize the risk of arbitrary application?

B. STATEMENT OF THE CASE

K.S. was born on July 28, 1995. RP 17. Appellant Derek Gladin is K.S.'s father and Elizabeth Sleasman is her mother.<sup>3</sup> RP 17. K.S. was taken into custody on November 23, 2002, after Sleasman engaged in a high speed chase with K.S. in the car. RP 17, 75. At that time, Gladin was living in Alabama. RP 19-20. A dependency was established as to Sleasman on January 6, 2003, based on a finding of neglect. CP 5. On August 29, 2003, a dependency was established as to Gladin because he did not appear to be able to meet K.S. significant needs.<sup>4</sup> CP 5; RP 74.

K.S. suffers severe developmental delays and mental health issues which manifest in extreme behavior problems.<sup>5</sup> K.S. has been diagnosed with fetal alcohol exposure, attention deficit hyperactivity disorder, post traumatic stress disorder,

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<sup>3</sup> Sleasman's parental rights have been terminated. CP 4-9.

<sup>4</sup> The Department identified Gladin's primary parental deficiency to be his inability to fully comprehend or meet K.S.'s needs. RP 95.

<sup>5</sup> The trial court found Gladin was not responsible for causing these circumstances. RP 541.

communication disorder, mild mental retardation, opposition defiance disorder, and a mood disorder. RP 103, 292. Although K.S. is 14 years old, her cognitive function is akin to that of preschooler. RP 250, 262.

As a result, K.S. acts out aggressively (physically and verbally) when she does not get her way or is frustrated, engages in highly sexualized and inappropriate behavior, self injures, and verbally threatens to kill others. RP 104, 295. She has been hospitalized several times for psychiatric treatment -- sometimes needing to stay up to 180 days. RP 91, 102, 290, 300.

K.S.'s behavior is so extreme she now has to live in a single home without roommates. RP 266, 297. She requires multiple caregivers and is staffed at all times. RP 105, 302. The staff has had to develop an elaborate safety plan for protecting K.S. and themselves when she is out of control. RP 298-300. This includes attempting to restrain K.S., and if that does not work,<sup>6</sup> leaving the house and observing her through the windows. RP 299. As a last resort, the staff is directed to call 911 for help. RP 300. The police

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<sup>6</sup> Ordinary safety restraining techniques often do not work on K.S., because she drops to the ground and prevents a safe hold. RP 301.

have been called a few times, and K.S. has had to be handcuffed.  
RP 301.

Although K.S. attends a self-contained special education class at public school, the school has had to undertake considerable accommodations to keep K.S., the other students, and the staff safe. RP 247-49. The school purchased protective gear and built a special time-out room with a one-way locking door especially for K.S. RP 252-53. If K.S. escalates, the staff must clear all the other students from the room, while 2 or 3 staff members put on the protective gear and attempt to restrain her. RP 257, 259. K.S. is then locked in the time-out room and observed through a window until she can de-escalate and remain calm for ten minutes. RP 252-53. The school staff has suffered scratches, bites, bloody noses, fat lips, and kicks to the head. RP 260.

The social worker testified K.S.'s behavioral issues are extreme compared to other children she worked with, and that she does not see K.S. ever being able to live independently. RP 106. K.S.'s needs have proven too much to handle for her relatives and the one foster home she was placed in. RP 274, 408. Similarly, although Gladin was provided with remedial services throughout

the dependency, the trial court found he was not in a position to meet his daughter's significant daily needs as a single parent and no amount of services could change that. RP 77-81; 540-41.

Throughout the dependency, K.S. has had to be placed fourteen times. RP 143. For several years, K.S. had been placed in the group home Right Start in Arlington (her longest placement), but the Department removed her after discovering the facility violated the Department's policies designed to protect K.S. from sexual exploitation by the male staff members. RP 33, 120, 273.

While K.S. was at Right Start, Gladin participated in numerous visits with his daughter. The reports document that Gladin was appropriate with her. He maintained a patience and calm and successfully redirected his daughter appropriately to avoid escalating behavior. K.S. was excited to see her father and asked to see him on several occasions. They enjoyed their time together.<sup>7</sup> RP 36, 123-24, 147- 72, 186, 347-65.

In August 2008, K.S. was transferred to SL Start Children's Home in Spokane, even though the Department was aware the

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<sup>7</sup> The trial court found Gladin's visits with his daughter were not harmful and stated it would order a continuation of the dependency with visits if it had the authority to do so. RP 543-44.

transfer would present visitation challenges because Gladin lived in western Washington. RP 115, 290. Gladin visited K.S. only a few times at SL Start. RP 38, 321-22, 303-04. At one point, the agency recommended Gladin meet with K.S.'s case manger and therapist to discuss visitation guidelines. RP 100, 306, 328. Gladin attempted to meet with the therapist but got caught in snowy condition coming over the pass and arrived late. RP 35, 101. Although Gladin's attorney was there, the meeting did not proceed, the therapist leaving before Gladin arrived. RP 35.

On March 3, 2009, the Department moved to have visits suspended. RP 38, 101. Gladin was required to meet with K.S.'s staff before they would be reinstated. RP 38, 101. The Department withheld travel expenses and Gladin's transportation became unreliable, however. RP 38. Since then, Gladin has called the Department to inquire whether he could visit his daughter or call on her birthday, but was told no. RP 88, 90.

Despite the ongoing dependency, K.S. had been cleared for adoption in April 2008. RP 409. K.S. has been listed with the Northwest Adoption Exchange Network and specifically presented twice. RP 106. Although one family was interested, they decided to adopt a disabled child with less challenges. RP 106, 336-39.

SL Start is committed to providing for K.S.'s care permanently so long as she needs a placement. RP 108, 118-19, 329. The agency cannot adopt K.S., however. RP 108

The social worker testified K.S. was more likely to be adopted if Gladin's parental rights were terminated, because in general, people are more likely adopt if the child is already legally available. RP 107. However, when the trial court asked the social worker to render a specific opinion as to how likely it is for a 15-year-old girl with K.S.'s needs to be adopted, she admitted she had no idea, but was hopeful and did not think it was impossible. RP 410.

A service provider testified that for K.S. to be adopted, the Department would have to find a highly specialized home in which the parents had engaged in some kind of social work or residential services previously. RP 190. When the trial court asked if she believed that K.S. will be adopted, however, the service provider admitted she was not in the position to make a professional judgment because she was not an adoptive expert.<sup>8</sup> RP 191.

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<sup>8</sup> Apparently realizing its witnesses were not qualified to render expert opinions regarding K.S.'s prospects for finding a permanent home, the State attempted to call an adoption expert in rebuttal.

After hearing this evidence, the trial court concluded there was no chance K.S. would be adopted and it was absolutely certain she would remain in a home such as RL Start the rest of her life. RP 542, 543. It stated: "...I think [K.S.] is in as stable and permanent a home now as she'll ever be in." RP 544.

C. ARGUMENT

I. THE EVIDENCE WAS NOT SUFFICIENT TO PROVE THAT CONTINUATION OF THE PARENT AND CHILD RELATIONSHIP CLEARLY DIMINISHES K.S.'S PROSPECTS FOR EARLY INTEGRATION INTO A STABLE AND PERMANENT HOME.

It is well established that parents have a fundamental liberty in the care and custody of their children. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 27, 969 P.2d 21 (1998). The State may interfere with a parent's constitutional due process right "only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." Smith, 137 Wn. 2d at 15. Unless parental actions or decisions seriously conflict with the physical or mental health of

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However, the trial court sustained the defense objection that such testimony was beyond the scope. RP 489-90.

the child, the State does not have the right to intervene to protect the child. In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

The State may only regulate a parent-child relationship if it can show such an intrusion is necessary protect a child from harm or risk of harm. Smith, 137 Wn. 2d at 15.; Santosky, 455 U.S. at 766.

To terminate a parent-child relationship in Washington, the Department must establish the six statutory elements set forth in RCW 13.34.180(1). Under RCW 13.34.180(1)(f), the State must prove by cogent and convincing evidence that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." Clear, cogent and convincing evidence exists only "when the ultimate fact in issue is shown by the evidence to be 'highly probable.'" In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995).

There was not sufficient evidence that continuation of Gladin's relationship with his daughter would clearly diminish her prospects for integration into a stable and permanent home. The record shows any prospects for K.S.'s long-term placement in a foster home or for adoption are merely a theoretical hope at this

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point. RP 543<sup>9</sup>; See, In re T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001) (explaining that when it comes to dependency matters, “theoretical possibilities are not enough”).

The State’s witnesses agreed K.S.’s prospects for a permanent home outside of SL Start were bleak. RP 106, 190-91. Despite this, the social worker testified K.S. is theoretically adoptable and that her chances for adoption would be greater if Gladin’s parental rights were terminated because people in general are more willing to adopt when a child is legally free. RP 107. The trial court’s findings echo the social worker’s generalizations regarding the increased adoption prospects of children who are legally free. CP 8.

Such generalizations are simply not relevant, however. The issue here is not whether, theoretically, K.S. is more likely be adopted if she is legally free – the relevant issue is whether the State has proven clearly and convincingly that there tangible chance that K.S.’s circumstances would change as a result of termination. It did not.

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<sup>9</sup> The trial court explained, “As much as the State would like to see [K.S. adopted], I just don’t think it is likely.”

Particularly telling in this case is the trial court's oral ruling which, unlike the generalized written findings, presents a more complete analysis of the relevant issues and specific circumstances of this case. As the record shows, the bulk of the trial court's factual findings that speak to K.S.'s actual situation and prospects - - rather than theoretical prospects - weigh against the State.

Even after hearing the State's evidence, the trial court was convinced there was no chance K.S. would be adopted and that K.S. would remain in an institutional residence like SL Start for the rest of her life. RP 542. It ultimately concluded "[K.S.] is in as in as stable and permanent home now as she'll ever be in." RP 544. Thus, the trial court appeared convinced that, as a practical matter, K.S.'s life and prospects for permanency would not change if her legal relationship with her father remained intact.

Nevertheless, the trial court contradicted itself, suggesting K.S.'s chances of finding a permanent home might improve by 5% if appellant's legal relationship with his daughter were terminated. RP 543-44. The trial court then concluded that because there might be the slightest possibility (5%) that continuation of the parent-child relationship could diminish K.S.'s prospects for permanency, it was

required to find the State met its burden under RCW 13.34.180(1)(f). RP 544, 546. The trial court was mistaken.

Even assuming arguendo the evidence supported the trial court's finding that K.S.'s prospects improve by 5% if Gladin's parental rights are terminated,<sup>10</sup> this finding was not sufficient to support the legal conclusion that the State met its burden under RCW 13.34.180(1)(f). The State's burden is not to produce some evidence that the child's prospects might be slightly improved if the parent-child relationship were terminated. Instead, the State must produce clear, cogent and convincing evidence establishing that a child's prospects are "clearly"<sup>11</sup> diminished by continuation of the parent-child relationship. RCW 13.34.180(1)(f). It did not do so. Hence, this Court should find the State did not produce sufficient evidence under RCW 13.34.180(1)(f).

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<sup>10</sup> The basis for the trial court's quantification of K.S.'s prospects is not apparent in this record as there was no expert that could quantify K.S.'s prospects in any meaningful way. Hence, the number appears speculative at best.

<sup>11</sup> The use of the word "clearly" is entitled to significance and weight. See, State ex rel. Dole v. Kirchner, 182 Kan. 622, 322 P.2d 759 (1958). The word "clearly" means "1: in a clear manner 2: of something asserted or observed: without doubt or question." Webster's Third New Int'l Dictionary 420 (unabridged ed. 2002); see also, State v. Edwards-Peecher, 218 Or. App. 311, 319, 179 P.3d 746 (2008).

In response, the State may argue that when the trial court finds there is little likelihood that conditions will be remedied so that the child can be returned to a parent in the near future under RCW 13.34.180(1)(e), it necessarily follows that the State has met its burden under RCW 13.34.180(1)(f) as well. While there is some case law that supports this proposition, this Court is not bound by it for two reasons: (1) it has been overruled sub silentio in a more recent Supreme Court opinion; and (2) it renders superfluous a significant portion of the statute.

This proposition first emerged in a Washington Supreme Court ruling which stated:

Insofar as the finding required by RCW 13.34.180(6), that continuation of the parent-child relationship diminishes the child's prospects for early integration into a stable and permanent home, such a finding necessarily follows from an adequate showing of the allegation made pursuant to RCW 13.34.180(5).<sup>12</sup>

In re Dependency of J.C., 130 Wn.2d 418, 427, 924 P.2d 21 (1996). The J.C. Court offered no reasoning to support this conclusion and cited no case law.

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<sup>12</sup> The statutory subsections refer to a former version of the statute. Former RCW 13.34.180 (5) and (6) are now codified as RCW 13.34.180(1)(e) and (1)(f).

Four years after J.C., the Washington Supreme Court reviewed a case in which the mother challenged the sufficiency of the evidence under RCW 13.34.180 (6), but did not properly raise a challenge under RCW 13.34.180(5). In re Dependency of K.S.C., 137 Wn.2d 918, 926, n. 3, 976 P.2d 113 (1999). The Supreme Court refused to review any argument regarding RCW 13.34.180(5), letting stand the finding that the State had met its burden regarding that element. Under J.C., any further review of the case would have been unnecessary as a result. Instead, however, the K.S.C. Court reviewed the case to determine whether the State had met its burden under RCW 13.34.180(6) -- even though the State had adequately proven RCW 13.34.180(5). In so doing, the Supreme Court appeared to abandon its unreasoned and off-handed comment in J.C. that proof of RCW 13.34.180(5) automatically leads to a finding that RCW 13.34.180(6) also has been proved.

The Supreme Court's sub silentio abandonment of J.C. is consistent with the longstanding rule of statutory construction that all language within a statute must be given effect so that no portion is rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 1231 (1999). Appellate

courts are duty bound to give meaning to every word the legislature includes in a statute and must avoid rendering any language superfluous. City of Seattle v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). The legislature is presumed not to engage in unnecessary or meaningless acts. Bailey v. Allstate Ins. Co., 73 Wn. App. 442, 446, 869 P.2d 1110 (1994).

For the reasons stated above, this Court should find the trial court erred in concluding the State met its burden under RCW 13.34.180(1)(f), and accordingly, reverse the termination order.

II. BECAUSE THE RECORD DOES NOT SUPPORT A FINDING OF CURRENT PARENTAL UNFITNESS, GLADIN WAS DENIED DUE PROCESS.

In a recent decision, In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010), the Washington Supreme Court held that the trial court must make an explicit finding that the parent is currently unfit before ordering termination. If there is no explicit finding of current parental unfitness, the Court held:

the appellate court can imply or infer the omitted finding if -- but only if -- all the facts and circumstances clearly demonstrate that the omitted finding was actually intended, and thus made, by the trial court.

A.B., 168 Wn.2d at 921. If the trial court makes findings that are conflicting or ambiguous, appellate courts may not infer the omitted finding. Id. at 921-22.

The trial court did not make an explicit finding Gladin is currently unfit to parent K.S. CP 4-10. While trial court found K.S.'s needs are so extensive she requires 2-3 professional caregivers to provide for her daily needs, and that it would be impossible for Gladin to meet K.S.'s parenting needs on a daily basis (CP 7-8; RP 540-53), it does not necessarily follow that Gladin is unfit to maintain any form of relationship with his daughter or unfit for visits.<sup>13</sup> This is especially so given that K.S. will not likely find another parental figure and will remain in institutionalized care.

Having observed Gladin and having heard his testimony, the trial court found that Gladin loves his daughter very much, was not responsible for causing her circumstances, and posed no danger during visits, and that he and K.S. both enjoyed visits. RP 46, 540-47. Given K.S.'s lack of prospects for adoption or placement with a

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<sup>13</sup> Appellant has assigned error to finding of fact 2.13 to the extent the finding may be read by this Court to conclude that appellant is incapable of parenting his daughter in any capacity.

foster family, parental visits with Gladin may be the only form of parenting she will ever know outside her institutional setting.

The trial court ultimately concluded the ideal situation would be to continue of the dependency and K.S.'s placement at RL Start with occasional supervised parental visits. RP 543-44. This conclusion conflicts with the notion that Gladin is unfit to parent his daughter. For if the trial court had been convinced Gladin were unfit to parent K.S. in any way including during visits, it would never have voiced a preference for continued visitation.

Based on this record, it is simply not possible to discern that the trial court actually found that Gladin was currently unfit to parent his daughter in any capacity. As such, this Court may not infer the missing finding and must reverse the termination order. A.B., 168 Wn.2d at 921-22, 927; see, also, In re Dependency of B.R., \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2010). Hence, reversal is required. Id.

### III. THE COURT ERRED WHEN IT FOUND THAT TERMINATION WAS IN K.S.'S BEST INTERESTS.

Before it may terminate a parent's rights, the trial court must determine by a preponderance of the evidence whether termination is in the best interests of the child. RCW 13.34.190(1).

The potential for permanency is one factor to be considered, but “the idea of permanence should not be regarded as a talisman that automatically opens the door to termination.” In re Dependency of A.C., 123 Wn. App. 244, 252, 98 P.3d 89 (2004). It is axiomatic that any child needs stability and permanency and would benefit in not being the subject of a dependency proceeding. Hence, such generalized truths standing alone can hardly be said to sufficiently support a legal conclusion that termination is in the best interest of a particular child. This is especially so when any prospects for permanency are as speculative as in this case.

Here, the trial court’s written findings state that it is in K.S.’s best interest to resolve who will be the child’s permanent caretaker and to allow adoption planning to begin. CP 8. However, the record shows that adoption planning had already begun (RP 106) and that K.S. was already in as permanent a placement as she would likely ever know (RP 544). Beyond this, the trial court gave no reason why termination might be in K.S.’s best interest. CP 8.

Even under the preponderance of the evidence standard, the court’s factual findings do not support its legal conclusion that termination was in child’s best interests at this time. For this

additional reason, the order terminating parental rights should be reversed.

IV. THE TRIAL COURT FAILED TO RECOGNIZE AND, THUS, EXERCISE ITS EQUITABLE POWER TO ORDER THE LESS RESTRICTIVE ALTERNATIVE TO TERMINATION WHICH IT CONSIDERED TO BE THE BEST RESOLUTION OF THIS CASE.

*Simply because a statute fails to speak to a specific situation [this] should not, and does not in [Washington's] common law system, operate to preclude the availability of potential redress.<sup>14</sup>*

Washington courts may invoke their equity powers and common law responsibility to respond to the needs of children and families in the face of unique realities. L.B., 155 Wn.2d at 689. This is so even if legislative enactments may have spoken to the area of law, but did so incompletely. Id.

Washington case law reveals courts have often used their equitable powers within the province of familial relationships and expanded the common law accordingly to address the unusual needs of families. Id. at n. 6 (citations omitted).

This case presents a prime example of when a trial court should be permitted to exercise its equitable powers in order to fill a gap in the termination statutes.

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<sup>14</sup> In re Parentage of L.B., 155 Wn.2d 679, 689, 122 P.3d 161 (2005)

As the trial court's findings reveal, given the "very, very unusual" (CP 545) circumstances of this case, it struggled with how to reach what it believed to be the best outcome in this case given its limited statutory authority. CP 542-47. The trial court identified two less restrictive alternatives to termination, and it would have ordered one of them but for the fact the statutes did not provide for these remedies. Id. Unfortunately, the trial failed to recognize it could use its equitable powers to order one of the identified remedies a less restrictive to termination for the very reason that the statutes do not speak to such alternatives.

One alternative the trial court identified was to make the findings necessary to support a termination order, but to withhold entry and thus, preserve the parent-child relationship) until the State could identify a person willing to be K.S.'s adoptive parent or permanent foster parent. RP 545. While there is no statutory provision providing for such a remedy, there was nothing prohibiting this.

RCW 13.34.190(1) provides that after the State has met its burden under the termination statutes, "the court **may** enter an order terminating all parental rights to a child." Emphasis added. This

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indicates judicial action other than termination is permissible. See, e.g., Vaughn v. Chung, 119 Wn.2d 273, 281, 830 P.2d 668 (1992) (“may” indicates something is permissible; “shall” indicates something is mandatory). The termination statutes do not address what other action the trial court may take when it makes the necessary findings and legal conclusions supporting a termination order, but chooses not to enter the termination order. Hence, there is a statutory gap and the trial court could have used its equitable powers to shape a remedy.

Alternatively, the trial court stated that if it had the statutory authority, it would have ordered the dependency continued with K.S. remaining in R.L. Start’s Care, enjoying occasional supervised visits. RP 543. Essentially, such an arrangement could have been accomplished by the creation of a dependency guardianship, with SL Start taking the role of guardian. See, RCW 13.34.231,<sup>15</sup> RCW

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<sup>15</sup> Two days after the findings were entered in this case, the Legislature repealed the guardianship statute to replace it with another statutory scheme. See, Washington Laws 2010, ch. 272, § 16, eff. June 10, 2010. However, this case should be analyzed under former RCW 13.34.231, which provides:

At the hearing on a dependency guardianship petition, all parties have the right to present evidence and cross examine witnesses. The rules of evidence apply to the conduct of the hearing. A guardianship shall be

13.34.232; In re Dependency of A.C., 123 Wn. App. 244, 251-52, 98 P.3d 89 (2004) (recognizing a dependency guardianship is a viable alternative to termination).

The problem for the trial court is that there was no guardianship petition before it. Thus, it was without statutory authority to enter a guardianship. See, In re Dependency of K.S.C.,

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established if the court finds by a preponderance of the evidence that:

(1) The child has been found to be a dependent child under RCW 13.34.030;

(2) A dispositional order has been entered pursuant to RCW 13.34.130;

(3) 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 under RCW 13.34.030;

(4) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

(5) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(6) A guardianship, rather than termination of the parent-child relationship or continuation of efforts to return the child to the custody of the parent, would be in the best interest of the child.

137 Wn.2d 918, 930-31, 976 P.2d 113 (1999); T.C.C.B., 138 Wn. App. 797-800 (holding there is no requirement for a court to consider a dependency guardianship absent a petition). This does mean, however, that a court is without power to order the dependency guardianship – especially given the fact that R.L. Start representatives testified the agency was willing to care for K.S. as long as she needed them. RP 329.

In response, the State may suggest that under T.C.C.B. and K.S.C., the trial court was not permitted to consider a dependency guardianship absent a petition. However, such a reading of those cases would be incorrect.

In T.C.C.B., this Court emphasized that neither the statutes nor the constitution demand consideration where there is no petition and “no other evidence to support a guardianship.” Id. at 800-02. In reaching this conclusion, however, this Court never went so far as to conclude the statutes actually bar a trial court from ever considering a dependency guardianship as a viable less restrictive alternative when there is evidence to support it. Indeed, such a holding would clearly violate substantive due process and separation of powers doctrines, because it would be permitting the

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State to legislate away the courts constitutional duties and it would permit the Legislature to statutorily usurp the court's power as the final arbiter of constitutional issues. Hence, T.C.C.B. cannot be read as broadly as the State may suggest.

Likewise, the Washington Supreme Court's ruling in K.S.C. does not support the notion that a trial court may never consider ordering a guardianship. In K.S.C., the parents challenged a termination order, arguing the trial court was statutorily required to consider a dependency guardianship even though no party had petitioned under RCW 13.34.230. K.S.C., 137 Wn.2d at 931. Hence, the Supreme Court looked only to the statutory language of the guardianship and termination statutes, concluding that they "do not demand consideration or creation of a dependency guardianship where there has been no petition for the creation of one." Id. (emphasis).

Notably, the petitioners in both T.C.C.B. and K.S.C. did not raise – and consequently the Courts did not consider-- whether the trial court is actually barred from considering a guardianship alternative when there is no formal petition before it. While K.S.C. and T.C.C.B. indicate the trial court has no **statutory** authority to consider this less restrictive alternative without a guardianship petition

before it, these cases do not speak to the Court's equitable powers – the relevant question here.

T.C.C.B. and K.S.C actually highlight the fact that the termination statutes leave a gap in circumstances where there is no petition but some evidence a dependency guardianship is a real option to termination. However, this gap in the statutes does not mean the trial court is wholly without power to act; instead, it simply means the trial court must invoke its equitable powers when considering such a remedy where no petition has been filed.

Here, the trial court failed to recognize it had the power to order one of the two identified alternatives to termination (i.e. a dependency guardianship or a conditional order.) It clearly believed these alternatives would provide the best outcome for this case given the unique circumstances. RP 543-45.

The trial court's failure to exercise its discretion amounts to an abuse of discretion. See, State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998). Based on this record, this Court cannot conclude which alternative the trial court would have ordered. Thus, the termination order should be reversed, and the case remanded for the trial court to implement the alternative it favors.

V. RCW 13.34.190 VIOLATES DUE PROCESS BECAUSE IT IS VAGUE AND LACKS THE NECESSARY GUIDANCE FOR UNIVERSALLY EQUITABLE APPLICATION.

State intervention into the family implicates “the most essential and basic aspect of family privacy – the right of the family to remain together without coercive interference of the awesome power of the State.” Duchenease v. Sugarman, 566 F.2d 817, 825 (2nd Cir. 1977). Consequently, the termination of parental rights is often referred to as the “civil death penalty”. See, e.g., In re FM, 163 P.3d 844, 851 (2007); Tammila G. v. Nevada, 148 Nev. 759, 763 148 P.3d 759 (2006); In re K.A.W., 133 S.W.3d 1 (Mo.2004); In re Hayes, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

RCW 13.34.190 permits the trial court to permanently and irrevocably destroy a parent-child relationship if it finds that such an action is in the best interest of the child. Yet, the statute provides no guidelines directing a court’s discretion when considering such interests.

Likewise, case law addressing the best-interest standard specifically refuses to incorporate even minimal standards. In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980) (holding the factors in determining best interest of the child need

not be specified); A.V.D., 62 Wn. App. at 572. Due process requires, however, that a statute authorizing such a dire result must contain provisions that provide for guided discretion to provide uniformity of standards and provide for meaningful appellate review.

The “void for vagueness” doctrine invokes fundamental due process rights and is applicable to civil as well as criminal actions. See, Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925). This doctrine requires statutes “provide explicit standards for those who apply” them in order to avoid “resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972).

Where a statute affords a decision-maker discretion on matters as grave as the permanent and irrevocable breaking of a parent-child relationship, the decision-maker’s discretion must be suitably directed so that decisions are not arbitrary or overly influenced by the personal views of those enforcing them, thus promoting uniformity of application. Gregg v. Georgia, 428 U.S. 153, 188-89, 96 S.Ct 2909 (1976).

For example, in 1972, the Supreme Court struck down the capital punishment laws in this country in Furman v. Georgia, 408 U.S. 238, 309-10, 92 S.Ct. 2726. 33 L.Ed.2d 346 (1972). Although the Court's reasoning was somewhat murky because there was no clear majority opinion, the one point of consensus and most commonly asserted rationale was that the lack of statutory standards to guide decision-makers resulted in an unconstitutionally arbitrary process for determining whether to invoke one of the State's most powerful and serious actions. Id.; see also, Jill Cochran, Courting Death: 30 Years Since Furman, Is The Death Penalty Any less Discriminatory, 38 VALULR 1399, 1399-1401, Summer, 2004 (reviewing the Furman decision, its rationale(s), and the subsequent reinstatement of the death penalty laws).

In 1976, the Supreme Court reinstated the death penalty in the United States approving statutory schemes that included mitigating and aggravating factors that would be considered in each case. The Supreme Court found these statutes were constitutionally acceptable because they incorporated the concept of guided discretion and created a more uniform sentencing system. Gregg, 428 U.S. at 192-93.

RCW 13.34.190 suffers the same flaw as the Furman statutes -- it lacks the necessary standards to provide for uniform, guided discretion. When considering what is in the best interest of a child, opinions may vary widely. See, generally, Smith, 137 Wn.2d at 20 (acknowledging opinions vary as to what is the best way of raising a family). Even judges can have a wide variety of opinions on this matter. Yet, the decision of whether to extinguish the fundamental right of a family to maintain ties should not be influenced by which judge is assigned the case. Concepts of due process dictate that families be assured that there are at least minimal guiding standards that protect against individualized and arbitrary application of the best-interest standard in termination proceedings. RCW 13.34.190 provides no such assurances. See D. Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J.Fam.L. 213 (1977-78).

Equally problematic, RCW 13.34.190 grants courts broad authority to interfere with parents' childrearing decisions without providing for effective appellate review. See, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 684-85, 88 S.Ct. 1298 (1968). The Legislature's failure to identify statutory factors to be

considered when determining whether termination is in the best interest of a child under RCW 13.34.190 leaves open the distinct possibility that there will not be an adequate record to permit effective appellate review. As one commentator explained:

Vagueness hampers effective judicial review because it is difficult to identify the factors relied upon in the adjudication below when all-encompassing statutes provide the basis for prosecution. The possibility therefore exists that “[p]rejudiced, discriminatory, or overreaching exercises of state authority may remain concealed behind findings of fact impossible for the Court to redetermine when such sweeping statutes have been applied to the complex, contested fact constellations of particular cases.”

See, Stan Thomas Todd, Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts, 26 Stan. L. Rev. 855, 859 (1974).

In response, the State may argue that because best-interest considerations often turn on case-specific facts the trial court’s discretion should be left open-ended and unguided. BOR at 45-46. This argument is unpersuasive. First, the same could be said of death penalty cases, which turn on case-specific facts and involve individual circumstances of the perpetrator, the victim, and the families impacted by the acts. Despite this, the United States Supreme Court decided that unguided discretion was unacceptable

given the exceptional consequences involved in death penalty cases. Furman, at 240.

Challenged by the U.S. Supreme Court, the post-Furman Legislatures were able to design and codify constitutionally acceptable uniform standards while permitting enough flexibility to account for individual facts and circumstances. In Gregg, however, the Supreme Court approved the use of mitigating and aggravating factors. Although the Supreme Court noted the sentencing factors were necessarily somewhat general, it found that the statutory scheme provided enough structure and guidance to reduce the likelihood of arbitrary decision-making that lacked uniformity. It also noted the safeguard of meaningful appellate review was promoted where the decision-maker was required to specify the factors it relied upon in reaching its decision. Gregg, 428 U.S. at 193-95. There is no reason why this type of guiding structure could not be incorporated into RCW 13.34.190.

It is not impossible for the Legislature to make a list of factors to guide a court in exercising its discretion under RCW 13.34.190. The Washington Legislature has already shown that guided discretion is feasible in the termination context. For example, parental unfitness involves factually intense and case-

specific circumstances. Yet, the Legislature has set forth in RCW 13.34.180 uniform statutory guidelines that are applied in each and every case where the court is determining parental unfitness for termination purposes. This provides for uniform application, but it also permits the trial court enough flexibility to account for individual circumstances and facts. There is no legitimate reason why the Legislature could not set forth a similar due process protection in RCW 13.34.190.

Additionally, the Washington Legislature has shown that it is possible to provide guided discretion to determine the best interest of a child in the context of a third-party visitation statute.<sup>16</sup>

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<sup>16</sup> Former RCW 26.09.240 (6) provided:

The court may consider the following factors when making a determination of the child's best interests:

- (a) The strength of the relationship between the child and the petitioner;
- (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
- (c) The nature and reason for either parent's objection to granting the petitioner visitation;
- (d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

Although that statute was ultimately struck down because the best-interest-of-the-child standard was not constitutional in that context, the former statute demonstrates the Legislature is capable of providing guidance when it comes to applying the best-interest-of-the-child standard.<sup>17</sup>

In conclusion, RCW 13.34.190 lacks the necessary statutory guidance needed to protect against arbitrary enforcement and to provide for effective appellate review. Due process requires more given the extreme consequence of permanently destroying a parent-child relationship. The termination order issued pursuant to this unconstitutional statute must, therefore, be reversed.

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(e) The residential time sharing arrangements between the parents;

(f) The good faith of the petitioner.

<sup>17</sup> See, In re Parentage of C.A.M.A., 154 Wn.2d 52, 109 P.3d 405 (2005).

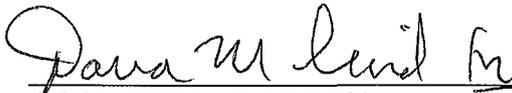
D. CONCLUSION

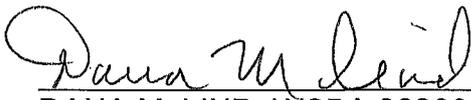
The termination order must be reversed because the State has not met its burden under RCW 13.34.180(1)(f) and RCW 13.34.190. Alternatively, it must be reversed because RCW 13.34.190 is unconstitutionally vague and thus lacks the necessary guidelines for equitable application.

Dated this 20<sup>th</sup> day of October, 2010.

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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In re the Dependency of K.D.S.	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65565-5-1
	)	
DEREK GLADIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF IN SUPPORT OF MOTION FOR ACCELERATED REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ROBYN MARTIN  
ATTORNEY GENERAL'S OFFICE  
103 E. HOLY STREET, SUITE 310  
BELLINGHAM, WA 98225
  
- [X] DEREK GLADIN  
8362 PORTAL WAY  
BLAINE, WA 98230

2010 OCT 20 11:44:03  
SUPERIOR COURT  
CLERK OF COURT

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*