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NO. 98094-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF A.M.-S., Minor Child.

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH,
and FAMILIES,

Respondent,

v.

S.M.-G.,

Petitioner.

DCYF SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Department of Children, Youth, and Families' mission is to protect children and strengthen families so they can flourish. To meet this objective, it is imperative that the Department have access to information to keep children safe and to ensure parents access the services they need to reunify or remain with their children. Court-ordered evaluations are a critical means of obtaining this vital information.

In addressing the inherent authority of trial courts to grant derivative use immunity during these evaluations, the Department requests that this Court keep two fundamental points in mind.

First, numerous safeguards protect parents' Fifth Amendment rights while they pursue reunification with their children. Those procedural protections include, among others, the ability to invoke the right, a statutory prohibition on direct use of information gained during evaluations in subsequent criminal proceedings, and the court's ability to permit parents' attorneys to attend evaluations. These protections appropriately balance parents' Fifth Amendment rights and the critical need for evaluations to facilitate reunification. A parent's invocation of the Fifth Amendment right does not and cannot lead directly to the termination of parental rights.

Second, under longstanding jurisprudence, if a parent refuses to answer questions during these evaluations, the juvenile court has the

discretion to draw an adverse inference. Such inferences allow the juvenile court and the Department to protect children and ensure that parents are offered necessary services.

The Department does not request that this Court affirmatively address these points. Instead, the Department requests that this Court avoid calling these fundamental points into doubt. The Department takes no position as relates to trial court's authority to grant a parent derivative use immunity.

II. RESTATEMENT OF THE ISSUE

In a dependency proceeding, does the superior court have inherent authority to grant a parent derivative use immunity?

III. STATEMENT OF THE CASE

S.M.-G. is the biological father of ten-year-old A.B.M.-S. and eleven-year-old A.P.M.-S. Both children were removed from the care of their parents in May 2018 following allegations of serious physical abuse by the father. Respondent's Appendix (Res. App.) at 2.¹ These allegations triggered both a dependency action and a law enforcement investigation. Petitioner's Appendix (Pet. App.) at 66, Res. App. at 7.

¹ Citations to Petitioner and Respondent's briefs and appendices thereto refer to those briefs filed with the Court of Appeals below.

On August 14, 2018, the parents signed agreed orders of dependency pursuant to RCW 13.34.030(6)(b) and (c). Pet. App. at 73. A separate dispositional hearing was set. Pet. App. at 73. The Department recommended that the court order the father to complete a psychological evaluation, as well as domestic violence and anger management assessments. Pet. App. at 73.

Both parents moved for protection orders, seeking use and derivative use immunity for any statements made during their evaluations. Pet. App. at 65, Finding 1. At that time, the Snohomish County Prosecutor's Office had an open criminal investigation related to the physical abuse. Pet. App. at 65, Finding 2. The Prosecutor's Office filed an objection, asking the juvenile court to deny the parents' motions. Pet. App. at 5. The court heard argument regarding those motions at the parents' dispositional hearing in September 2018. Pet. App. at 1.

At that hearing, the Prosecutor's Office appeared and continued to oppose the motions. Pet. App. at 5. The Department deferred to the court. Pet. App. at 15. The court requested additional briefing. Pet. App. at 45. Following review of the briefs, the court denied the parents' motions for immunity in an order filed November 28, 2018. Pet. App. at 66-72.

The father sought discretionary review by the Court of Appeals. The Snohomish County Prosecutor's Office intervened and opposed

discretionary review. The Court of Appeals accepted review and set the matter to be heard by a panel. In the meantime, the father had completed the evaluations at issue. Accordingly, the Department requested that the Court of Appeals dismiss the matter as moot pursuant to RAP 18.9(c)(2).

The Court of Appeals issued a published decision, holding that trial courts do not possess the inherent authority to grant derivative use immunity over the objection of the Prosecuting Attorney. In doing so, it also recognized long-established principles of Fifth Amendment jurisprudence, including the absence of compulsion when a court orders an evaluation in a dependency action and the ability of civil courts to draw an adverse inference from an individual's decision to invoke their right to remain silent. The Court of Appeals declined to dismiss due to mootness.

This Court granted the father's petition for review. The Department files this brief to address ancillary issues, should this Court choose to address them.

IV. ARGUMENT

The child welfare system is designed to protect children and facilitate reunification of families. A critical aspect of the system is the parent's participation in services to address any identified parental deficiencies. Evaluations are a necessary part of the process, as they permit identification

of the parent's deficiencies and provide individualized recommendations regarding services that would remedy deficiencies and permit reunification.

The issue on which this Court granted review is whether the trial court also has the authority to grant derivative use immunity, in addition to statutory immunity under RCW 26.44.053 as an additional protective measure. As to that issue, the Department takes no position. But in case this Court takes up broader tenets of the legal structure that may impact the child welfare system's functioning, the Department emphasizes two key points.

First, even without additional immunity beyond the statutory immunity, other procedural protections in place permit parents to meaningfully participate in evaluations and invoke their Fifth Amendment right as needed and still engage in the remedial process. Termination of parental rights does not automatically flow from that invocation or engagement.

Second, while invocation of the Fifth Amendment protects parents from criminal liability for statements made during these necessary evaluations, the juvenile court retains the discretion to draw reasonable adverse inferences from such an invocation.

The Court need not and should not address these points. Should the Court take up these questions, it should reaffirm these long-standing tenets of Fifth Amendment jurisprudence.

A. There Are Numerous Safeguards for Parents of Dependent Children Who Simultaneously Face Criminal Charges

Numerous safeguards protect parents from having to choose between self-incrimination and maintaining their parental rights. During an evaluation ordered through the dependency proceedings, a parent may invoke the Fifth Amendment and refuse to answer questions that might tend to incriminate the parent. *See In re Dependency of J.R.U.-S.*, 126 Wn. App. 786, 793, 110 P.3d 773 (2005). Such a refusal does not—and cannot—directly result in the loss of parental rights. *See* RCW 13.34.180(1). In addition to these primary safeguards, there are at least three additional protections: (1) in dependency proceedings involving allegations of child abuse or neglect, the Legislature has limited the use of information from evaluations in criminal proceedings, RCW 26.44.053(2); and (2) juvenile courts may, in their discretion, permit counsel to attend the evaluation, *J.R.U.-S.*, 126 Wn. App. at 790.

Dependency proceedings are intended to be preliminary, remedial, and non-adversarial proceedings designed to protect children, to help parents identify and alleviate problems, and where appropriate, to reunite families. *In re Dependency of Schermer*, 161 Wn. 2d 927, 942, 169 P.3d 452, 460 (2007); *In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). As part of that remedial process, parents are frequently ordered to participate in various

evaluations. RCW 13.34.136, .138. These may include psychological evaluations, domestic violence assessments, parenting assessments, and other evaluations designed to assess their ability to be a safe and capable parent. These evaluations allow the Department to obtain vital information about how to address specific issues and assist the Department in meeting its obligation to offer the parent necessary remedial services, tailored to meet the parent's particular needs.² See *In re Termination of S.J.*, 162 Wn. App. 873, 881, 256 P.3d 470 (2011).

Once evaluations are ordered in a dependency, no party disputes that a parent may invoke the Fifth Amendment and decline to respond to questions in a dependency evaluation. The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. The privilege may be raised in any proceeding—civil, criminal, administrative, or a court-ordered evaluation—where the answers might incriminate the person in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d. 274 (1973).

² In this case, the father was ordered to participate in a number of evaluations, including a psychological evaluation, a domestic violence assessment, and an anger management assessment. Pet. App. at 78. The anger management assessment was later removed from his list of court-ordered services. Declaration in Support of Motion for Mootness at 2.

The Department recognizes that, as part of the evaluation process, parents may be asked about their potentially-criminal conduct, and therefore, their right against self-incrimination may be implicated. *J.R.U.-S.*, 126 Wn. App. at 798-800. Accordingly, the parent may decline to answer specific questions during an evaluation. *See J.R.U.-S.*, 126 Wn. App at 795.

The opportunity to decline to answer questions is a meaningful one. It does not and cannot directly lead to the termination of parental rights. In order to terminate parental rights, the Department must generally prove the six separate statutory elements in RCW 13.34.180(1) by clear, cogent, and convincing evidence. RCW 13.34.190(1). A trial court would also have to find that termination is in the child's best interests. RCW 13.34.190(1)(b). Although a parent's decision to decline to answer a question is not consequence-free, it is plainly insufficient to independently justify terminating parental rights.

Additionally, a parent's assertion of their Fifth Amendment right not to self-incriminate does not necessarily control the outcome of an evaluation. Most evaluations completed during a dependency have many components, including but not limited to: an interview with the parent, collection of collateral information, a standardized, normed battery of testing, and a personal observation by the evaluator of the parent's interactions with his or her children. A parent's invocation of the Fifth

Amendment to specific questions is just one piece of information relied on by an evaluator. In turn, the evaluator's diagnoses, conclusions, and recommendations guide the next step in the remedial process—outlining the best way to assist the parent to develop the skills needed to become a safe parent.

If a parent makes incriminating statements, the Legislature has already limited the use of information from evaluations in criminal proceedings related to allegations of child abuse or neglect through RCW 26.44.053(2), which prevents the direct use of any information given in any subsequent criminal proceedings against that person.

Finally, additional discretionary protections exist. Juvenile courts may, in their discretion, permit counsel to attend the evaluation if necessary to protect against self-incrimination. *J.R.U.-S.*, 126 Wn. App. at 790.

Certainly, the father in this case was not forced to choose between protecting his right against self-incrimination or facing termination of his parental rights. When the father brought his motion for derivative use immunity, he had not yet engaged in any court-ordered evaluations. His need to invoke during any evaluation was hypothetical at that time. Under the facts here, the father was never actually put in a position where any refusal to admit potentially-criminal behavior resulted in adverse

consequences during the dependency. No termination petition had been filed.

While the Department takes no position on whether a trial court has inherent authority to grant derivative use immunity, a complete understanding of the existing safeguards may be helpful. This Court should be skeptical of any argument that a parent must choose between asserting a Fifth Amendment right and the parent's right to the care, custody, and control of the child. The two are compatible.

B. A Trial Court's Discretion in a Civil Proceeding to Draw an Adverse Inference from a Person's Invocation of the Fifth Amendment is a Well-Settled Matter of Law

Should this Court addresses the issue, this Court should affirm the long-recognized discretion of trial courts in civil cases to draw adverse inferences from a person's invocation of their Fifth Amendment rights. There are meaningful limits on adverse inferences. Any inference must be logical. *Diaz v. Wash. State Migrant Council*, 165 Wn. App 59, 85, 265 P.3d 956 (2011). Additionally, the adverse inference is limited to the specific civil proceeding; the State may not rely on the adverse inference in any criminal proceeding. And the adverse inference is discretionary; the trial court is in the best position to determine if it is warranted in a particular case. Within these limits, the ability of the courts to draw reasonable adverse inferences is a critical tool for keeping children safe and reunifying families.

At the outset, the Department is not requesting that the Court address the ability of the dependency court to draw reasonable adverse inferences. That issue is not before this Court, as neither petitioner nor respondent sought review. *See* RAP 13.7(b). However, to the extent that this Court discusses the role of adverse inference, like the Court of Appeals did in dicta, *In re Dependency of A.M.-S.*, 11 Wn. App. 2d 416, 428, 454 P.3d 117 (2019), the Department wishes to ensure that this Court is fully informed.

It is well-settled that, while a person may choose to assert the Fifth Amendment privilege against self-incrimination in a civil proceeding, the trier of fact in the civil proceeding may draw an adverse inference from the person's silence. *Mitchell v. United States*, 526 U.S. 314, 328, 119 S. Ct. 1307, 1315, 143 L. Ed. 2d 424 (1999); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808, n. 5, 97 S. Ct. 2132, 53 L.Ed.2d 1 (1977); *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); *see also Ikeda v. Curtis*, 43 Wn.2d 449, 457–58, 261 P.2d 684 (1953); *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 355–56, 16 P.3d 45 (2000); *State Farm Fire & Casualty Co. v. Huynh*, 92 Wn. App. 454, 962 P.2d 854 (1998).

The law regarding the purpose of the Fifth Amendment privilege is clear—it is for the purpose of ensuring that a witness avoids criminal liability, not obviating all consequences of their choice. In a civil proceeding such as a dependency or a termination of parental rights proceeding, an inference is

permissible, where appropriate, not as a sanction or remedy for any unfairness created by exercise of the privilege, but simply because the inference is relevant and outside the scope of the privilege. *Diaz*, 165 Wn. App. at 85–86. A parent participating in a court-ordered evaluation may choose to answer the evaluator’s questions or they may choose to assert their privilege. If a parent chooses to assert the privilege, the court is entitled to draw a reasonable inference from their choice not to answer. *Ikeda*, 43 Wn.2d at 457–58.

The trial court’s ability to make this inference is particularly important in the dependency context. Dependency courts are tasked with making decisions that balance both child safety and the preservation of the family unit, where possible. *In re K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). A parent should not, by invoking the Fifth Amendment, be able to thwart the Department’s efforts to protect children. Yet without the ability to draw a logical adverse inference, that might occur in some cases. Additionally, by drawing an adverse inference, the dependency court is better situated to order appropriate services. For example, if a parent invokes the Fifth Amendment in response to a question about whether they have used methamphetamine in the past 30 days, allowing the dependency court to draw an adverse inference ensures that the Court has an adequate basis for ordering drug treatment.

An adverse inference made by the Department or trial court is not a sanction or penalty. The court and Department can make recommendations and order tailored services based on that inference that will potentially allow the family to reunite. *S.J.*, 162 Wn. App. at 881. Rather, the trial court's ability to make an inference without the father having been compelled to incriminate himself balances the fundamental interests at stake. U.S. Const. amend V ("No person shall be compelled in any criminal case to give evidence against himself."); *In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344 (1993) ("Parents have a fundamental liberty and privacy interest in the care and custody of their children.").

Again, this Court need not reach this ancillary issue. To the extent that it does consider it, the Department respectfully requests that this Court reaffirm the long-standing principle that trial courts may use their discretion to draw reasonable adverse inferences from a parent's invocation of their Fifth Amendment privilege during a court-ordered evaluation in a dependency proceeding.

V. CONCLUSION

Based on the foregoing, the Department respectfully requests that, should this Court reach these issues, that it uphold the following principles: that there are numerous protections in place that prevent unfair consequences from flowing directly from a parent's invocation of the Fifth Amendment's

protection against self-incrimination during court-ordered evaluations, and that a trial court hearing a civil matter may draw an appropriate adverse inference from a parent's invocation of their Fifth Amendment privilege. These tenets balance the fundamental rights at stake in these proceedings.

RESPECTFULLY SUBMITTED this 29th day of May, 2020.

ROBERT W. FERGUSON
Attorney General

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

RACHEL BREHM KING, WSBA #42247
Assistant Attorney General

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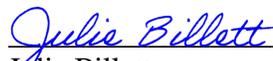
I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

1. My name is Julie Billett and I am employed as a paralegal for counsel for respondent.

2. On May 29, 2020, I filed DCYF Supplemental Brief electronically with the Supreme Court, through the Court's online filing system.

3. An electronic version of this document was served upon all parties of record using the Court's filing portal.

DATED this 29th day of May, 2020, at Everett, Washington.



Julie Billett

ATTORNEY GENERAL'S OFFICE - EVERETT

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