***The Court’s Authority and Responsibility to Order the Frequency and Length***

***of Parental Visitation in Dependency Cases***

Commissioner Bart Vandegrift, Chelan County Superior Court

March 10, 2017

1. REASONS WHY THE COURT SHOULD DECIDE APPROPRIATE VISITATION AND NOT SIMPLY DEFER TO THE DEPARTMENT
   1. Enforce Legal Rights
      1. A parent’s contact with his or her child is a constitutional right which the Court should enforce.
      2. Early, consistent and frequent visitation is a statutory right which the Court should enforce.
      3. The Court oversees the Department’s obligation to make reasonable efforts to reunify the family, which includes an obligation to provide appropriate visitation.
   2. Create a Healthy Parent-Child Relationship
      1. Inadequate visitation may endanger the child’s attachment process.
      2. Inadequate visitation may endanger the parent’s bonding process.
   3. Enhance the Parent-Child Relationship and Promote Reunification[[1]](#footnote-1)
      1. Visitation helps families cope with changing relationships, empowers, informs and motivates parents, and enhances children’s well-being.
      2. Visitation helps families confront reality and provides a time and place to practice new behaviors.
      3. Visitation permits others to assess the parent-child relationship and assist parents to learn safe and effective parenting behaviors.
      4. Studies show that frequent visitation is more likely to lead to reunification.
2. LEGAL AUTHORITY TO OVERRIDE DEPARTMENT’S RECOMMENDATION
   1. The Court is not limited by the Department’s budget or contracts.
      1. The Court of Appeals held that the Court may not order services for which no budget has been appropriated, such as housing. *Welfare of JH*, 75 Wash. App. 887 (1994), *rev. denied*, 126 Wn. 2d 1024 (1995). But the Supreme Court abrogated *JH* in part when it held that the Court does have authority to order the Department to provide housing assistance where lack of adequate housing is the primary factor in the out-of-home placement. *Washington State Coalition for the Homeless v. DSHS*, 133 Wn. 2d 894 1997.
      2. Nevertheless, visitation is a right, not a service. *Dependency of TH*, 139 Wash. App. 784 (2007), *rev. denied, Dependency of Hackney*, 162 Wn. 2d 1001 (2007). Therefore, the *JH* budget issue is immaterial.
      3. Further, “[t]he costs to the State, however, cannot form a basis for avoiding the mandate of a statute.” *Retired Public Employees Council v. Health Care Authority*, 82 Wash. App. 773 (1996), *rev. denied*, 130 Wn. 2d 1024 (1997).
   2. Express statutory authority to order visitation is lacking.
      1. RCW 13.34 does not provide express statutory authority for the Court to decide visitation length and frequency, except when a dependency guardianship is ordered. RCW 13.34.232(1)(d).[[2]](#footnote-2)
   3. Implied statutory authority to order visitation seems clear.
      1. RCW 13.34 provides strongly implied statutory authority for the Court to decide visitation length and frequency.
      2. When the Department removes a child from her parents, the Department must advise the parents that the Department is required to provide the parents with visitation with their child *according to court orders*. RCW 13.34.062(2)(b) (see paragraph 7 of required notice).
      3. At the shelter care hearing, the Court is statutorily required to inquire regarding the terms and conditions for parental visitation. RCW 13.34.065(4)(k). If the Court places the child with a relative or other suitable person, the placement is conditioned on that person complying with *Court orders regarding parent-child contact*. RCW 13.34.065(5)(e).
      4. At disposition, if the Court places the child with a relative or other suitable person, the placement is conditioned on that person complying with *Court orders regarding parent-child contact*. RCW 13.34.130(9).
      5. In developing the permanent plan, RCW 13.34.136(2)(b)(ii)(D) states that: (a) visitation is the right of the family, including the child and the parent, in cases in which visitation is in the best interest of the child; (b) early, consistent, and frequent visitation is crucial for maintaining parent-child relationships and making it possible for parents and children to safely reunify; and (c) the Department shall encourage the maximum parent and child and sibling contact possible, when it is in the best interest of the child, including regular visitation and participation by the parents in the care of the child while the child is in placement. The Department’s plan must provide for visitation opportunities, unless visitation is not in the best interests of the child. RCW 13.34.136(2)(b)(i)(A). If visitation is denied, *it may be challenged in Court*. RCW 13.34.136(2)(b)(iii)(B). Visitation may only be limited or denied *if the Court determines that such limitation or denial is necessary to protect the child’s health, safety, or welfare.* RCW 13.34.136(2)(b)(ii)(B). At the permanency planning hearing, the *Court shall order the Department’s plan be implemented as presented, or the Court may modify it and Order implementation of the modified plan.* RCW 13.34.145(8)(a).
      6. At review hearings, *the Court shall establish whether terms of visitation need to be modified*. RCW 13.34.138(2)(c)(xi).
      7. The Department is required by statute to have visitation policies and protocols consistent with RCW 13.34 *and with relevant orders of the Court*. RCW 13.34.380.
      8. Under the statutory scheme in effect in 1953,[[3]](#footnote-3) the Supreme Court (citing no particular statute) concluded that the trial Court had authority to order “all rules of visitation and changes therein.” “When delinquent or dependent children have been committed to the care and custody of others, the parents or guardian retains the right to visit such children at reasonable times and places to the extent consistent with the welfare of the children and the proper operation of the home, institution, or school where the children are placed. Rules relating to visitation are to be formulated with this objective in mind. It is therefore necessary that such parents or guardian have a forum in which to air their grievances, in the event such rules, or the interpretation and enforcement thereof, violate this principle. This can be assured only if all rules of visitation and changes therein are promulgated by order of the juvenile court. This, we believe, is what is contemplated by the juvenile court act.” *In re Jones*, 41 Wn. 2d 764, 773 (1953).
      9. When a child has been removed by Court order, the Department must make reasonable efforts to reunify the family.[[4]](#footnote-4) Failure to make reasonable efforts jeopardizes federal foster care funding paid to the State for the care of the child.[[5]](#footnote-5)
      10. Although this author finds no Washington case on point, a noted national author persuasively argues that appropriate visitation is critical to the delivery of reasonable reunification efforts.[[6]](#footnote-6)
   4. The Court has inherent authority to order visits.
      1. Even if the Court had no statutory authority to order the frequency and length of parent-child visitation in dependency cases, it would have inherent authority to do so.
      2. Parents have a fundamental liberty and property interest in the care and custody of their children. *In re Sumey*, 94 Wn. 2d 757, 762 (1980). This constitutional right is enforceable by the Courts whether or not there is a statutory mechanism to do so. “If a statute does not contain all of the process which is due, this court will impose the requirements necessary to satisfy due process. This court has inherent authority to supplement statutory provisions by requiring additional procedures to satisfy the requirements of procedural due process.” *State v. Thorne*, 129 Wn. 2d 736, 769 (1996), *abrogated on other grounds, Blakely v. Washington*, 542 U.S. 296 (2004). “When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.” RCW 2.28.150.
      3. “Where the Legislature enacts a statute that grants rights to an identifiable class, there is an assumption that those rights are enforceable. *See Bennett v. Hardy*, 113 Wash. 2d 912, 919-20, 784 P.2d 1258 (1990). In *Bennett*, 113 Wash. 2d at 920-21, 784 P.2d 1258, we held that in determining whether a cause of action exists, the court must consider: (1) whether the plaintiffs are within the class of persons for whose benefit the statute was enacted; (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and (3) whether implying a remedy is consistent with the underlying purpose of the legislation.” *Washington State Coalition for the Homeless v. DSHS*, 133 Wn. 2d 894, 912-913 (1997). RCW 13.34.136(2)(b)(ii)(D) grants visitation rights to parents and children in dependencies. They are within the class of persons for whose benefit the statute was enacted. The legislative intent implicitly supports creating a remedy. Implying a remedy is consistent with the underlying purpose of the legislation.
      4. The California Court of Appeal held that its trial Courts have constitutional authority to order the frequency and length of parent-child visitation in dependency cases. “There is no question but that the power to regulate visitation between minors determined to be dependent children and their parents rests in the judiciary. The judicial power in this state is vested in the courts. The judicial function is to declare the law and define the rights of the parties under it and to make binding orders or judgments. Parents have the right of visitation from the fact of parenthood. The parental right to have children and to the custody of those children is included among the liberties protected by the due process clause. The concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government is not limited to those expressly mentioned in either the Bill of Rights or elsewhere in the Constitution, but instead extends to basic values implicit in the concept of ordered liberty and to the basic civil rights of man. Among such basic liberties and rights not explicitly listed in the Constitution are the right to marry, establish a home and bring up children; the right to educate one's children as one chooses; and the right to privacy and to be let alone by the government in the private realm of family life. Thus, the court must define the rights of the parties to visitation. The definition of such a right necessarily involves a balancing of the interests of the parent in visitation with the best interests of the child. In balancing these interests, the court in the exercise of its judicial discretion should determine whether there should be any right to visitation and, if so, the frequency and length of visitation. The court may, of course, impose any other conditions or requirements to further define the right to visitation in light of the particular circumstances of the case before it. *In re Jennifer G.*, 221 Cal. App. 3d 752, 756-757 (1990) (citations and internal quotation marks omitted).

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Commissioner Bart Vandegrift

Chelan County Superior Court

[bart.vandegrift@co.chelan.wa.us](mailto:bart.vandegrift@co.chelan.wa.us)

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1. *See,* Judge Leonard Edwards, *Reasonable Efforts: A Judicial Perspective* (2014), Ch. VII, Recurring Factual Situations in the Trial Courts, pp. 41-47. [↑](#footnote-ref-1)
2. “An order establishing a dependency guardianship shall . . . [s]pecify an appropriate frequency of visitation between the parent and the child.” [↑](#footnote-ref-2)
3. That statutory scheme was set forth in RCW 13.04 and known as the Juvenile Court Act. [↑](#footnote-ref-3)
4. *See*, RCW 13.34.130(5) (“An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child’s home and to make it possible for the child to return home . . .”); RCW 13.34.136(1) (“The [permanency] planning process shall include reasonable efforts to return the child to the parent’s home”); RCW 13.34.138(2)(c)(i) (“If the child is not returned home, the court shall establish in writing . . . [w]hether the . . . department is making reasonable efforts to provide services to the family and eliminate the need for placement of the child”). [↑](#footnote-ref-4)
5. 45 C.F.R. § 1356.21. [↑](#footnote-ref-5)
6. *See,* Edwards, *Reasonable Efforts: A Judicial Perspective* (2014), Ch. VII(B)(3) (“Visitation”). [↑](#footnote-ref-6)