Ethical Issues and Parent Representation
Washington State Office of Public Defense
Spring 2008 Conference

REPRESENTING A PARENT WITH DIMINISHED CAPACITY

CLIENT WITH DIMINISHED CAPACITY
RPC RULE 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Assessing Client's Capacity
The Commentary to RPC 1.14 provides some guidance when assessing whether a client has sufficient capacity to make certain decisions. The lawyer should consider and balance the following factors[1]:

- The client's ability to articulate reasoning leading to a decision
- Variability of state of mind
- Ability to appreciate consequences of a decision and the substantive fairness of a decision
- The consistency of the client's decision with the known long-term commitments and values of the client
- In appropriate circumstances, the lawyer may seek guidance from a qualified diagnostician

In addition to these factors, an attorney should also consider the client's:

- Ability to communicate
- Emotional and mental development and stability
- Opinion of others[2]

[1] RPC 1.14 Comment 6

Protective Measures
The Commentary to RPC 1.14 describes a continuum of protective measures that an attorney can take on behalf of a client with diminished capacity.[3] These steps include:

- Consulting with family members
- Using a reconsideration period to permit clarification or improvement of circumstances
- Consulting with professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client
- Appointment of a guardian ad litem

In taking any protective action, the lawyer should be guided by the client's known wishes and values of the client as well as the client's best interests. Furthermore, the lawyer has a duty to maximize the client's capacities and intrude into the client's decision-making autonomy to the least extent feasible.[4]

Confidentiality and the Client with Diminished Capacity
Taking protective action on behalf of a client may place the attorney in the untenable position of disclosing confidential information in order to protect the client's best interest. Disclosure of information regarding the client's diminished capacity could adversely affect the client's interests and such information is protected by RPC 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information.

However, the Commentary to RPC 1.14 states that when a lawyer is taking protective action pursuant to paragraph (b), the lawyer is *impliedly authorized* to make the necessary disclosures as necessary to protect the client's best interest.[5] The attorney must provide some information to establish a basis for the protective action, but must also guard against harming the client's legal rights. The Commentary also states that the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.[6]

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[2] *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases,* Ventrell & Duquette (pages 484-486).
[3] RPC 1.14 Comment 5 & Comment 7
[4] RPC 1.14 Comment 5
[5] RPC 1.14 Comment 8
[6] RPC 1.14 Comment 8

Appointment and Role of a GAL for a Parent

A guardian ad litem (GAL) is appointed for the benefit of and to protect the rights and best interests of the alleged incompetent individual.[7] RCW 4.08.06 provides that the court shall appoint a GAL for an incapacitated party to a Superior Court proceeding.[8] If there is objection or resistance to the appointment of a GAL, an adjudication of incompetency must precede or at least be contemporaneous with, the appointment of a GAL and an alleged incompetent individual has a right to defend and is entitled to be heard.[9]

In *In re Houts*, the Washington State Court of Appeals reversed an order terminating parental rights where the parents' attorney stipulated that his client was mentally ill. The court stated that by not insisting upon a hearing on the issue of competency, their attorney impliedly admitted that both parents were either mentally incompetent or so far incompetent that they needed the protection of a GAL. This implied admission became an express admission when the attorney stipulated that the father "was mentally ill." The court noted that the breadth of the stipulation substantially impaired whatever chances the parents might otherwise have had to prevent entry of an order of permanent deprivation against the parents.[10]

When representing an incapacitated parent, it is essential that the GAL act as an advocate on behalf of the individual and submit to the court all relevant defenses or legal claims the parent may have. A non-adversarial GAL does not afford constitutional and statutory guarantees of the assistance of counsel. In the absence of the client's knowing consent a GAL may not waive any fundamental right.[11]

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[7] Quesnell v. State, 83 Wn.2d 224 (1973)

[8] RCW 4.08.06 states: *"When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem. Said guardian shall be appointed as follows:*

(1) When the incapacitated person is plaintiff, upon the application of a relative or friend of the incapacitated person.

(2) When the incapacitated person is defendant, upon the application of a relative or friend of such incapacitated person, such application shall be made within thirty days after the service of summons if served in the state of Washington, and if served out of the state or service is made by publication, then such application shall be made within sixty days after the first publication of summons or within sixty days after the service out of the state. If no such application be made within the time above limited, application may be made by any party to the action."

[9] In re Houts, 7 Wn. App. 476, 499 P.2d 1276 (1972).

[10] Id.

[11] Id.

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Court of Appeals of Washington, Division 1, Panel One.
In the Matter of the Welfare of Charlie L. HOUTS, III, and Suzanne Houts, Minors.
No. 1417-I.

Aug. 7, 1972.

Proceeding for depriving parents of custody of their son and daughter. The Juvenile Court of Pierce County, Bertil E. Johnson, J., entered an order depriving parents of custody, and they brought certiorari. The Court of Appeals, Horowitz, C.J., held that parents, who were allegedly both mentally ill, were deprived of due process, despite good motives of their attorney, counsel for other parties and the court, where there attorney consented to be appointed as their guardian ad litem and to exclusion of parents from hearing.

Reversed with directions.

West Headnotes

[1] Child Custody 76D 410

76D Child Custody
76DVIII Proceedings
76DVIII(A) In General
76Dk410 k. Process. Most Cited Cases
(Formerly 285k2(6))

Child Custody 76D 500

76D Child Custody
76DVIII Proceedings
76DVIII(C) Hearing
76Dk500 k. In General. Most Cited Cases
(Formerly 285k2(6), 285k2(14))

Constitutional Law 92 4396

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4396 k. Child Custody, Visitation, and Support. Most Cited Cases
(Formerly 92k306(2), 92k306)
A parent is entitled to notice and opportunity to be heard before a court may enter an order permanently depriving him of custody of his child, and such right is protected by due process clauses. RCWA Const. art. 1, §§ 3, 22; U.S.C.A.Const. Amends. 6, 14.

[2] Constitutional Law 92 3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited Cases
(Formerly 92k251.6, 92k305, 92k305(2))
The right to a hearing under due process clauses ordinarily includes the right to be present. RCWA Const. art. 1, §§ 3, 22; U.S.C.A.Const. Amends. 6, 14.

[3] Child Custody 76D 500

76D Child Custody
76DVIII Proceedings
76DVIII(C) Hearing
76Dk500 k. In General. Most Cited Cases
(Formerly 285k2(4.1), 285k2(4), 285k12(4))
A parent, having a constitutional right to a hearing to defend himself against being permanently deprived of his child, may employ counsel and such counsel must use his best efforts by lawful means to prevent entry of an order of permanent deprivation.

[4] Attorney and Client 45 77

45 Attorney and Client
45II Retainer and Authority
45k77 k. Scope of Authority in General. Most

Incompetency of Parents in Juvenile Cases

- **What is the issue?** Periodically the parents in dependency or termination cases are mentally incompetent and do not understand the nature of the proceedings or how the proceedings impact their best interest. Defense attorneys may be reluctant to raise the issue because of the implications such a finding might have on the ultimate resolution of the case. On the other hand, all participants in the proceeding have an obligation to raise the issue if the circumstances warrant it. Vo. v. Pham, 81 Wn. App. 781, 916 P. 2d 462 (1996)

- **Competency is Presumed** – In Washington, adult litigants are presumed to be mentally competent and they have a fundamental right to use their own personal judgment and intelligence with respect to their interest in the proceedings. Vo v. Pham, 81 Wn. App. 781. At the same time, trial courts have a duty to protect the rights of litigants who appear incompetent by conducting a competency hearing, and appointing a guardian ad litem for litigants who are found incompetent. In re Marriage of Blakely, 111 Wn. App. 351 (Div. III 2002); *See also* RCW 4.08.060 (when an incompetent person is a party to an action in superior court, he or she must appear by guardian or guardian ad litem).

- **There must be a competency hearing prior to appointing a GAL for a parent, unless they agree:** Because the interposition of a guardian ad litem has such far reaching consequences for the alleged incompetent and his or her ability to direct the course of the litigation, courts are directed to afford every litigant who opposes the appointment of a guardian ad litem a full and fair hearing. Graham v. Graham, 40 Wn. 2d 64, 66 – 67, 240 P. 2d 564 (1952). A full hearing is required because of the impact that appointment of a guardian ad litem has. After a guardian ad litem has been appointed for a person who has been adjudicated incompetent, that person can appear in court only via his guardian ad litem. The guardian has complete statutory power to represent the interest of the ward, and can substitute his judgment, inclinations, and intelligence for that of the incompetent party. In re Dill, 60 Wn. 2d. 148, 372 P. 2d 541 (1962); Graham v. Graham, 40 Wn. 2d at 68.

- **Civil Test for competency:** The civil test for competency is lenient. The question to be asked is: "Does the parent understand and comprehend the significance of the legal proceedings and their effect on his or her best interests?" Graham at 68. If this question is answered in the affirmative, the parent is legally competent and should not be appointed a Guardian ad litem.

- **How the civil test differs from the criminal test of incompetency:** This civil competency test is lower than the more rigorous inquiry used in a criminal case. *See* RCW 10.77.010(14)("Incompetency means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his or her own defense as a result of mental disease or defect."). For criminal purposes, an incompetent person may not be tried, convicted, or sentenced for a crime so long as the incapacity continues. RCW 10.77.050. That is not true however for civil cases, and in dependency and termination cases, it is especially important for the child not to delay the proceeding.

- **What's the relationship between competency under RCW 4.08.060 and incapacity under RCW 11.88?** They are completely separate determinations and deal with different issues. *See* In re Marriage of Blakely, 111 Wn. App. 351 (Div. III 2002)

- **Factors the court should consider:** In making the competency determination, the trial court exercises "wide discretion" and the conclusion of the court carries great weight when its action is reviewed before an appellate tribunal. In re Mignerey, 11 Wn. 2d 42, 49-50, 118 P. 2d 440 (1941). This granting of discretion to the trial court is necessary because the trial court is in the best position to consider the factors relevant to the competency determination. These factors include the parent's answers to questions, his/her appearance, his/her demeanor, his/her

conduct and the reports of others. State v. Dodd, 70 Wn. 2d 513, 424 P. 2d 302 (1967).

- **The Role of the Guardian Ad Litem if One is Appointed** The Guardian ad litem has complete statutory power to represent the interest of the ward. In re Dill, *supra;* Rupe v. Robison, 139 Wash. 592, 595, 247 Pac. 954 (1926). Upon the guardian ad litem's appointment following an adjudication of incompetency, he thereafter is substituted for the incompetent person as the proper party to a legal action, and the incompetent person may only appear through his guardian ad litem. Franks v. Douglas, 57 Wn. 2d at 586-587; In re Dill, supra. It is further the role and duty of the Guardian ad litem to actively represent the interests of the incompetent person and defend against the action. In re Guardianship of K.M. 62 Wn. App. 811, 816 P. 2d 71 (1991)(GAL must actively protect the interests by assuming an adversary posture in proceedings affecting the incompetent person's fundamental rights); In re Quesnell, 83 Wn. 2d 224, 517 P. 2d 568 (1973)(If the GAL does not submit all relevant defenses or legal claims, investigate actively, and perform other vital functions, the appointment of a GAL becomes a "mere formality.")

- **What happens to the attorney for the incompetent parent if a GAL is appointed?** Where an attorney has previously been retained or appointed to represent a party, a subsequent adjudication that the party is incompetent terminates the relationship of attorney and client and likewise terminates entirely the attorney's authority to act as legal counsel for the incompetent person. Franks v. Douglas, 57 Wn. 2d 583, 586, 358 P. 2d 969 (1961); In re Houts, 7 Wn. App. 476, 484, 499 P. 2d 1276 (1972). The guardian ad litem has the authority to continue the services of previously retained legal counsel or to employ a different attorney entirely, subject to some direction and control by the Court. Graham v. Graham, *supra*. Where an incompetent person is acting through a guardian ad litem, legal counsel must look to such representative for those decisions that are normally the prerogative of the client to make. Where an incompetent person is represented by both an attorney and a separate attorney-guardian ad litem, the attorney represents the guardian ad litem who in turn stands in the shoes of the incompetent person. Under no circumstances should both the attorney and the attorney-guardian ad litem be allowed to conduct examinations of witnesses or make objections during the course of a court proceeding. CR 43(a)(2).

- **A GAL may not waive or stipulate away any substantial rights** -Just as an attorney has no authority to waive or stipulate away any substantial right of his client without special authority from the client, so the guardian ad litem for an incompetent person lacks the authority to waive a substantial right of his ward. In re Houts, 7 Wn. App. at 481-482. Therefore, a GAL may not agree to dependency, or a dependency guardianship, or relinquish parental rights on behalf of a parent.

- **Is it legally possible for a defense attorney to act in a dual capacity as attorney and GAL?** Washington courts have yet to address this issue, but it might be permissible because the role of the GAL is very much like that of an attorney, in that both are required to present defenses to the action and advocate for the party. In re Quesnell, 83 Wn. 2d 224, 517 P. 2d 568 (1973). In re Houts, 7 Wn. App. 476, 499 P 2d 1276 (1972)(fulfillment of both roles implicitly approved). Other jurisdictions have rejected the argument that an attorney cannot also act as a guardian ad litem. In the Interest of JIW, 695 S.W. 2d 513 (Mo. App. 1985)(because the duties of an appointed guardian ad litem are the same as an attorney, they may serve a dual role).

Cited Cases

Attorney and Client 45 ⚿86

45 Attorney and Client
45II Retainer and Authority
45k86 k. Stipulations and Admissions. Most Cited Cases

Attorney and Client 45 ⚿101(1)

45 Attorney and Client
45II Retainer and Authority
45k101 Settlements, Compromises, and Releases
45k101(1) k. In General. Most Cited Cases
An attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate hearing, but had no authority to waive any substantial right of his client, and such waiver must be specially authorized by client.

[5] Infants 211 ⚿78(1)

211 Infants
211VII Actions
211k76 Guardian Ad Litem or Next Friend
211k78 Necessity and Grounds for Appointment
211k78(1) k. In General. Most Cited Cases

Mental Health 257A ⚿488

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak488 k. Necessity of Appointment. Most Cited Cases
(Formerly 257Ak41, 257Ak8)

Mental Health 257A ⚿489

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak489 k. Time for Appointment and Conditions Precedent. Most Cited Cases
The law requires appointment of guardian ad litem for a minor or insane person, whether or not the latter is an adult, but if the appointment is for an adult and there is objection or resistance to the appointment, adjudication of incompetency must precede or at least be contemporaneous with such appointment, and alleged incompetent has a right to defend and is entitled to be heard. RCWA 4.08.050, 4.08.060.

[6] Mental Health 257A ⚿495

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak495 k. Powers, Duties, and Liabilities. Most Cited Cases
A guardian ad litem, even if appointed after hearing and determination of incompetency, is no more permitted to waive a substantial right of the ward than is an attorney for a competent client.

[7] Attorney and Client 45 ⚿76(3)

45 Attorney and Client
45II Retainer and Authority
45k76 Termination of Relation
45k76(3) k. Insanity. Most Cited Cases
Where attorney agrees to act as guardian ad litem for an adult, if the adult is in fact incompetent at time of the hearing, even though he was competent when he retained the attorney, the subsequent incompetency serves to terminate the attorney's authority to act as such.

[8] Constitutional Law 92 ⚿4401

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4400 Protection of Children; Child Abuse, Neglect, and Dependency
92k4401 k. In General. Most Cited Cases
(Formerly 92k4402, 92k306(2), 92k306)
Parents, who were allegedly both mentally ill, were

deprived of due process in proceeding to deprive them of custody of their children, despite good motives of their attorney, counsel for other parties and the court, where their attorney consented to be appointed their guardian ad litem and to exclusion of parents from hearing.
***477 **1277** Davies, Pearson, Anderson & Gadbow, John C. Kouklis, Tacoma, for appellant-petitioner.

Joseph D. Mladinov, Special Counsel to Pros. Atty., Pierce County, Tacoma (Ronald L. Hendry, Pros. Atty. and Eugene G. Olson, Tacoma, Chief Criminal Deputy Pros. Atty., with him on the briefs), for respondent.

HOROWITZ, Chief Judge.

Petitioners, Charlie L. and Patricia Houts, seek review by certiorari of a juvenile court order permanently depriving them of their son and daughter. At the time the order was entered their son was 3 1/2 years of age and their daughter 6 months of age. The controlling question presented is whether the hearing, resulting in the order of permanent deprivation, conformed to due process requirements. We hold it did not and reverse for a new trial.

In referring to the evidence in our statement of the case, we do so notwithstanding that much of it was received in the absence of Mr. and Mrs. Houts under circumstances later explained. Mr. and Mrs. Houts were married in 1967. Mrs. Houts had been a patient in the Western State Hospital on an in-and-out basis since 1953. She was suffering from chronic schizophrenia. There was psychiatric testimony that she would 'be in and out of some mental institution***478** for the rest of her life.' Her condition, however, could be and was controlled by medication. A psychiatrist testified that if she did not take medication her ability to take care of her children would be adversely affected. There was evidence that two months before Mrs. Houts had failed to take her prescribed medication. As a result she was unable to look after her youngest child who had soiled her diapers while she was being held by her mother at a counter in a drug store. Nevertheless, the psychiatrist testified that she was no danger to the physical safety of her children, saying, 'I don't think Mrs. Houts is a dangerous person, but she is unpredictable.' There was no evidence that she had failed to take her medication since the drug store incident. She testified she fully intended to take the medication prescribed.

Mr. Houts, while a patient at the same hospital, was considered a paranoid schizophrenic. He was discharged, however, in 1969. No opinion testimony was offered concerning his mental condition since discharge. Mr. Houts did testify that, since his discharge, he continued to take medication and that, from time to time, he visited a community mental health clinic on a 'consultation basis.' Aside from the stipulation of trial counsel for Mr. and Mrs. Houts later referred to, no testimony was introduced that Mr. Houts was unpredictable in his conduct or dangerous to his children.

On August 30, 1968, their son had been made a ward of the juvenile court and was under foster home care. At the time of the trial, the daughter had not been made a ward of the court as a dependent child. The dependent status of that child, however, was an issue below.

The evidence showed that both Mr. and Mrs. Houts loved their children. Both parents testified that they wanted their children back in the home. A psychiatrist ****1278** who treated Mrs. Houts testified in the state's case. There was no testimony presented concerning whether the children here were schizophrenic. The psychiatrist stated, however, that from a statistical point of view, if two schizophrenic people have ***479** children the chances of their off-spring being schizophrenic are 85%. If only one member is schizophrenic, the chances statistically are only 15%. He was unable to state whether the figures testified to were caused by heredity or environment.

In the hearing below, the state was represented by a deputy prosecuting attorney for Pierce County. The minor children were represented by a guardian ad litem who was an attorney. Mr. and Mrs. Houts were represented by their attorney.

At the outset of the hearing the court stated:

(T)he record may show . . . that it has been stipulated that for the orderly hearing in the matter that they (Mr. and Mrs. Houts) probably should not be present, but

should remain until they are called.

The court then appointed the attorney for Mr. and Mrs. Houts as their guardian ad litem. The attorney accepted the appointment without objection to the procedure used in making it.

The record does not affirmatively show what, if anything, occurred prior to the stipulation referred to by the court. Neither does the record show whether Mr. and Mrs. Houts were in the courtroom when the court described the stipulation of counsel, when their guardian ad litem was appointed, or during the presentation of the state's case. However, Mr. and Mrs. Houts' counsel on appeal states without contradiction by the state's appeal counsel, and consistently with the court-announced stipulation providing for the exclusion of the Houts from the hearing, that neither of the parents was in the courtroom during the presentation of the state's testimony.

The state presented five witnesses, including the testimony of a psychiatrist. The testimony dealt principally with the conduct of Mr. and Mrs. Houts concerning their son and daughter and dealt also with Mrs. Houts' mental condition. Mr. and Mrs. Houts were called by their attorney and guardian ad litem to testify to various matters including***480** the parents' relationship to and love for their two children.

Several matters involving trial procedures were taken up with the court in chambers by counsel for Mr. and Mrs. Houts. There is no showing that the Houts were made aware of what occurred in chambers or that they authorized their attorney to act on their behalf in the respects shown by the record. Thus their attorney and guardian ad litem expressed a willingness to stipulate that 'Mr. Houts was mentally ill.' He requested, and the state agreed to terminate the cross-examination of Mr. Houts 'because of the agitation it was causing Mr. and Mrs. Houts.' Their attorney also requested that 'witness Mary Margaret Lang not be cross-examined about the condition of the child in Longview or about who had contacted the authorities because the witness was afraid and did not want the Houtses to know that she had . . . (contacted the authorities) out of concern for Charlie Houts III's appearance.' When the assigned case worker for the Department of Social and Health Services was called as a witness by the state, the trial attorney for Mr. and Mrs. Houts stated, '. . . it's my wish that the Houts do not hear this type of testimony . . .' The court stated, 'I'll leave it to you and Mr. Loomis to determine when you think it would be safe for the defendants.'

At the conclusion of the trial, the court entered findings, conclusions and an order of permanent deprivation. This petition for review and order for certiorari then followed.

Petitioners have assigned 12 errors. The first 11 are directed to the findings and conclusions. The 12th assignment reads, 'Procedural irregularities at trial deprived petitioners of the right to confront witnesses against them, in violation ****1279** of due process.' That assignment made raises the controlling question on this appeal.

[1][2] A parent is entitled to notice and opportunity to be heard before a court may enter an order permanently depriving him of the custody of his child. The right is protected by the due process clauses of the state and federal ***481** Constitutions. U.S.Const. amend. 14; Const. art. 1, s 3; In re Petrie, 40 Wash.2d 809, 246 P.2d 465 (1952); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The right to a hearing ordinarily includes the right to be present. Harter v. State, 260 Iowa 605, 149 N.W.2d 827 (1967); Swindell-Dressler Corporation v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); Clampitt v. Johnson, 359 P.2d 588 (Okl.1961); Leonard's of Plainfield, Inc. v. Dybas, 130 N.J.L. 135, 31 A.2d 496 (1943); Cockrell v. Taylor, 347 Mo. 1, 145 S.W.2d 416 (1940); Shields v. Shields, 26 F.Supp. 211 (W.D.Mo.1939). Cf. Const. art. 1 s 22; U.S.Const. amend. 6.

[3][4] A parent, having a constitutional right to a hearing to defend himself against being permanently deprived of his child, may employ counsel to assist him. Such counsel, upon accepting employment, is under a duty to use his best efforts by lawful means to prevent the entry of an order of permanent deprivation. As an attorney, he is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing. However, in his capacity as attorney, he has no authority to waive any substantial right of his client. Such waiver, to be binding upon the client, must be specially authorized

by him. As stated in Wagner v. Peshastin Lumber Co., 149 Wash. 328, 337, 270 P. 1032, 1036 (1928), 'It will be readily admitted that an attorney without special authority has no right to stipulate away a valuable right of his client.' This rule is also stated elsewhere. Linsk v. Linsk, 70 Cal.2d 272, 74 Cal.Rptr. 544, 449 P.2d 760 (1969); Jackson v. United States, 93 U.S.App.D.C. 328, 221 F.2d 883 (1955); De Long v. Owsley's Executrix, 308 Ky. 128, 213 S.W.2d 806 (1948); Fresno City High School Dist. v. Dillon, 34 Cal.App.2d 636, 94 P.2d 86 (1939); Laurent v. Costa, 61 A.2d 804 (D.C.Mun.App.1948); 1 E. Thornton, Attorneys at Law, ss 258, 263 (1914).

[5] On the question of the appointment of a guardian ad litem, the law requires such an appointment for a minor or insane person, whether or not the latter is an adult. RCW 4.08.050, 4.08.060; ***482**Graham v. Graham, 40 Wash.2d 64, 240 P.2d 564 (1952). However, if the appointment is for an adult and there is objection or resistance to the appointment:

(A)n adjudication of incompetency must precede or at least be contemporaneous with the appointment of a guardian Ad litem; and in that connection that an alleged incompetent has a right to defend and is entitled to be heard.

40 Wash.2d at 68, 240 P.2d at 566. The court explained:
(T)hat a guardian Ad litem should not be appointed by the court unless a full and fair opportunity is given to the alleged incompetent to defend and to be heard. There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the alleged incompetent. Furthermore, there is something fundamental in a party litigant being able to employ an attorney of his voluntary choice to represent him in court and in being free to reject or accept the advice of such attorney. The interposition of a guardian Ad litem could very well substitute his judgment, inclinations and intelligence for an alleged incompetent's; furthermore, the retention of legal counsel or the employment of a different attorney could be determined by the guardian Ad litem, subject, of course, to some direction and control by the court, and the latter might be open to some question.

****1280** 40 Wash.2d at 67, 240 P.2d at 566.

[6] Even if the appointment is one made after hearing and determination of incompetency, the guardian ad litem is no more permitted to waive a substantial right of the ward than is an attorney for a competent client. Calhoun County Bank v. Ellison, 133 W.Va. 9, 54 S.E.2d 182 (1949); Fox v. Starbuck, 115 W.Va. 39, 174 S.E. 484 (1934); First Trust Co. v. Hammond, 139 Neb. 546, 298 N.W. 144 (1941); Peterson v. Hague, 51 Idaho 175, 4 P.2d 350 (1931).

It is true that in Graham v. Graham, Supra, the appointment of the guardian ad litem was over objection made to the trial court. In the instant case, however, there is no ***483** showing that either Mr. or Mrs. Houts was presented and knew of the stipulation and court order excluding them so as to be in a position to object; or that they knew that their attorney had been appointed guardian ad litem and had consented to the appointment without objection; or, whether or not present, that they had intentionally, understandingly, freely and voluntarily waived their right to object to their exclusion from the courtroom.

By not insisting upon a hearing on the issue of the competency of Mr. and Mrs. Houts, their attorney in effect impliedly admitted that both his clients were either mentally incompetent or so far incompetent that they needed the protection of a guardian ad litem. This implied admission became an express admission with respect to Mr. Houts when, while in chambers and apparently outside the presence of Mr. and Mrs. Houts, he expressed a willingness to stipulate that 'Mr. Houts was mentally ill.' The state consented. The breadth of the stipulation was such as to substantially impair whatever chances Mr. and Mrs. Houts might otherwise have had to prevent entry of an order of permanent deprivation against the parents. Furthermore, their attorney's and guardian ad litem's stipulation that neither Mr. nor Mrs. Houts be present during the hearing of the state's case, and later his request that the cross-examination of Mr. Houts be terminated and that the witness Mary M. Lang not be cross-examined, and his statements to the court that he did not wish Mr. and Mrs. Houts to hear the testimony of the caseworker for the Department of Social and Health Ser-

vices called by the state, further diminished their chances of preventing the order of permanent deprivation. There is nothing in the record to show, nor is there any finding that the admissions and stipulations and requests of their counsel and guardian ad litem were ever authorized by either Mr. or Mrs. Houts so as to be binding upon them. See Kallen v. Pollock, 412 Pa. 281, 194 A.2d 227 (1963).

[7] It should be noted that a further difficulty presents itself when an attorney agrees to act as a guardian ad litem for ***484** an adult. If the adult is in fact incompetent at the time of the hearing, even though he was competent when he retained the attorney, the subsequent incompetency serves to terminated the attorney's authority to act as his attorney. Thus, W. Seavey, Agency, s 48 at page 90 (1964) discussing the rule, cites Yonge v. Toynbee (1910) 1 K.B. 215, which holds that an unknowing solicitor is liable for costs. See Restatement (Second) of Agency s 122 (1958).

The trial court was no doubt influenced by the stipulations and requests and statements of the attorney for Mr. and Mrs. Houts. Thus, he entered an express finding reading, 'At the first conference, their attorney stipulated that Mr. Houts was mentally ill, and Mr. Houts was excused from further testimony.'

[8] We have no doubt the trial counsel for Mr. and Mrs. Houts, counsel for the other parties, and the court as well were all well motivated in following the procedure used below. However, good motives do not excuse the violation of the parents' constitutional right to a hearing when parents are sought to be permanently deprived of their children. We agree with retained counsel on appeal for Mr. and Mrs. ****1281** Houts that the hearing did not conform to due process requirements.

The judgment is reversed with direction to grant a new trial.

WILLIAMS and CALLOW, JJ., concur.
Wash.App., 1972.
In re Houts
7 Wash.App. 476, 499 P.2d 1276

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Supreme Court of Washington, Department 2.
GRAHAM
v.
GRAHAM.
No. 31949.

Feb. 7, 1952.

Original proceeding for an alternative writ of prohibition to prevent the King County Superior Court from appointing a guardian ad litem to represent petitioner in her capacity as a party defendant in a lawsuit pending in that court. The Supreme Court, Finley, J., held, inter alia, that petitioner was entitled to a full and fair hearing and an opportunity to defend against the appointment of a guardian ad litem.

Order in accordance with opinion.

West Headnotes

[1] Mental Health 257A 487

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak487 k. Authority to Appoint. Most Cited Cases
(Formerly 214k94(1) Insane Persons)
It is proper and desirable for court to appoint guardian ad litem for party litigant when reasonably convinced that party litigant is not competent, understandingly and intelligently, to comprehend significance of legal proceedings and effect and relationship of such proceedings in terms of best interests of such party litigant; and power to act in such cases is within inherent jurisdiction of court, which jurisdiction is part of and incidental to general jurisdiction of court over case and parties properly before it.

[2] Mental Health 257A 490

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak490 k. Proceedings for Appointment. Most Cited Cases
(Formerly 214k94(1) Insane Persons)
An application by one of parties to lawsuit is not prerequisite to appointment of guardian ad litem, and trial court on its own motion may appoint a guardian ad litem.

[3] Mental Health 257A 490

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak490 k. Proceedings for Appointment. Most Cited Cases
(Formerly 214k94(1) Insane Persons)
A litigant's right to use his personal judgment and intelligence in connection with a lawsuit affecting him and his relationship with his attorney in prosecuting or defending such suit are fundamental matters of such significance that appointment of guardian ad litem ought not to be permitted after a full, fair hearing and after an opportunity to be heard has been accorded to alleged incompetent, where objection or resistance to appointment has been timely made.

[4] Prohibition 314 3(1)

314 Prohibition
314I Nature and Grounds
314k3 Existence and Adequacy of Other Remedies
314k3(1) k. In General. Most Cited Cases

Prohibition 314 10(1)

314 Prohibition
314I Nature and Grounds
314k8 Grounds for Relief
314k10 Want or Excess of Jurisdiction
314k10(1) k. In General. Most Cited Cases
A writ of prohibition lies only when a trial court is

acting without or in excess of its jurisdiction, and then only when there is no other adequate remedy.

[5] Mental Health 257A 490

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak490 k. Proceedings for Appointment. Most Cited Cases
(Formerly 214k94(1) Insane Persons)
Where timely objection or resistance to appointment has been made by alleged incompetent, trial court proceeds in excess of its jurisdiction in appointing guardian ad litem without affording alleged incompetent a hearing and an opportunity to be heard.

[6] Prohibition 314 3(1)

314 Prohibition
314I Nature and Grounds
314k3 Existence and Adequacy of Other Remedies
314k3(1) k. In General. Most Cited Cases
In proceedings instituted by husband to eliminate wife's visitation rights under divorce decree because of change in her mental and nervous condition since entry of decree, decision on question of wife's competency, although solely in connection with appointment of guardian ad litem to represent wife in proceeding, could very well prejudice wife's rights in connection with trial of case on its merits, and therefore wife would have no adequate remedy at law, and hence writ of prohibition would lie, to prevent trial court from appointing guardian ad litem to represent her without first giving her a full and fair hearing and an opportunity to defend against such appointment.
***65 **564** Wright & Wright and Elias A. Wright, all of Seattle, for relator.

Metzger, Blair, Gardner & Boldt, Tacoma, for respondent.

FINLEY, Justice.

Mrs. Clover Graham seeks a writ of prohibition to prevent the King county superior ****565** court from appointing a guardian ad litem to represent her in her capacity as party defendant in a lawsuit now pending in that court. In such lawsuit she has been and now is represented by counsel, a member of the Seattle bar.

The pertinent facts stated in the application for the writ are as follows: 'David Graham, plaintiff, and Clover E. Graham, defendant, were divorced in Nevada in 1948. The parties and their three children are now in the state of Washington. Under the Nevada decree, Mr. Graham was given primary custody of the three children. Mrs. Graham was awarded certain visitation rights. In an effort to eliminate the visitation rights the father instituted the King county superior court lawsuit mentioned above. He alleged that the personality, the mental and nervous condition, and the psychic disposition of Mrs. Graham had changed greatly ***66** since the entry of the custody decree; that now her visitation with the children would be upsetting to them and not in their best interests. She denied this. The matter came on for trial before the Honorable Chester A. Batchelor. Mr. Graham called Dr. S. Harvard Kaufman, a psychiatrist, as a witness, who testified that he had examined Mrs. Graham; that he diagnosed her condition as schizophrenia, paranoid type, dementia praecox, paranoid type, of a chronic and progressive nature.

At this stage of the proceedings the judge indicated that he felt compelled to protect the interests of Mrs. Graham by appointing a guardian ad litem for her. There was no indication that such guardian would have any unusual power or control over the attorney then employed by Mrs. Graham, or that he would be replaced through the employment of different legal counsel. Mrs. Graham's attorney objected to the proposed appointment on the ground that his client was entitled to a hearing on a matter of such importance. The court was of the opinion that Dr. Kaufman's testimony had established a prima facie case of incompetency and that, thereupon, it became the duty of the court to appoint a guardian ad litem. It was agreed that Mrs. Graham would be allowed an opportunity to apply to the supreme court for a writ of prohibition before any order appointing a guardian ad litem would be entered.

The primary and controlling question to be decided here is whether, under the circumstances, the entry of an order appointing a guardian ad litem is within and

not in excess of the jurisdiction of the superior court. State of Washington ex rel. New York Casualty Co. v. Superior Court for King County, 31 Wash.2d 834, 199 P.2d 581.

[1] Irrespective of specific statutory authorization, the principle is well established that it is proper and desirable for courts to appoint guardians ad litem for parties litigant when reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect nd relationship of such proceedings in terms of the best interests ***67** of such party litigant. It has been said that the power to act in such cases is within the inherent jurisdiction of the courts. Borough of East Paterson v. Karkus, 136 N.J.Eq. 286, 41 A.2d 332; Moore v. Roxbury, 85 N.H. 394, 159 A. 357. This jurisdiction is part of and incidental to the general jurisdiction of a court over a case and the parties properly before it. Denny v. Denny, 8 Allen 311, 90 Mass. 311.

[2] An application by one of the parties to a lawsuit is not a prerequisite. A trial court on its own motion may appoint a guardian ad litem. Moore v. Roxbury, supra. Some cases indicate that a guardian ad litem may be appointed summarily. Sobel v. Sobel, 180 Misc. 618, 42 N.Y.S.2d 467. In this regard some courts go so far as to say that when the question of mental capacity arises for the first time in the trial of a case in equity, the better practice is to cause it to be submitted to a jury. Pyott v. Pyott, 191 Ill. 280, 61 N.E. 88. Any and all of this would seem to be quite proper in the usual case involving appointment of a guardian ad litem. But it seems to us that a most serious question arises when there is timely objection or resistance ****566** to the appointment either by the alleged incompetent or his attorney.

[3] While in such instances submission of the question of competency to a jury might be unobjectionable and might provide proper protection to an alleged incompetent, we would not go so far as to say that submission of the matter to a jury would be an absolute essential. On the other hand, in such cases, it seems to us that a guardian ad litem should not be appointed by the court unless a full and fair opportunity is given to the alleged incompetent to defend and to be heard. There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the alleged incompetent. Furthermore, there is something fundamental in a party litigant being able to employ an attorney of his voluntary choice to represent him in court and in being ***68** free to reject or accept the advice of such attorney. The interposition of a guardian ad litem could very well substitute his judgment, inclinations and intelligence for an alleged incompetent's; furthermore, the retention of legal counsel or the employment of a different attorney could be determined solely by the guardian ad litem, subject, of course, to some direction and control by the court, and the latter might be open to some question. In any event the changes which might result from the appointment of a guardian ad litem are of such significance as to be permitted only after a full, fair hearing and an opportunity to be heard is accorded to an alleged incompetent. This, of course, is on the assumption that there is objection or resistance to the appointment, and that same was timely made. In such a case we are convinced that an adjudication of incompetency must precede or at least be contemporaneous with the appointment of a guardian ad litem; and in that connection that an alleged incompetent has a right to defend and is entitled to be heard. See Webb v. Webb, 96 N.J.Eq. 1, 124 A. 706; Kalanianaole v. Liliuokalani, 23 Haw. 457; In re Haynes' Will, 82 Misc. 228, 143 N.Y.S. 570.

[4] Now as to whether prohibition is a proper and available remedy under the circumstances in the instant case. We have repeatedly stated that a writ of prohibition lies only, (1) when a trial court is acting without or *in excess of* its jurisdiction; and then only, (2) when there is no other adequate remedy. State ex rel. Western Canadian Greyhound Lines v. Superior Court for King County, 26 Wash.2d 740, 175 P.2d 640.

[5] From the standpoint of definition the term 'jurisdiction' is somewhat illusive, to say the least. It has been characterized as one of the nebulous, slippery, weasel words of the law. These observations would seem to apply equally to the phrase 'excess of jurisdiction.' Clearcut, authoritative definitions of the phrase are not too numerous. At best they are quite

confusing. It was pointed out above that the trial court definitely has jurisdiction or possesses the power to act in the matter of appointment of guardians ad litem ***69** in the usual run-of-the-mill situation. Therefore, the question now to be resolved is whether it should be said that the trial court, in proceeding without a hearing in the face of timely objection and resistance, was acting in excess of jurisdiction. For the reasons indicated, we have stated hereinabove that under certain circumstances a hearing and an opportunity to be heard are essential. Absent such essentials, we are convinced that a court would be proceeding in *excess of its jurisdiction.*

[6] The only other question is whether petitioner has an adequate remedy at law. At the trial of the instant case on its merits the basic and controlling question to be determined involves the competency of Mrs. Graham, the defendant. It is our best judgment that a decision on the question of competency, although solely in connection with the appointment of a guardian ad litem, might very well prejudice Mrs. Graham in connection with the trial of the case on its merits. In view of this we ****567** think that no adequate remedy at law is available.

We are expressing no opinion as to whether after a hearing the trial court should or should not appoint a guardian ad litem. Our opinion here is only to the effect that petitioner is entitled to a full and fair hearing and an opportunity to defend, as we have indicated. A writ of prohibition will be issued to afford petitioner such a hearing on the question of whether a guardian ad litem should or should not be appointed.

HILL, HAMLEY, WEAVER and OLSON, J.J., concur.

WASH. 1952
Graham v. Graham
40 Wash.2d 64, 240 P.2d 564

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C

Court of Appeals of Washington,
Division 1.
Tai Vinh VO, Respondent,
v.
Le Ngoc PHAM, Defendant,
and Susan Partridge, Appellant.
No. 34467-6-I.

May 28, 1996.

Plaintiff brought action against defendant to quiet title on two properties. The Superior Court, King County, Dale Ramerman, J., entered judgment for plaintiff, and defendant appealed. The Court of Appeals, Cox, J., held that trial court erred in failing to conduct hearing to determine whether defendant was mentally competent or required guardian ad litem.

Vacated and remanded.

West Headnotes

[1] Mental Health 257A 490

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak490 k. Proceedings for Appointment. Most Cited Cases
Trial court erred by failing to conduct hearing to determine whether party litigant was mentally competent or required guardian ad litem, where, during her testimony, she stated several times that she had second personality that she was unable to control and that it was her second personality who was speaking.

[2] Mental Health 257A 517

257A Mental Health
257AV Actions
257Ak517 k. Review. Most Cited Cases
Court of Appeals reviews trial court's determination of need for guardian ad litem for abuse of discretion.

[3] Appeal and Error 30 946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
Trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds.

[4] Mental Health 257A 487

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak487 k. Authority to Appoint. Most Cited Cases
Trial court has inherent power to appoint guardian ad litem for litigant upon finding that he or she is incompetent.

[5] Evidence 157 62

157 Evidence
157II Presumptions
157k62 k. Mental Capacity in General. Most Cited Cases

Mental Health 257A 506

257A Mental Health
257AV Actions
257Ak505 Evidence
257Ak506 k. Presumptions and Burden of Proof. Most Cited Cases
Mental competency of litigant is presumed.

[6] Mental Health 257A 486

257A Mental Health
257AV Actions

257Ak485 Guardian Ad Litem or Next Friend
257Ak486 k. Propriety of Representation.
Most Cited Cases
Court has duty to act to protect rights of litigant who appears to be incompetent, notwithstanding presumption of competency and fundamental right of parties to use their personal judgment and intelligence in connection with their lawsuit.
****463 *782** Deborah A. Elvins, Stoel Rives Boley Jones & Grey, Seattle, for appellant.

Laurason T. Hunt, Law Offices of Laurason T. Hunt, Bellevue, for respondent.

COX, Judge.

Susan Partridge appeals a judgment and decree that quiets title to two properties in her, Tai V. Vo, and Le Ngoc Pham. Partridge's conduct at trial raised significant and unresolved questions as to her mental competency. Accordingly, we vacate the judgment and decree and remand this case to the trial court for a hearing to determine whether she is competent or requires a guardian ad litem.

Vo and Partridge met in 1983. Both are Vietnamese, but speak and read English. Vo worked for the United States Postal Service. He and Partridge maintained an account***783** at the Seattle Postal Employees Credit Union to which both contributed funds.

In December 1986, Vo and Partridge's sister, Le Ngoc Pham, along with two others not involved in this case, signed a real estate contract to buy a house. Vo testified at trial that Partridge used Pham's name on the contract solely to avoid affecting her welfare status. According to Vo, owning real estate would have jeopardized Partridge's welfare benefits. Vo and Partridge moved into this property and lived there together for several years.

In May 1987, Vo and Partridge (in Pham's name) acquired a second house. They assumed an existing mortgage balance as part of this transaction.

In September 1990, Vo and Partridge stopped living together. On October 24, 1990, Partridge recorded two quit claim deeds purporting to transfer all of Vo's interest in both properties to Pham, Partridge's sister. At trial, Vo denied signing these deeds. On November 5, 1991, Partridge recorded two more quit claim deeds purporting to transfer all of Pham's interest in the two properties to Partridge.

Vo brought a quiet title action against Pham and Partridge. At the bench trial of the case, Vo was represented by counsel. Partridge was not, but she appeared and participated in the trial. Pham did not appear at trial.

During the opening statement of Vo's counsel, Partridge began to exhibit bizarre behavior. Notwithstanding the concerns of the court and Vo's counsel about that behavior, the trial court decided the trial should proceed.

During trial, Partridge's behavior became increasingly bizarre. She manifested extreme vocal outbursts and wild gestures. She also claimed she had two personalities.

At the conclusion of the trial, the court issued its written decision and also entered its findings, conclusions, and a judgment and decree quieting title. The court awarded Vo an undivided 50 percent interest in each of the two properties and awarded the remainder of each property to ***784** Partridge and ****464** Pham. Finally, the court retained jurisdiction for further proceedings in this case.

Partridge filed her own notice of appeal. She is now represented by counsel in this appeal.

I

Mental Competency

[1] Partridge contends that the trial court erred by failing to appoint a guardian ad litem to represent her interests. We hold that the trial court erred by failing to conduct a hearing to determine whether Partridge was mentally competent or required a guardian ad litem.

[2][3] In *In re Mignerey,*[FN1] our Supreme Court stated that "[i]n appointing a guardian, the trial court is called upon to exercise a wide discretion, and the

conclusion of the court carries great weight when its action is reviewed before an appellate tribunal." We therefore review a trial court's determination of the need for a guardian ad litem for an abuse of discretion. "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." FN2

FN1. 11 Wash.2d 42, 49-50, 118 P.2d 440 (1941).

FN2. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wash.App. 125, 131, 896 P.2d 66 (1995), *review denied*, 128 Wash.2d 1008, 910 P.2d 482 (1996).

[4][5] A trial court has the inherent power to appoint a guardian ad litem for a litigant upon finding that he or she is incompetent. Mental competency is presumed.FN3 In *Graham v. Graham*,FN4 our Supreme Court stated that

> it is proper and desirable for courts to appoint guardians *ad litem* for parties litigant when reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms ***785** of the best interests of such party litigant.... This jurisdiction is part of, and incidental to, the general jurisdiction of a court over a case and the parties properly before it.

The court further noted its concern for the rights of the alleged incompetent: "There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted...." FN5

FN3. *Binder v. Binder*, 50 Wash.2d 142, 148, 309 P.2d 1050 (1957).

FN4. 40 Wash.2d 64, 66-67, 240 P.2d 564 (1952).

FN5. 40 Wash.2d at 67, 240 P.2d 564 (holding that, prior to appointing a guardian ad litem, the trial court must conduct a hearing that affords the alleged incompetent an opportunity to defend and be heard).

[6] Notwithstanding the presumption of competency and the fundamental right of a party to use his or her personal judgment and intelligence in connection with his or her lawsuit, the court has a duty to act to protect the rights of a litigant who appears to be incompetent. In *Shelley v. Elfstrom*,FN6 this court stated that " '[t]he welfare of incompetent persons and the care of their property are objects of particular care and attention on the part of the courts.' " The *Shelley* trial court had dismissed a suit for damages by a person who had previously been found incompetent. The trial court had opened Shelley's sealed file and learned that he had not been discharged from the hospital "as recovered by either the hospital superintendent or the court," although he had been released.FN7 Because RCW 4.08.060 requires that an insane person be represented either by a guardian or a guardian at litem and Shelley had neither, the trial court dismissed his complaint without prejudice. FN8

FN6. 13 Wash.App. 887, 889, 538 P.2d 149 (1975) (quoting *In re Mignerey*, 11 Wash.2d at 49, 118 P.2d 440; *Potter v. Potter*, 35 Wash.2d 788, 215 P.2d 704 (1950)).

FN7. *Shelley*, 13 Wash.App. at 888, 538 P.2d 149.

FN8. *Shelley*, 13 Wash.App. at 888, 538 P.2d 149.

Reversing that decision, this court held that the prior adjudication had created a *rebuttable* presumption of insanity and that the superior court was thus obligated to ****465 *786** give Shelley an opportunity to defend against the allegation of incompetence.FN9 This court therefore held that the trial court had a duty to determine either that Shelley was competent or that he required a guardian ad litem.FN10

FN9. *Shelley*, 13 Wash.App. at 889, 538 P.2d 149.

FN10. *Shelley*, 13 Wash.App. at 889, 538

P.2d 149.

We have not found any Washington case that addresses the duty of a trial court to inquire into the competence of a litigant who has not been legally adjudged insane but who exhibits the type of bizarre behavior demonstrated by Partridge. But the cases are clear that the trial court has the inherent duty and power to make a determination as to the mental competency of an alleged incompetent by conducting a hearing, on the record, in which the alleged incompetent has the opportunity to present evidence on the question of mental competency.

Here, the trial court was faced with a dilemma. During the opening remarks of Vo's counsel at trial, Partridge began to exhibit bizarre behavior. The record shows the following exchange among counsel for Vo, Partridge, and the court:

> [Vo's counsel:] Ms. Partridge has basically taken possession of the properties, including the one house that was the rental house, and has excluded Mr. Vo from any reporting of income or any accounting for the houses whatsoever since this-these two quit claim deeds.
>
> MS. PARTRIDGE: (Screaming.) Don't lie.
>
> THE COURT: All right.
>
> MS. PARTRIDGE: (Inaudible).
>
> THE COURT: Ms. Partridge-
>
> [Vo's counsel]: I'm not going to-I'm not going to put up with this. I'm just not going to do it, Your Honor. I'm not going to be scared out of my wits, so I'm just not going to do it. There's going to have to [be] either some kind of security in here or something.
>
> MS. PARTRIDGE: (Screaming.)
>
> ***787** THE COURT: What's your position on Ms. Partridge's right to participate in this trial?
>
> [Vo's counsel]: Well, I should have moved for a guardian ad litem, Your Honor. Our position is, is that-you know, she has never filed an answer, at least with us. She has never [served on] us a notice of appearance.

The court expressed its own concern about Partridge's mental competency in the following exchange:

> [THE COURT:] I don't know at this point-
>
> MS. [PARTRIDGE]: (Inaudible).
>
> THE COURT:-how I can exclude her from being present or participating. I don't-I gave some thought about whether the Court should initiate appointment of a guardian ad litem. I was concerned that I didn't have sufficient record to make findings that it was necessary-you know, that it was justified. I've done that before on my own motion, but I've also had psychiatric evaluations when I've done it, and I don't have at this time, so-
>
> [Vo's counsel]: All right.
>
> THE COURT:-I don't-I think we're going to have to ... go forward and do the best we can....

Despite both the court's and counsel's concerns, the trial proceeded.

Partridge's bizarre behavior continued during trial. During her testimony, Partridge stated several times that she had a second personality, a little girl named "Barbara," who controlled Partridge at times. Partridge also claimed to have been treated by a psychotherapist for her alleged multiple personality disorder. "Barbara" seemed to speak several times during the trial. At one point, Susan/"Barbara" stated to the trial judge that it was the little girl who was speaking. The court then admonished Partridge that it needed to speak with Susan, not "Barbara".

After the presentation of Vo's case, the following exchange occurred among Vo's counsel, the court, and Partridge:

> ***788** [Vo's Counsel]: Your Honor, I have nothing further.

****466** THE COURT: Okay. All right, Ms. Partridge?

MS. PARTRIDGE: Yes, sir?

THE COURT: Do you want to testify?

MS. PARTRIDGE: What does mean?

THE COURT: Do you want to sit up here and tell me-and offer your exhibits?

MS. PARTRIDGE: Yeah, I like go up there. (Laughter.) My need to talk to Judge. After you Judge and I judge myself, sir, (inaudible) up there. (Screaming.)

THE COURT: Ms. Partridge?

MS. PARTRIDGE: Judge, sir? I sit up here? (Laughter.) Now I sit here, Judge. I like that.

THE COURT: Ms. Partridge?

MS. PARTRIDGE: Yes, sir?

THE COURT: Would you please stand? Raise your right hand. Do you solemnly swear or affirm that the testimony you give in this matter will be the truth?

MS. PARTRIDGE: Yes, sir.

THE COURT: All right. Please be seated.

[Vo's counsel]: Your Honor, could I request that if she's in her Barbara phase that maybe she be sworn in as Barbara also?

THE COURT: No, I don't want to hear Barbara. I want to hear Susan Partridge.

The court was unable to get Susan to speak. "Barbara" spoke at some length regarding Vo's mistreatment of Susan while the court repeatedly asked for Susan to say her name. "Barbara" also threatened to kill Vo. The court then called a recess for nearly two hours and stated that it wanted "to see Susan at 1:30." Thereafter, Partridge's testimony was substantially more lucid. She also testified ***789** in some detail as to the nature of "Barbara's" control over her.

Several other incidents illustrate the need for the trial court to have inquired further into Partridge's mental competence. While Vo was testifying about one of the houses, "Barbara" interrupted, addressing Partridge by name:

Q [Vo's counsel] Now, before purchasing that house, did you then-I mean before you moved out of that house, did you purchase another house?

A [Vo:]: Yes, sir, the one on 15918 First Avenue Northeast.

Q [Vo's counsel:] Okay.

MS. PARTRIDGE: I'm sorry, Susan. I'm sorry I do wrong. He try to steal your house. I'm sorry, I try to help him, but he cheat you. I know. I think-

For a portion of the trial, a sheriff's deputy was present in the courtroom.

Although the record does not directly answer why the deputy was present, an exchange between counsel for Vo and the court suggests they were concerned that Partridge might further disrupt the trial.[FN11]

> FN11. "[Vo's counsel]: Excuse me. I'm not pleased about proceeding under the situation as [it] exists right now, Your Honor. As you can see, the Sheriff's deputy has left, and-
>
> "THE COURT: That's all right. We'll get him back if we need him."

At the conclusion of the trial, the court entered its findings of fact and conclusions of law. A portion of finding 2, which is unchallenged on appeal, states:

At times during the trial, the Defendant Partridge spoke rationally and intelligently, understanding the significance of the proceedings and at other times, she was subject to extreme vocal outbursts and wild

gestures. She represented herself in these proceedings but was not qualified to do so.

We conclude from our review of the record that the above unchallenged finding describing Partridge's conduct during trial is supported by the record. But the finding ***790** also illustrates the need for a hearing on her mental competency that the trial court never conducted.

Graham teaches that the court should appoint a guardian ad litem for a litigant when it is "reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the ****467** best interests of such party litigant." [FN12] When, as here, the court's own finding suggests that Partridge did not understand the significance of the proceedings throughout the trial, a hearing on the question of mental competency is required.

FN12. 40 Wash.2d at 66-67, 240 P.2d 564.

Vo concedes that the principle of *Graham* applies to this case. Nevertheless, he argues that the trial court fulfilled its duty and properly exercised its discretion. We disagree.

Vo notes that the court inquired of Vo's counsel at the beginning of trial as to Partridge's ability to participate at trial. The court also examined the court file and reviewed the letter that constituted Partridge's notice of appearance. Vo concludes that the trial court properly exercised its discretion and determined that Partridge met the *Graham* test-that she could understand the proceedings and properly defend her interests. Vo further states that the trial court made efforts throughout the trial to assure that Susan, and not "Barbara," was present and participated in all stages of the trial. In doing so, the trial court endured Partridge's outbursts and instructed her that Susan's, and not "Barbara's," presence was required.

However, as noted above, *Graham* contemplates mental competency for the *entire* proceeding. We lack a sufficient record to determine that the trial court satisfied that test. Even assuming that the court properly determined that Partridge was competent at the time of her outburst during Vo's opening statement, her subsequent conduct was sufficiently bizarre to warrant renewed inquiry.

***791** Vo also argues that the fact that Partridge forged Vo's name on the deeds and thereafter executed deeds to vest title in herself showed a degree of competency that satisfies the *Graham* test. The problem with that argument is that such actions *prior* to trial do not answer the more basic question whether she was competent *at* trial.

In holding as we do, we do not suggest what the outcome of the hearing on competency should be. The parties will have an opportunity to present proper evidence at a hearing on the question of competency and have that matter resolved by the trial court in the proper exercise of its discretion.

We vacate the judgment and decree and remand this case to the trial court for further proceedings consistent with this opinion.

The rest of this opinion has no precedential value and therefore will not be published.[FN13]

FN13. RCW 2.06.040.

KENNEDY and ELLINGTON, JJ., concur.
Wash.App. Div. 1,1996.
Vo v. Pham
81 Wash.App. 781, 916 P.2d 462

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Incompetency of Parents in Juvenile Cases

- **What is the issue?** Periodically the parents in dependency or termination cases are mentally incompetent and do not understand the nature of the proceedings or how the proceedings impact their best interest. Defense attorneys may be reluctant to raise the issue because of the implications such a finding might have on the ultimate resolution of the case. On the other hand, all participants in the proceeding have an obligation to raise the issue if the circumstances warrant it. Vo. v. Pham, 81 Wn. App. 781, 916 P. 2d 462 (1996)

- **Competency is Presumed** – In Washington, adult litigants are presumed to be mentally competent and they have a fundamental right to use their own personal judgment and intelligence with respect to their interest in the proceedings. Vo v. Pham, 81 Wn. App. 781. At the same time, trial courts have a duty to protect the rights of litigants who appear incompetent by conducting a competency hearing, and appointing a guardian ad litem for litigants who are found incompetent. In re Marriage of Blakely, 111 Wn. App. 351 (Div. III 2002); *See also* RCW 4.08.060 (when an incompetent person is a party to an action in superior court, he or she must appear by guardian or guardian ad litem).

- **There must be a competency hearing prior to appointing a GAL for a parent, unless they agree:** Because the interposition of a guardian ad litem has such far reaching consequences for the alleged incompetent and his or her ability to direct the course of the litigation, courts are directed to afford every litigant who opposes the appointment of a guardian ad litem a full and fair hearing. Graham v. Graham, 40 Wn. 2d 64, 66 – 67, 240 P. 2d 564 (1952). A full hearing is required because of the impact that appointment of a guardian ad litem has. After a guardian ad litem has been appointed for a person who has been adjudicated incompetent, that person can appear in court only via his guardian ad litem. The guardian has complete statutory power to represent the interest of the ward, and can substitute his judgment, inclinations, and intelligence for that of the incompetent party. In re Dill, 60 Wn. 2d. 148, 372 P. 2d 541 (1962); Graham v. Graham, 40 Wn. 2d at 68.

- **Civil Test for competency:** The civil test for competency is lenient. The question to be asked is: "Does the parent understand and comprehend the significance of the legal proceedings and their effect on his or her best interests?" Graham at 68. If this question is answered in the affirmative, the parent is legally competent and should not be appointed a Guardian ad litem.

- **How the civil test differs from the criminal test of incompetency:** This civil competency test is lower than the more rigorous inquiry used in a criminal case. *See* RCW 10.77.010(14)("Incompetency means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his or her own defense as a result of mental disease or defect."). For criminal purposes, an incompetent person may not be tried, convicted, or sentenced for a crime so long as the incapacity continues. RCW 10.77.050. That is not true however for civil cases, and in dependency and termination cases, it is especially important for the child not to delay the proceeding.

- **What's the relationship between competency under RCW 4.08.060 and incapacity under RCW 11.88?** They are completely separate determinations and deal with different issues. *See* In re Marriage of Blakely, 111 Wn. App. 351 (Div. III 2002)

- **Factors the court should consider:** In making the competency determination, the trial court exercises "wide discretion" and the conclusion of the court carries great weight when its action is reviewed before an appellate tribunal. In re Mignerey, 11 Wn. 2d 42, 49-50, 118 P. 2d 440 (1941). This granting of discretion to the trial court is necessary because the trial court is in the best position to consider the factors relevant to the competency determination. These factors include the parent's answers to questions, his/her appearance, his/her demeanor, his/her

conduct and the reports of others. State v. Dodd, 70 Wn. 2d 513, 424 P. 2d 302 (1967).

- **The Role of the Guardian Ad Litem if One is Appointed** The Guardian ad litem has complete statutory power to represent the interest of the ward. In re Dill, *supra;* Rupe v. Robison, 139 Wash. 592, 595, 247 Pac. 954 (1926). Upon the guardian ad litem's appointment following an adjudication of incompetency, he thereafter is substituted for the incompetent person as the proper party to a legal action, and the incompetent person may only appear through his guardian ad litem. Franks v. Douglas, 57 Wn. 2d at 586-587; In re Dill, supra. It is further the role and duty of the Guardian ad litem to actively represent the interests of the incompetent person and defend against the action. In re Guardianship of K.M. 62 Wn. App. 811, 816 P. 2d 71 (1991)(GAL must actively protect the interests by assuming an adversary posture in proceedings affecting the incompetent person's fundamental rights); In re Quesnell, 83 Wn. 2d 224, 517 P. 2d 568 (1973)(If the GAL does not submit all relevant defenses or legal claims, investigate actively, and perform other vital functions, the appointment of a GAL becomes a "mere formality.")

- **What happens to the attorney for the incompetent parent if a GAL is appointed?** Where an attorney has previously been retained or appointed to represent a party, a subsequent adjudication that the party is incompetent terminates the relationship of attorney and client and likewise terminates entirely the attorney's authority to act as legal counsel for the incompetent person. Franks v. Douglas, 57 Wn. 2d 583, 586, 358 P. 2d 969 (1961); In re Houts, 7 Wn. App. 476, 484, 499 P. 2d 1276 (1972). The guardian ad litem has the authority to continue the services of previously retained legal counsel or to employ a different attorney entirely, subject to some direction and control by the Court. Graham v. Graham, *supra*. Where an incompetent person is acting through a guardian ad litem, legal counsel must look to such representative for those decisions that are normally the prerogative of the client to make. Where an incompetent person is represented by both an attorney and a separate attorney-guardian ad litem, the attorney represents the guardian ad litem who in turn stands in the shoes of the incompetent person. Under no circumstances should both the attorney and the attorney-guardian ad litem be allowed to conduct examinations of witnesses or make objections during the course of a court proceeding. CR 43(a)(2).

- **A GAL may not waive or stipulate away any substantial rights** -Just as an attorney has no authority to waive or stipulate away any substantial right of his client without special authority from the client, so the guardian ad litem for an incompetent person lacks the authority to waive a substantial right of his ward. In re Houts, 7 Wn. App. at 481-482. Therefore, a GAL may not agree to dependency, or a dependency guardianship, or relinquish parental rights on behalf of a parent.

- **Is it legally possible for a defense attorney to act in a dual capacity as attorney and GAL?** Washington courts have yet to address this issue, but it might be permissible because the role of the GAL is very much like that of an attorney, in that both are required to present defenses to the action and advocate for the party. In re Quesnell, 83 Wn. 2d 224, 517 P. 2d 568 (1973). In re Houts, 7 Wn. App. 476, 499 P 2d 1276 (1972)(fulfillment of both roles implicitly approved). Other jurisdictions have rejected the argument that an attorney cannot also act as a guardian ad litem. In the Interest of JIW, 695 S.W. 2d 513 (Mo. App. 1985)(because the duties of an appointed guardian ad litem are the same as an attorney, they may serve a dual role).

321 P.3d 309
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 2.

In re the WELFARE of **H.Q.**, A Minor Child.

No. 44649–9–II. | March 25, 2014.

Synopsis

Background: Department of Social and Health Services filed a dependency petition. The Kitsap Superior Court, Sally F. Olsen, J., terminated father's parental rights, and he appealed.

Holdings: The Court of Appeals, Penoyar, J.P.T., held that, as matters of first impression:

[1] juvenile court should have held a hearing to determine father's competence to voluntarily relinquish his parental rights before involuntarily terminating his parental rights to child, and

[2] juvenile court violated father's right to due process when it accepted father's attorney's waiver of father's competence to voluntarily relinquish his parental rights to child without holding a hearing or determining whether father authorized his attorney to concede his incompetence.

Vacated and remanded.

West Headnotes (14)

[1] **Adoption**
Exceptions; relinquishment or forfeiture of parent's rights in general
Adoption
Examination and approval by court
Constitutional Law
Adoption
Constitutional Law
Removal or termination of parental rights
Infants
Necessity; right to hearing

Right to voluntarily relinquish parental rights in order to consent to adoption was part of the fundamental right to parent protected by due process, and, thus, juvenile court should have held a hearing to determine father's competence to voluntarily relinquish his parental rights, in order to enter open-communication adoption agreement for child and maintain a relationship with her, before involuntarily terminating his parental rights to child. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[2] **Adoption**
Adoption agreements; brokering, fees and effect

If father was competent to voluntarily relinquish his parental rights, he would then be entitled, through his guardian, to enter into an open-communication adoption agreement.

Cases that cite this headnote

[3] **Adoption**
Review
Infants
Issues and questions in lower court in general

Although father did not raise a due process argument in the juvenile court with respect to his right to voluntarily relinquish his parental rights to child and enter into an open-communication adoption agreement, appellate court would consider it because it pertained to his constitutional rights as a parent. U.S.C.A. Const.Amend. 14; RAP 2.5(a)(3).

Cases that cite this headnote

[4] **Appeal and Error**
Cases Triable in Appellate Court

Appellate courts review constitutional challenges de novo.

Cases that cite this headnote

[5] **Infants**

Persons and Relationships Affected or Subject

Natural parents do not lose constitutionally protected interests simply because they have not been model parents or have lost temporary custody of their child to the State.

Cases that cite this headnote

[6] **Constitutional Law**

Parent and Child Relationship

Because a parent's fundamental right is protected as a matter of substantive due process under the Fourteenth Amendment, any state interference with the right to parent must be subjected to strict scrutiny and is justified 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. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Adoption**

Review

Constitutional Law

Adoption

Constitutional Law

Removal or termination of parental rights

Infants

Questions considered

Because there was state action, in that Department of Social and Health Services acted to terminate father's parental rights, appellate court had to determine whether voluntarily relinquishing parental rights in order to consent to adoption was a fundamental liberty interest protected by due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**

Adoption

Constitutional Law

Removal or termination of parental rights

Parent's decision to relinquish parental rights to a child in order to consent to adoption is a decision made in relation to the care, custody, and management of the child, and this decision bears directly on whether a parent will be entitled to continue to parent or have contact with his child, and thus the right to make this decision is part of the fundamental liberty interest to parent that is protected by due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Adoption**

Examination and approval by court

Constitutional Law

Adoption

Constitutional Law

Removal or termination of parental rights

Infants

Relinquishments and Consent

Infants

Necessity; right to hearing

Because relinquishing parental rights was a fundamental liberty interest, juvenile court violated father's right to due process when it accepted father's attorney's waiver of father's competence to voluntarily relinquish his parental rights to child, so he could enter into an open-communication adoption agreement for child, without holding a hearing or determining whether father authorized his attorney to concede his incompetence. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Adoption**

Adoption agreements; brokering, fees and effect

Infants

Relinquishments and Consent

In general, the statutes pertaining to adoption permit a parent involved in a dependency action to elect to relinquish his or her parental rights, and parent who does this may then enter into an open-communication adoption agreement to

preserve some contact with the child. West's RCWA 26.33.295.

Cases that cite this headnote

[11] **Adoption**
Exceptions; relinquishment or forfeiture of parent's rights in general
Guardian and Ward
Custody and control of person
Protection of Endangered Persons
Guardian ad litem or next friend

Simply because a party has an appointed guardian or guardian ad litem (GAL) does not preclude the party from seeking to voluntarily relinquish his parental rights. West's RCWA 4.08.060.

Cases that cite this headnote

[12] **Attorney and Client**
Scope of authority in general
Attorney and Client
Stipulations and admissions
Attorney and Client
Settlements, Compromises, and Releases

Although an attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate a hearing, an attorney may not waive her client's substantial rights; instead, the client must specifically authorize waiver of a substantial right.

Cases that cite this headnote

[13] **Adoption**
Exceptions; relinquishment or forfeiture of parent's rights in general
Attorney and Client
Scope of authority in general

Voluntarily relinquishing parental rights in order to consent to adoption is a fundamental, and thus a substantial, right that an attorney may not waive.

Cases that cite this headnote

[14] **Constitutional Law**
Removal or termination of parental rights

Because of the parents' fundamental constitutional rights at stake in termination hearings, due process requires that parents have the ability to present all relevant evidence for the juvenile court to consider prior to terminating parents' rights. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

Maureen Marie Cyr, Washington Appellate Project, Seattle, WA, for Appellant.

Peter Everett Kay, Office of the Attorney General, Tacoma, WA, for Respondent.

Opinion

PUBLISHED OPINION

PENOYAR, J.P.T. [1]

¶ 1 C.Q. appeals the involuntary termination of his parental rights. C.Q. is the father of **H.Q.**, a girl born in 2008. [2] C.Q. has a good relationship with **H.Q.** but is unable to parent her because of disabilities caused by a head injury when he was a child. As a result, C.Q. was faced with termination of his parental rights.

¶ 2 C.Q. sought to voluntarily relinquish his rights in order to enter into an open-communication adoption agreement with **H.Q.'s** prospective adoptive parents because that was the only way for him to have an enforceable right to continue a relationship with **H.Q.** after the termination. The juvenile court did not conduct a hearing to determine C.Q.'s competence to voluntarily relinquish his parental rights. Instead, it accepted the representation of C.Q.'s attorney that C.Q. was not competent to voluntarily relinquish his parental rights and subsequently involuntarily terminated those rights. Because a parent's right to voluntarily relinquish his parental rights is a fundamental right protected by due process, we vacate the termination of C.Q.'s parental rights and remand for the juvenile court to hold a hearing on C.Q.'s competence to voluntarily relinquish his parental rights and for further

additional proceedings dependent upon the outcome of the competency hearing.

FACTS

I. BACKGROUND

¶ 3 C.Q. is a 30–year–old man with disabilities caused by a head injury when he was eight or nine years old.[3] These disabilities leave him with the mental faculties of a six-year-old. Francis Peck became C.Q.'s foster parent after C.Q.'s head injury and then his legal guardian under chapter 11.88 RCW when he turned 18. Peck makes all of H.Q.'s medical and financial decisions and provides him transportation. Despite C.Q.'s disabilities, C.Q. has lived on his own in a fifth-wheel RV trailer located near Peck's friends since June or July 2012. C.Q. is independent in feeding, bathing, and dressing himself, and he prepares his own meals, keeps his residence clean, and has maintained a job as a stock clerk.

¶ 4 Prior to February 2012, C.Q. lived with H.Q.'s mother, C.H. In December 2008, H.Q. fractured her leg. Due to concerns regarding H.Q.'s injury, the Department of Social and Health Services filed a dependency petition. In February 2009, C.Q. agreed to a dependency of H.Q. under former RCW 13.34.030(5)(c) (2008). In accepting C.Q.'s waiver, the juvenile court found that C.Q. understood the terms of the order he signed, including his responsibility to participate in remedial services, and understood that entry of the order started a process which could result in termination of his relationship with H.Q. The juvenile court also found that C.Q. "knowingly and willingly stipulated and agreed to and signed the order or orders, without duress, and without misrepresentation by fraud or any other party." Ex. 1, at 2.

¶ 5 As part of the dependency, C.Q. completed a psychological evaluation in October 2009. The examiner recommended that C.Q. receive hands-on parent coaching. Eventually, H.Q. returned to the care of C.H. and in December 2009, the Department dismissed the dependency.

II. SECOND DEPENDENCY PETITION

¶ 6 In August 2010, the Department filed a second dependency petition as to H.Q. on the basis of neglect due to unsanitary conditions in C.H.'s home.[4] On December 20, 2010, the juvenile court held a contested fact finding hearing and found that C.Q. had "significant mental health issues and head trauma causing developmental and cognitive delays such that he [was] currently unable to adequately care for his child." Ex. 6, at 2. The juvenile court found H.Q. dependent under former RCW 13.34.030(6)(c) (2010). On January 31, 2011, the juvenile court entered an agreed dispositional order[5] that required C.Q. to participate in parent coaching. The juvenile court also permitted C.Q. to have supervised visitation with H.Q. once per week for two hours.

¶ 7 The Department social worker, Jean Austin, referred C.Q. for hands-on parent coaching with Debra Roo, a master's degree parenting instructor. Austin did not know whether Roo had expertise in working with developmentally disabled individuals, but she had used Roo in other cases with developmentally disabled parents. After two sessions with C.Q., Roo reported that further parenting coaching was not an effective tool for C.Q. due to his cognitive capacity and rate of skill development during the sessions. The Department stopped offering this service. Thereafter, the only support offered or provided to C.Q. was supervised visitation with H.Q.

¶ 8 At the permanency planning hearing on September 28, 2011, the juvenile court found that C.Q. was in compliance with the court order but was not making progress towards correcting his parenting deficiencies.[6] The juvenile court also changed H.Q.'s permanent plan from reunification to adoption. That same day, the Department filed a petition to terminate C.Q.'s parental rights.[7] On January 23, 2013, the juvenile court ordered that H.Q.'s placement be changed from foster care to relative care with P.M., H.Q.'s maternal great aunt who lives in Missouri.

III. TERMINATION HEARING

¶ 9 Prior to the termination fact finding hearing on February 12, 2013, Laura Jorgensen, C.Q.'s attorney, submitted a trial brief indicating that C.Q.'s guardians wished to sign a relinquishment of his parental rights in order to take advantage of an open-communication adoption agreement under chapter 26.33 RCW. Jorgensen also informed the juvenile court that C.Q. was not in a position where he was competent to personally relinquish his legal rights.[8] She argued that C.Q.'s equal protection rights were violated by the Department's position that C.Q. could not voluntarily relinquish his rights through his guardians and enter into open-communication adoption under chapter 26.33 RCW because of his disability.

¶ 10 In response, the Department argued that C.Q. was unable to enter into any type of voluntary agreement to relinquish his rights and thus could not meet the necessary prerequisites under chapter 26.33 RCW. The Department asserted that the only option was to pursue involuntarily termination of his rights.[9] Without addressing the issue in any manner, the juvenile court asked the Department to call its first witness.

¶ 11 Austin, the Department social worker, testified that the permanent plan for **H.Q.** was for her to be adopted by P.M., who intended to support a continuing emotional relationship between **H.Q.** and C.Q. Austin believed that some kind of ongoing contact between C.Q. and **H.Q.** was in **H.Q.'s** best interests, although she also believed that termination was in **H.Q.'s** best interest so that she could be adopted and have a permanent, legal parent. Peck, C.Q.'s guardian, testified that C.Q. loved **H.Q.** very much and watched out for her safety when they were together. Peck had never seen C.Q. do anything to harm **H.Q.** and believed that he could keep her safe. Peck stated, however, that C.Q. could not independently care for **H.Q.** and that someone else would need to be her parental figure.

¶ 12 **H.Q.**'s GAL, Kyle Barber, testified that his preference would be to accept C.Q.'s relinquishment with an open-communication adoption agreement if the law permitted it. He stated that **H.Q.** knew C.Q. was her father and that she had a good relationship with him. Barber believed it would be detrimental to **H.Q.** if she did not have contact with C.Q. in the future, but he nevertheless said that termination was in **H.Q.'s** best interest because she needed legal permanence and C.Q. could not safely parent her in the long term. Barber had spoken to P.M. about adoption and believed that she intended to allow C.Q. and **H.Q.** to have a continuing relationship.

¶ 13 Following the testimony, the juvenile court found that the Department proved the elements of former RCW 13.34.180(1)(a) through (f) (2013) by clear, cogent, and convincing evidence. It found that C.Q. had the intellectual level of a six-to-eight year old and there was little likelihood conditions would be remedied so that **H.Q.** could be returned to his care in the near future. In addition, it found by a preponderance of the evidence that termination of C.Q.'s parental rights was in **H.Q.'s** best interest because she needed a parent who could help prepare her for the future. As to C.Q.'s ability to voluntary relinquishment his parental rights, the juvenile court stated:

> Under Washington law, there cannot be an open adoption in involuntary termination cases under RCW 13.34. An open adoption requires a voluntary relinquishment of parental rights under RCW 26.33, and the agreement of all the parties, and the adoptive parents, to an open adoption under RCW 26.33.295. The father is *apparently* not capable of voluntarily relinquishing his parental rights, and thus this case had to proceed to trial. His legal guardian participated in the trial.

Clerk's Papers (CP) at 72 (emphasis added). On March 13, 2013, the juvenile court entered an order terminating C.Q.'s parental rights to **H.Q.** C.Q. appeals.

ANALYSIS

I. DUE PROCESS

[1] **[2]** ¶ 14 C.Q. argues he had a fundamental right to voluntarily relinquish his parental rights to **H.Q.** and enter into an open-communication adoption agreement. He contends that the juvenile court violated due process by failing to determine whether he was capable of voluntarily relinquishing his parental rights before proceeding with the involuntary termination hearing. We hold that the right to relinquish parental rights in order to consent to adoption is part of the fundamental right to parent protected by due process. The juvenile court should have held a hearing to determine C.Q.'s competence to relinquish his parental rights before involuntarily terminating his parental rights to **H.Q.** Thus, we vacate the involuntary termination of C.Q.'s parental rights and remand for the juvenile court to hold a hearing on C.Q.'s competence to voluntarily relinquish his parental rights. If the trial court determines that C.Q. is competent to relinquish, he would then be entitled to enter into-through his guardian-an open-communication adoption agreement.

[3] **[4]** ¶ 15 Although C.Q. did not raise a due process argument at the juvenile court, we will consider it because it pertains to his constitutional rights as a parent. RAP 2.5(a)(3). We review constitutional challenges de novo. *State v. Vance*, 168 Wash.2d 754, 759, 230 P.3d 1055 (2010).

A. FUNDAMENTAL RIGHT TO PARENT

[5] ¶ 16 The question at issue here—whether the right to voluntarily relinquish parental rights in order to consent to adoption is included in the fundamental right to parent—is an issue of first impression in Washington. It is well settled that parents have a "fundamental liberty interest[ ]" in "the care, custody, and management of their children," which is protected by the Fourteenth Amendment. *Troxel v. Granville,* 530 U.S. 57, 65–66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("[T]his Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *In re Dependency of J.H.,* 117 Wash.2d 460, 473, 815 P.2d 1380 (1991) ("It is unquestioned that biological and adoptive parents do have a fundamental liberty and privacy interest in the care, custody and management of their children."). This fundamental liberty interest includes a parent's "fundamental right to autonomy in child-rearing decisions" and gives parents the freedom to make personal choices in matters of family life. *In re Custody of Smith,* 137 Wash.2d 1, 13, 969 P.2d 21 (1998); *see also Santosky,* 455 U.S. at 753, 102 S.Ct. 1388. Natural parents do not lose these constitutionally protected interests "simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky,* 455 U.S. at 753, 102 S.Ct. 1388.

[6] ¶ 17 Our Supreme Court described the importance of family as follows: "The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a societal institution." *Smith,* 137 Wash.2d at 15, 969 P.2d 21. Because a parent's fundamental right is protected as a matter of substantive due process under the Fourteenth Amendment, any state interference with the right to parent must be subjected to strict scrutiny and " 'is justified 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.' " *In re Parentage of C.A.M.A.,* 154 Wash.2d 52, 57, 109 P.3d 405 (2005) (quoting *Smith,* 137 Wash.2d at 15, 969 P.2d 21).

B. RIGHT TO RELINQUISH PARENTAL RIGHTS IN ORDER TO CONSENT TO ADOPTION IS A FUNDAMENTAL RIGHT

¶ 18 In distinguishable cases, Division One and Division Three of this court held involuntary parental termination proceedings are substantially different from voluntary parental relinquishment proceedings because relinquishment proceedings are voluntary, nonadversarial, and do not involve state action. *In re Adoption of Infant Boy Crews,* 60 Wash.App. 202, 217–18, 803 P.2d 24 (1991); *In re Adoption of Hernandez,* 25 Wash.App. 447, 452, 607 P.2d 879 (1980). Due to the lack of state action, both courts held voluntary relinquishment proceedings do not trigger due process concerns. *Crews,* 60 Wash.App. at 217, 803 P.2d 24; *Hernandez,* 25 Wash.App. at 452–53, 607 P.2d 879.

[7] ¶ 19 In both *Crews* and *Hernandez,* mothers in their early 20s independently decided to relinquish their parental rights to their children; the state was not involved in their decisions to relinquish their parental rights. *Crews,* 60 Wash.App. at 204–05, 803 P.2d 24; *Hernandez,* 25 Wash.App. at 449–50, 607 P.2d 879. Neither court determined whether the right to relinquish parental rights is a fundamental right, but instead held the voluntary relinquishment proceedings at issue did not trigger due process concerns because there was no state action. *Crews,* 60 Wash.App. at 217, 803 P.2d 24; *Hernandez,* 25 Wash.App. at 452–53, 607 P.2d 879. In contrast, here, the Department did act to terminate C.Q.'s parental rights. Thus, there was state action and we must determine whether voluntarily relinquishing parental rights in order to consent to adoption is a fundamental liberty interest protected by due process.

[8] ¶ 20 A parent's decision to relinquish parental rights to a child in order to consent to adoption is a decision made in relation to the care, custody, and management of the child. This decision bears directly on whether a parent will be entitled to continue to parent or have contact with his child. Thus the right to make this decision is part of the fundamental liberty interest to parent that is protected by due process.

¶ 21 C.Q. wanted to relinquish his parental rights so he could enter into an open-communication adoption agreement for H.Q. and maintain a relationship with her. In a similar case, the District of Columbia Court of Appeals addressed whether a mother, whose parental rights had not yet been terminated, retained the right to select an appropriate custodian for her child where she was personally unable to care for the child due to a mental illness. *In re T.J.,* 666 A.2d 1, 5–

6, 12 (D.C.App.1995). In considering the issue, the court "recognized that absent termination of parental rights or some other finding that the parents should no longer be permitted to influence the child's future, the parents' rights necessarily include the right to consent, or withhold consent, to the child's adoption." *T.J.*, 666 A.2d at 12; *In re Matter of Baby Girl D.S.*, 600 A.2d 71, 86 n. 21 (D.C.App.1991). The court stated that a parent's "right to consent must be guarded just as zealously as the Constitution guards the right of a natural parent to the custody and companionship of his or her child." *T.J.*, 666 A.2d at 12; *see also In re Petition of T.W.M.*, 964 A.2d 595, 603 (D.C.App.2009) (holding that parents did not forfeit their right to choose a caregiver for the child merely because they were unfit to personally parent the child, as their parental rights had not yet been terminated).

¶ 22 A parent's fundamental right to make decisions regarding the care, custody, and management of his child includes the difficult decision to relinquish parental rights so that the child may be raised in a home better able to provide for the child's needs. Here, because C.Q.'s mental disability prevented him from parenting **H.Q.**, C.Q. wanted to relinquish his parental rights so that he could enter into an open-communication adoption agreement and continue a relationship with **H.Q.** As our Supreme Court stated, "[t]he family entity is the core element upon which modern civilization is founded," and the courts must zealously safeguard familial bonds. [10] *Smith*, 137 Wash.2d at 15, 969 P.2d 21. Thus, the difficult decisions C.Q. faces of whether to relinquish parental rights and consent to adoption are decisions about **H.Q.'s** care, custody, and management that are within the fundamental right to parent protected by due process.

C. WAIVER OF A FUNDAMENTAL RIGHT

[9] ¶ 23 Instead of following the statutory procedure for relinquishing parental rights under chapter 26.33 RCW, C.Q.'s attorney conceded that C.Q. was not competent to relinquish his parental rights and that Peck, his guardian, wished to sign a voluntary relinquishment order on C.Q.'s behalf. Because relinquishing parental rights is a fundamental liberty interest, the • juvenile court violated C.Q.'s right to due process when it accepted Jorgensen's. waiver of C.Q.'s competence to voluntarily relinquish his parental rights to **H.Q.** without holding a hearing or determining whether C.Q. authorized Jorgensen to concede his incompetence.

[10] ¶ 24 In general, the statutes pertaining to adoption permit a parent involved in a dependency action to elect to relinquish his or her parental rights. A parent who does this may then enter into an open-communication adoption agreement to preserve some contact with the child. RCW 26.33.295. This is, in fact, what occurred with **H.Q.'s** mother.

[11] ¶ 25 Simply because a party has an appointed guardian or GAL, see RCW 4.08.060, however, does not preclude the party from seeking to voluntarily relinquish his parental rights. In fact, RCW 26.33.070, expressly permits incompetent persons to seek appointment of a guardian or a GAL in an adoption proceeding. Once appointed a guardian, the incompetent person may nevertheless voluntarily relinquish his parental rights after the guardian "make[s] an *investigation and report* to the court concerning whether any written consent to adoption or petition for relinquishment signed by the parent ... was signed *voluntarily* and *with an understanding of the consequences* of the action." RCW 26.33.070(1) (emphases added). This statute applies to parents of dependent children under chapter 13.34 RCW and permits the court to "rely on the minor parent's dependency court attorney or guardian ad litem to make a report to the court." RCW 26.33.070(1).

[12] **[13]** **[14]** ¶ 26 Although an attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate a hearing, an attorney may not waive her client's substantial rights. [11] *See In re Welfare of Houts*, 7 Wash.App. 476, 481, 499 P.2d 1276 (1972); *see also Russell v. Maas*, 166 Wash.App. 885, 890, 272 P.3d 273 (2012); *Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 303, 616 P.2d 1223 (1980). Instead, the client must specifically authorize waiver of a substantial right. *Graves*, 94 Wash.2d at 303, 616 P.2d 1223 (quoting *Houts*, 7 Wash.App. at 481, 499 P.2d 1276). Voluntarily relinquishing parental rights in order to consent to adoption is a fundamental, and thus a substantial, right that an attorney may not waive. "Because of the parents' fundamental constitutional rights at stake in termination hearings, due process requires that parents have the ability to present all relevant evidence for the juvenile court to consider prior to terminating [the] parent[s'] rights." *In re Welfare of R.H.*, 176 Wash.App. 419, 425–26, 309 P.3d 620, 623 (2013).

¶ 27 Here, Jorgensen conceded C.Q.'s incompetence to voluntarily relinquish his parental rights. The juvenile court found that "[t]he father is *apparently* not capable of voluntarily relinquishing his parental rights" without holding a hearing on C.Q.'s competence or determining whether C.Q. authorized the waiver. CP at 72 (emphasis added). The record

reflects that C.Q. wanted to relinquish his rights so that he could seek an open-communication adoption agreement. At an earlier hearing, C.Q. had been allowed to consent to a dependency fact finding, a waiver that opened the door to a dispositional order that would limit his parental rights and impose significant obligations on him to comply with a service plan. Instead of inquiring whether C.Q. in fact could also make the important but apparently less complex decision to relinquish his rights, the juvenile court and C.Q.'s attorney made the decision for him, depriving C.Q. of his last real chance for an enforceable agreement that would allow him and H.Q. to continue their loving, beneficial relationship.

¶ 28 We vacate the involuntary termination of C.Q.'s parental rights and remand for the juvenile court to hold a hearing on C.Q's competence to voluntarily relinquish his parental rights. We emphasize that in these unusual circumstances the juvenile court should consider C.Q.'s competence in light of the stark but fairly simple situation he is facing. If C.Q. is competent to understand that the juvenile court is likely to take away his right to see H.Q. and that his best chance of being able to be sure he can continue to see her is to relinquish his parental rights, then he should be allowed to do so.

¶ 29 All the parties agree that it would be in the best interests of both H.Q. and C.Q. to maintain the parent and child relationship. We note that legislature recently amended chapter 13.36 RCW in 2010 to create guardianships that establish permanency for dependent children while at the same time preventing the termination of parental rights. *See* RCW 13.36.010 ("The legislature finds that a guardianship is an appropriate permanent plan for a child who has been found to be dependent under chapter 13.34 RCW and who cannot safely be reunified with his or her parents.... The legislature intends to create a separate guardianship chapter to establish permanency for children in foster care through the appointment of a guardian and dismissal of the dependency."). If the juvenile court finds C.Q. competent to relinquish his parental rights in order to consent to an open adoption, then the guardian will have the authority to enter into the appropriate agreement for open adoption under RCW 26.33.295. In the event that the competency hearing results in a finding that the father is not competent to voluntarily relinquish his parental rights, the parties may explore alternatives to establishing permanency for the child while still safeguarding the important familial bond H.Q. and C.Q. share.

¶ 30 We vacate the termination of C.Q.'s parental rights and remand for the juvenile court to hold a hearing on C.Q.'s competence to voluntarily relinquish his parental rights and for further additional proceedings consistent with this opinion.

We concur: MAXA and LEE, JJ.

Footnotes

1 Judge Joel Penoyar is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

2 H.Q.'s mother, C.H., voluntarily relinquished her rights and entered into an opencommunication adoption agreement with H.Q.'s adoptive parents and, thus, is not a party to this appeal.

3 C.Q. has a serious brain injury as a result of his birth mother deliberately slamming his head in a car door when he was approximately eight or nine years old. He has an Axis I diagnosis of cognitive disorder affecting executive decision-making; social judgment dementia due to head trauma, provisional; adjustment disorder with low mood; moderate anxiety relating to dependency issues; mild mental retardation; history of head injuries; suspected fetal alcohol effects; and a global assessment functioning scale of 40.

4 C.H. had a number of pets and there were animal feces all over floor, such that it was hard to step on the carpet without stepping in feces. The Department was concerned because H.Q. was on the floor playing with her toys.

5 The order indicates that a dispositional hearing was held on January 26, 2011, at which C.Q. and his Guardian ad Litem (GAL) Kathy Schultz were present. It is unclear from the juvenile court's order whether it conducted a colloquy with C.Q. regarding waiver of his rights. Further, the order is stamped with "Ex Parte." Ex. 7, at 1.

6 The juvenile court had held its first dependency review hearing on April 13, 2011, and found that C.Q. was in compliance with the court order and was making progress towards correcting his parenting deficiencies.

7 On December 21, 2011, the juvenile court appointed Kathy Schultz to act as C.Q.'s GAL in the termination action. On August 20, 2012, Schultz was discharged as C.Q.'s GAL in the termination action because C.Q. has a permanent guardianship.

8 Subsequent to this, Jorgensen reported to the juvenile court that C.Q. had been permitted to sign an agreed order of dependency in 2009. Jorgensen noted, however, that she had not represented C.Q. in the prior action.

9 The Department further stated that open-communication adoption agreements were not permitted under the involuntary termination statutes.

10 The Department, H.Q.'s GAL, and C.Q.'s guardian all stated that maintaining a relationship with C.Q. was in H.Q.'s best interest.

11 Nor may a GAL waive a client's substantial right. *In re Matter of Quesnell,* 83 Wash.2d 224, 238–39, 517 P.2d 568 (1973) (quoting *Houts,* 7 Wash.App. at 481, 499 P.2d 1276).

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