

1 STATE OF WASHINGTON and the)
2 DEPARTMENT OF SOCIAL AND)
3 HEALTH SERVICES, and LYLE QUASIM,)
4 Individually, and as Secretary of the Department of)
5 Health and Human Services >
6 Defendants. >

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INTRODUCTION

The heart and soul of this case is to enjoin DSHS from injuring children through violations of state law and practices which cause the multiple placements of children. Secondary to that objective is to seek damages for the children who have been injured by these practices. As the litigation has taken shape, including the identification of defenses, Plaintiffs now propose that the Court bifurcate the litigation to resolve, sequentially, the claims for injunctive relief and damages.

II. ARGUMENT

Civil Rule 42 (b) provides for bifurcation of issues and claims.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue, or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

Under Civil Rule 42 (b), Plaintiff children propose that the claims for injunctive relief be tried to the Court at the scheduled trial date. The children's damage claims should be scheduled for hearing before a jury after the bench has ruled on the claims for injunctive relief and, potentially, the issues of first impression are resolved before the appellate court(s).

**MEMORANDUM IN SUPPORT OF MOTION
FOR BIFURCATION-**

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Washington case law vests the decision whether to bifurcate claims or issues to
1 the sound discretion of the trial court.

2 Under the civil rules, a trial court may order a separate trial of liability and
3 damages "in furtherance of convenience or to avoid prejudice, or when
4 separate trials will be conducive to expedition and economy . . . always
5 preserving inviolate the right of trial by jury." CR42(b) While it is not a
6 procedure to be liberally applied, the decision to bifurcate is within the
7 discretion of the trial court. *Maki v. Aluminum Bldg. Prods.*, 73 Wash.2d 23,
25, 436 P.2d 186 (1968); *Brown v. General Motors Corp.*, 67 Wash.2d 278,
282, 407 P.2d 461 (1965).

8 *Mvers v. Boeing, Co.*, 115 Wn. 2d 123,140,794 P.2d 1272 (1990).

9 If a single issue could be Dispositive of the case and its resolution might make
10 it unnecessary to try other issues in the litigation, then a separate trial on that
11 issue may be desirable. 9 Charles Alan Wright & Arthur R. Miller, Federal
12 Practice and Procedure sec. 2388 at 476 (2d ed. 1994)

13 *Gamache v. Groenig*, 87 Wn. App. 1109,1997 WL, 66 1324 (1997).

14 Plaintiffs propose that both parties, the Court and the jury will benefit by litigating
15 the claims for injunctive relief first. There are a number of benefits to the parties and the
16 Court from bifurcation.

17 **A. TIME**

18 Plaintiffs estimate that a trial to the bench on injunctive relief can be completed in
19 one to two weeks. A trial on damages is likely to take two to three months.

20 **B. POTENTIALFORRESOLUTIONOFTHECASE**

21 The Court's ruling in the injunctive relief phase of the trial may well educate the
22 parties on issues which will materially affect the damage claims and the parties'
23 willingness to settle the damage claims. If the parties are educated by the trial court's
24 ruling on injunctive relief, they may well be able to settle the case - eliminating the need

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26 **FOR BIFURCATION - 3**

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1 injunctive relief because an injunction is urgently needed to enjoin the ongoing harm to
2 children in care. However, once the injunctive relief ruling has been issued, the State's
3 argument makes sense. Once the Court has ruled on injunctive relief, both parties would
4 benefit by securing appellate rulings on the novel issues in this case before incurring the
5 time and expense of a lengthy trial on damages.

6 For example, the State is correct that the non-prevailing party will almost
7 certainly appeal the Court's ruling on discretionary immunity (separation of powers) or
8 other rulings that decide what, if any, rights the children have to be free from harm. If
9 the Supreme Court rules in favor of the State - it would eliminate a trial on damages. If
10 the Supreme Court rules in favor of the children, it would help guide a settlement
11 discussion or provide importance guidance to the trial court on appropriate rulings for a
12 trial on damages. There is an important distinction between letting a one or two week
13 trial go forward on a claim for injunctive relief tried to the trial court judge, and the
14 inconvenience and cost to twelve jurors whose lives would be disrupted for up to three
15 months - needlessly if the Supreme Court were to agree with the State that the children
16 have no rights.

17
18 For these reasons, the children agree with the State's suggestion that an
19 interlocutory appeal makes sense before the time and expense of a lengthy trial.
20 However, the children want their trial on injunctive-relief before an appeal.
21

22 A scholarly authority on pre-trial procedure counsels that the following factors
23 should be considered in assessing whether bifurcation is appropriate: (1) the
24 complexity of the issues; (2) whether there would be a risk of jury
misunderstanding in a non-bifurcated trial; (3) whether bifurcation would
facilitate disposition of the issues; and (4) whether bifurcation would

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1 prejudice either of the parties. Schwarzer, Tashima & Wagstaffe,
2 *Cal.Prac. Guide: Fed.Civ.Proc. Before Trial* 1 16: 164 (TRG 1993). This suit
3 plainly involves highly complex issues of both California and federal law. A
4 jury trial is likely, as the California law claims carry with them that right. The
Court concludes that a unitary trial in which fact issues pertaining to both
liability and class damages were combined would be substantially more
complicated than a bifurcated trial, and would consequently increase the risk
of jury misunderstanding.

5 Arnold v United Artists Theatre Circuit, 158 F.R.D. 439,459, 5 A.D. Cases 685 N.D.
6 California.

7 **D. REDUCING IMPACT ON JURORS**

8 A jury trial is estimated to last two to three months. If the case is resolved
9 following the injunctive hearing to the bench, it not only provides the parties with an
10 opportunity to consider the Court's ruling and resolve the case, but also reduces the
11 impact on the jury. Presumably, the jury would not hear that evidence which relates only
12 to the injunctive relief. The jury would not have to sit through the testimony related only
13 to injunctive relief. This would reduce the trial time required of jurors by an estimated
14 two weeks.

15
16 Additionally, if both injunctive and damage claims are processed simultaneously,
17 management of the trial becomes difficult in terms of impact on the jurors. Jurors would
18 often be excused, perhaps numerous times a day or for days at a time, while witnesses
19 testify about matters relating only to injunctive relief.

20
21 **E. POTENTIAL PARTIES AND COUNSEL HAVE INTERESTS LIMITED TO INJUNCTIVE
22 RELIEF**

23 There is no secret that this lawsuit is viewed as an important and essential suit to
24 protect children from ongoing concern. Many are concerned about the interest of

25 **MEMORANDUM IN SUPPORT OF MOTION**
26 **FOR BIFURCATION - 6**

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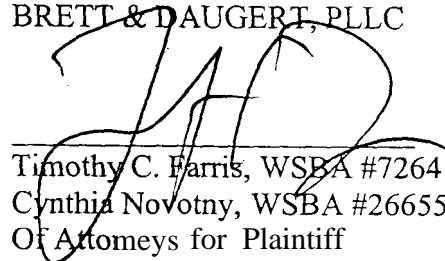
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1 children and many wish to be involved in this lawsuit. The Washington State Children's
2 Alliance, an umbrella organization of approximately 130 child welfare organizations
3 from around the State is extremely concerned about the condition of children in foster
4 care. The Children's Alliance has decided, upon behalf of its members, to become a party
5 in this lawsuit. (Subject to the court certifying the lawsuit as a class action.) The
6 Children's Alliance is interested, only, in injunctive relief. Thus, a bifurcated trial would
7 eliminate the need for The Children's Alliance (like jurors) to wade through the damage
8 trial.

9
10 **III. CONCLUSION**

11 For the reasons stated, Plaintiffs ask this Court to bifurcate this proceeding into
12 claims for injunctive relief followed, at a subsequent proceeding, by a separate trial on
13 the children's claims for damages.

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16 
17 Timothy C. Farris, WSBA #7264
18 Cynthia Novotny, WSBA #26655
19 Of Attorneys for Plaintiff

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25 **MEMORANDUM IN SUPPORT OF MOTION**
26 **FOR BIFURCATION - 7**

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing **Note for Motion Docket, Motion for Bifurcation, Memorandum in Support of Motion for Bifurcation and proposed Order for Bifurcation** by the following indicated method or methods:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorney(s) as shown below, the last-known address of the attorney(s), and deposited with the United States Postal Service at Bellingham, Washington on the date set forth below.
- by causing full, true, and correct copies thereof to be **hand-delivered** to the attorney(s) at the last-known address listed above on the date set forth below.
- by **faxing** full, true, and correct copies thereof to the attorney(s) at the fax number(s) shown above, which are the last-known fax number(s) for the attorney(s) offices, on the date set forth below.

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