90468-5

Court of Appeals No. 68772-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of M.H.P., a minor child

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON,

Petitioner,

v.

P. PARVIN AND L. BRAMLETT,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
Attorney General

TRISHA L. MCARDLE
Senior Counsel
WSBN 16371
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7045
OID #91016

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I. INTRODUCTION

The State of Washington, Department of Social and Health Services asks this Court to accept review of the June 9, 2014 majority decision issued by the Court of Appeals, Division I, which authorized *ex parte* motions to seal and appoint defense experts for parents in juvenile dependency and termination of parental rights proceedings. A copy of the decision is attached as Appendix A.

By condoning a system wide application of a criminal rule to juvenile dependency and termination of parental rights proceedings rather than go through the formal, open rule making process, and by dispensing with the notice requirements of GR 15(c)(1) the majority opinion reached a result inconsistent with Washington's constitutional mandate that justice be administered openly, and it took a step backward in protecting the rights of children.

The majority opinion not only conflicts with decisions of this Court and the Court of Appeals, but application of a criminal rule in this instance prejudices the constitutional and statutory rights of children and impairs the truth finding function of the court.

II. ISSUES PRESENTED FOR REVIEW

Three issues are presented by this Petition for Discretionary Review:

1. The Constitution, established case law, and court rules require court proceedings to be open and that all parties be given notice of motions. Should this Court accept review where the Court of Appeals majority opinion conflicts with this established law and permits the superior court to exempt certain litigants from these requirements without going through a formal, open rule-making process, and without making individualized, case specific findings necessary to seal court records?

2. Should a criminal rule be applied to juvenile dependency and termination proceedings that permits the court to appoint defense experts for parents *ex parte*, without consideration of the child's interests and after the discovery cutoff date and the deadline to disclose experts has passed, thereby causing unnecessary delays for the child and/or a potential waste of public funds?

3. Do existing civil and general rules provide alternative mechanisms for appointing experts that ensure parents a fair trial and the ability to obtain defense experts without revealing confidences or trial strategy, yet still protect the public's right to open proceedings and the parties' right to notice of all motions?

III. STATEMENT OF THE CASE

M.H.P., now five and a half years old, has been in state custody for the past four years based on his parents' mental illness, substance abuse,

history of violence, and resulting neglect. CP 610-615. The Department filed a petition for termination of parental rights and the court issued a case schedule establishing a discovery cutoff and deadline for disclosing witnesses in December of 2011. CP 1-10, CP 11-4, 15-16. After these deadlines had passed, the parents obtained multiple *ex parte* orders to authorize public funding for defense experts along with *ex parte* orders to seal. CP 59- 105, 180- 194.[1] The first *ex parte* order was entered more than a month after the discovery cutoff and witness disclosure deadline had passed; the second was entered two months after the deadlines had passed; and a third was entered a full three months after the deadlines had passed. CP 59- 71, CP 72-105, CP 180-194. The parents did not give notice of their motions to the Department or the child's court appointed special advocate (CASA); they never advised the Department or CASA of the possibility of additional defense witnesses; and they never requested that the court extend the discovery deadline or their deadline to disclose witnesses even though trial was continued five times – three times at their request for more time to correct parental deficiencies or to give their attorneys more preparation time. CP 11-14, 47-57, 113-179, 445-446, 479-483, CP 508. The court never modified the original discovery deadlines or eliminated

[1] *See* Appendix C for copies of pleadings related to these motions, which the Department has been able to access. Many pleadings remain sealed so the Department has no access to CP 62- 105, 137, 138, 139, 183-184, 187-194, and 472-477 to know exactly what was requested or ordered.

the obligation to timely disclose defense witnesses. CP 112, 178-179, 445-446, 483.

On March 15, 2012, after discovering this *ex parte* practice, the state challenged entry of the orders entered in this case, as well as similar orders in four other cases involving dependency and termination of parental rights proceedings.[2] CP 195-286. A motion to vacate the *ex parte* orders was brought before the Superior court criminal judge who entered the orders.[3] *Id.*

The judge denied the state's motion on April 10, 2012, in a memorandum decision. CP 438-443, 496-497. *See* copy of the court's ruling attached as Appendix B. A month later and five months after the discovery cutoff date, the mother's counsel sought and obtained an additional *ex parte* order to seal and appoint a defense expert. CP 464-477.

Then, just one business day before the trial, the mother identified an expert witness who the court had appointed secretly months earlier who had never been identified as a witness to either the state or the child's

[2] These *ex parte* orders were discovered inadvertently by the CASA. when reviewing the legal file after the parents made a joint motion to continue the trial date. CP 312-339

[3] It remains unclear why these motions were brought before a criminal judge who had no responsibility for juvenile dependency or termination cases. KCLGR 15(c).

CASA.[4] CP 509-511. Having no time to conduct discovery of that witness, and concerned about the impact that another continuance would have on the child, the state, joined by the child's CASA, filed a motion to exclude the testimony, which the trial court granted. CP 518-560, RP 27-35. Following a lengthy trial the court granted the state's petition, and both parents have appealed, claiming that exclusion of the mother's witness violated their due process rights. *See In re Dependency of M.H.P.*, No. 69713-7-I. That appeal has not been resolved, so the child's permanent legal status remains in limbo.

The state sought review of the order that condoned this *ex parte* motion practice. The Court of Appeals granted discretionary review, but stayed its review of the other four cases pending resolution of this appeal.

On June 9, 2014, Court of Appeals Judge Spearman, joined by Judge Dwyer, issued a published opinion affirming the ruling below. Majority Op. 1-22. Judge Becker dissented, concluding that the majority opinion unwisely expands the court's authority to create its own procedures outside the rule-making process; it creates a formula for unnecessary delay and expense; it sacrifices openness for administrative convenience; it treats these cases as identical to criminal cases, when in

[4] This was actually the second surprise expert witness the mother identified on the eve of trial. The first was identified just two weeks before trial, months after the court imposed deadline for disclosing witnesses. CP 515-17.

fact they are not; and it neglects to consider the interests of the children and the state. Dissent Op. 1-7.

IV. ARGUMENT

This case is appropriate for review by this Court under RAP 13.4(b)(1) and RAP 13.4(b)(2) because the ruling conflicts with decisions of this Court and the Court of Appeals concerning the sealing of court records and the mandates of formal rule-making. The issues presented are also appropriate for review under RAP 13.4(b)(3) because they raise significant questions of law under Washington's Constitution requiring that justice be administered openly and without unnecessary delay. Finally, review is appropriate under RAP 13.4(b)(4) because there is substantial public interest in the question of whether a criminal rule governing appointment of indigent defense experts should be applied to appointment of experts for parents in dependency and termination cases, which are civil cases, and which concern our most vulnerable citizens, who have independent statutory and constitutional rights not necessarily aligned with their parents.

A. The Court's Approval Of Routine Sealing Of Court Proceedings Without Individualized Determinations Conflicts With Decisions Of This Court And The Court Of Appeals.

Washington's Constitution mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art.

I § 10. This provision is mandatory. *State v. Duckett*, 141 Wn. App. 797, 804, 173 P.3d 948 (2007) (citation omitted). It assures fair trials and fosters "understanding and trust in the judicial system" by giving "judges the check of public scrutiny." *Id.* at 803. Because our courts are presumptively open, the party seeking to restrict access bears the burden of justifying an infringement on the public's right of access, and restrictions on access are to be granted only in rare circumstances. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539. 558-59, 569-70 (1976); *State v. Bone-Club*, 128 Wn.2d 254, 258, 906 P.2d 325 (1995).

In addition to the constitutional requirement that civil judicial proceedings be conducted in open court, the legislature has mandated that proceedings involving dependent children not be conducted in secrecy. Specifically, RCW 13.34.115 requires that all hearings under chapter 13.34 RCW shall be public. RCW 13.34.115(1); *In re the Dependency of J.A.F.*, 168 Wn. App. 653, 278 P.3d 673 (2012) (finding it unconstitutional for the court to close a termination of parental rights proceeding for the testimony of one witness). Among other findings required to close any court proceeding, the court hearing a juvenile dependency or termination proceeding must find closure to be in the best interest of the child before ordering the hearing closed to the public. RCW 13.34.115(2).

The Court of Appeals majority opinion condones a system in which approving defense experts and expending public funds is conducted not only through secret proceedings to which the public is not permitted, but through secret proceedings in which even the other *parties* to the case are denied notice and an opportunity to be heard. No legal justification exists for such secrecy.

It is well-established that GR 15 governs the sealing of juvenile dependency and termination court records.[5]

In relevant part, GR 15(c) provides as follows:

> (1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case...

GR15(c)(1) (emphasis added)

It is equally well-established that before the court approves sealing an order, it must first weigh the five factors established by *Allied Daily Newspapers*, 121 Wn.2d 205, 848 P.2d 1258 (1993) and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and it must enter written findings establishing that sealing or redacting is justified by identified,

[5] *In re the Dependency of J.B.S.*, 122 Wn.2d 131, 856 P.2d 694 (1993); *In re the Dependency of J.A.F.*, 168 Wn. App. 653, 278 P.3d 673 (2012); *In re the Dependency of G.A.R.* 137 Wn. App. 1, 150 P.3d 643 (2007)

compelling privacy or safety concerns which outweigh the public interest. GR 15(c)(2), *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009).

This Court made the requirement of notice for motions to seal and individualized findings abundantly clear in *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.3d 1182 (2005), and in *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004). In these cases, the Court clarified that documents in a court file may be sealed only if: (1) the proponent of sealing shows a need for sealing; (2) opponents of sealing are given an opportunity to object; (3) sealing is the least restrictive means available to protect the interests at stake and will be effective; (4) the court weighs the competing interests, considers alternative methods, and makes findings; and (5) the order is no broader in application or duration than necessary. *Rufer,* 154 Wn.2d at 543-44 & n. 7 (citing *Seattle Times Co. v. Ishikawa*)(emphasis added). In addition to considering these factors on the record, the court must enter specific findings, individual to the case to justify its closure order. *Press-Enter Co. v. Superior Court*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *In re the Dependency of J.A.F.,* 168 Wn. App. 653, 278 P.3d 673 (2012).

Despite the fact that none of the orders sealing court records below contained any of these required individualized findings, or a finding that it was in the child's best interest, and there was no record to determine whether the Superior Court ever considered these factors before ordering the records

sealed, the majority opinion accepted as sufficient the *post hoc* assurance contained in the Superior Court's memorandum decision written after the majority of records were ordered sealed.[6] Majority Op. 18-19. However, as Judge Becker notes in her dissent:

> The majority glides over this failing with the rationalization that the memorandum opinion we are reviewing reflects due consideration of the factors in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The memorandum opinion does not cure the defect. It was written months after sealing the orders. It does not mention the *Ishikawa* factors and does not reflect a case-specific analysis. The purpose of the memorandum opinion is to defend the existence of a streamlined process that *categorically excludes* these ex parte applications from the constitutional presumption for open courts. Dissent Op. at 4.

Judge Becker also correctly observes that the chosen system of King County might be easier to administer and more convenient for parents, "but it sacrifices openness, a value that has a higher priority." *Id.* The conflict between the well established laws of this Court, other Court of Appeals decisions, and the majority opinion below justifies review by this Court.

B. By Condoning Application Of A Criminal Rule And Inaccurately Balancing The Interests Involved, The Majority Opinion Ignores Important Differences Between Criminal

[6] The majority opinion references the "record" to support its conclusion that the court below engaged in the individualized case-specific inquiry required to seal records, but in fact there is no record other than the written orders themselves because the orders appointing experts and sealing records was done in chambers without any recording; and the memorandum opinion approving this practice was issued without oral argument. Majority Op. at 16, 16 n.9, and 18. The majority opinion also cannot justify the last order sealing records that was entered after the memorandum opinion was issued, which like the others, contains none of the required findings necessary to seal. *See* Orders entered in May 2012 attached in Appendix C.

Cases And Juvenile Dependency/Termination Cases And It Fails To Protect The Child, Whose Interests Take Priority And Are Most At Stake.

It is well-established that juvenile dependency, termination, and guardianship cases are civil cases, governed by the civil rules not criminal rules.[7] In justifying its application of a criminal rule to the appointment of defense experts, the trial court found the interests of parents in juvenile dependency and termination cases to be "identical" to the interests of defendants in criminal cases. Appendix B at 5. The majority opinion agreed, finding that any differences between these cases and criminal cases "have little bearing on the issues presented." Majority Op. at 21.

This conclusion ignores the most significant difference between juvenile dependency/termination cases and criminal proceedings – the child whose interests are paramount. As aptly noted by Judge Becker:

> The need for a secret process in dependency and termination cases is not identical to the need in criminal cases. In a criminal case, the defendant holds both the right to speedy trial and the right to present a defense. The defendant can decide for himself without affecting the rights of another person whether it is worth giving up his right to a speedy trial for the extra time it takes to consult experts. But here, the child is a party. The child's interest in bringing dependency status to an end may conflict with the parent's desire to consult more experts. Any time a judge is asked to make a decision that will potentially prolong the proceedings, the child's advocates must be notified and given the opportunity to be heard. Dissenting Op. at 5.

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[7] JuCR 1.4(a); *In re Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985); *In re Luscier*, 84 Wn.2d 135, 139, 524 P.2d 906 (1974); *In re the Welfare of S.E.*, 63 Wn. App. 244, 249, 820 P.2d 47, *review denied*, 118 Wn.2d. 1017, 827 P.2d 1012 (1991)

The failure of the majority opinion to consider the child's interests in categorically applying a criminal rule is evident in its analysis. In concluding that the notice requirements of GR 15(c)(1) unduly infringe on the parents' due process rights, the majority conducted a three part balancing test considering: (1) the private interests affected; (2) the risk of error created; and (3) the countervailing governmental interest. Majority Op. at 7-12. However, in considering the private interests at stake, the majority opinion spent four pages detailing the interests of the parents, never once mentioning the child's interests. Majority Op. 7-12. Instead, the majority combined its discussion of the child's interest with its discussion of the governmental interests and glossed over established law dictating that the child has a right to speedy resolution and a permanent home early in the process, and that when a child's rights conflict with his parents, the child's rights prevail.[8]

The facts of this case vividly illustrate the failure of King County's system to protect the child's interests. At this point M.H.P. has been out of his parents' home for more than four years, which is four times the length of time contemplated by statute for children to obtain permanent homes. RCW 13.34.145.

[8] RCW 13.34.020; *M.W. v. Department of Soc. & Health Svcs.*, 149 Wn.2d 589, 599, 70 P.3d 954 (2003); *In re the Dependency of J.S.*, 111 Wn. App. 796, 46 P.3d 273 (2002).

Instead of evaluating the child as a party with separate and paramount interests worthy of protection, the majority opinion presumes that parents are the only party with rights at issue, it presumes that the child's interests are aligned with the parents, and by condoning a system of appointing experts for parents in secret it eliminates any consideration of the interests of the one party whose rights are paramount to all others.[9] As Judge Becker noted in her dissent, the secret *ex parte* motion practice condoned by the majority "takes a step backward" in protecting children from lingering in the foster care system and is a "formula for unnecessary delay and expense, as the facts of this case illustrate." Dissent Op. at 2.

The majority opinion also incorrectly concludes that the risk of error would increase if notice was required because providing notice would likely chill the parents' use of experts, which would limit the relevant information available to the court and risk an ill-informed decision regarding parental fitness. Majority Op. at 12. First, contrary to the majority opinion, providing notice to the other parties of the motion to appoint defense experts and seal the record does not make that expert "available for questioning by the state." Majority Op. at 11. The law is clear that by identifying a witness as a "consulting witness" defense

[9] King County's system would even allow a parent to request an expert evaluation of the child, or an observation of the parent and child together, without the CASA or the Department being informed or able to provide the court any input as to how that might negatively affect the child. CP 465-477

attorneys automatically shield the opinions of that witness and prevent the other parties from either deposing or interviewing that witness, unless and until the attorney decides to call that person as a witness. *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d 525 (1982); *Pimentel v Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). The state concedes it need not even be given the name of the expert requested, so parents can keep the identity of the expert appointed confidential if they wish. Parents can also ask the court prospectively to redact or seal those portions of the motion or declaration supporting the request to the extent those documents reveal attorney/client confidences, or work product. *See* editorial comments to GR15 and CR 26, 3 Wash. Court Rules Ann., at 21 (2nd ed. 2008-09). Thus, contrary to the majority opinion, this is not an all-or-nothing proposition in which the entire defense request and motion to seal is either done in secret or everything is revealed. Following existing general and civil rules will not chill parents' requests for experts.

The second reason the majority opinion's risk of error analysis is mistaken is because it wrongly concludes that the amount of redaction necessary would make any notice given to the state meaningless. Majority Op. at 11. This conclusion ignores the case specific dialogue that would ensue to protect the interests of all parties, most especially the child's. As Judge Becker pointed out, if the state and CASA were notified of a

hearing to consider a motion by the parent for public funds, the state could have informed the court about the case schedule which would have caused "the court to ask some questions, and enter case-specific findings." Judge Becker quite correctly observed:

> Notice to adverse parties is not only meaningful, it is essential because without it, the court is making a decision based on one-sided information. Dissent Op. at 3.

In contrasting dependency and termination cases to criminal cases, Judge Becker also correctly noted that in dependency and termination cases, parents typically have already received professional services, and a judge asked to authorize more public funds needs objective information about the nature and adequacy of services already provided, which he/she will not receive through a secret *ex parte* proceeding. Dissent Op. at 6.

The third reason the majority opinion's risk of error analysis is mistaken is because it ignores the inextricable link between the secretive process for appointing experts, the discovery violations this secret process engenders, and the harm it does to the truth finding function of the court. This case is not unique in that every single order appointing defense experts was entered after the discovery cutoff and deadline for disclosing witnesses.

This case shows that the court's secretive and late appointment of the defense witness presented the state and the CASA with a Hobson's

choice between proceeding to trial as scheduled, unprepared to cross examine the parent's expert, or delaying the trial to complete discovery. If the state proceeded to trial ill-prepared to cross examine the surprise witness, it risked the court placing undue weight on that witness' testimony and possibly sending the child home to a dangerous situation. If the state requested a continuance to conduct the discovery, it risked the child being subjected to an on-going parental relationship that is harmful and a delay in the child obtaining a permanent home. And, as this case also demonstrates, if the state chose the third option of moving to exclude the surprise defense witness not identified until the eve of trial, it risks a waste of public funds and a parental claim on appeal that their due process rights were violated by excluding their witness.[10]

By misunderstanding the state's position in this appeal, the majority opinion also failed to correctly identify and balance the governmental interests involved. Contrary to the majority opinion, the state does not contest the *ex parte* process because it forces the state to "depose and otherwise prepare to address testimony offered by experts

[10] The positions taken by the parents in this case demonstrates that if the parents prevail in these appeals, parents' attorneys will be given a strong incentive to wait until the discovery deadlines pass before requesting experts, then wait until shortly before trial to disclose those witnesses, knowing the result will be a continuance, which only benefits them by delaying any order curtailing or terminating parental rights. The process approved by the majority opinion clearly protects parental interests, but it does so at the expense of the child's interests.

even though they had no say in whether the experts were appointed." Majority Op. at 13. The state fully accepts its responsibility to depose and prepare for the testimony of defense experts – it simply requests that it be allowed to conduct that discovery within the time lines set forth in the court imposed case schedule, and it opposes the imposition or expectation that it conduct discovery on the eve of trial. The state simply expects, like any party, that court rules regarding closed proceedings and timely disclosure of witnesses will be followed. LJuCR 1.4(e)(2)(formerly LJuCR 4.4(c)), GR 15(c)(1).

The state has an interest in protecting the public's right to open proceedings and the orderly administration of justice. The majority opinion allowing experts to be appointed in secret, without regard to discovery deadlines, is not only unfair and unnecessarily costly, but it risks the court making an ill-informed decision about parental fitness. The majority opinion acknowledged that parents receive ineffective assistance of counsel if their attorneys have not had the opportunity to interview the state's witnesses. Majority Op. at 8. Surely, the state and the child's CASA are entitled to no less in their representation.

C. The Majority Opinion Condones The Creation Of A System-Wide Secretive Motion Practice Without Engaging In A Formal Rule Making Process That Allows All Interested Parties To Participate.

By affirming the application of a criminal rule and the implementation of a system-wide secret motion practice that dispenses with any notice of the motions to the other parties, the majority opinion also dispensed with the formal open rule-making process that would consider the interests of all parties. As Judge Becker noted in her dissent:

> The rule-making process makes it possible for all persons potentially affected to participate and have their interests considered. Because King County Superior Court implemented the secret motion practice informally at the request of indigent parents without inviting public comment, only the parents' interests were considered. The interests of the children and the state were not. Dissent Op. at 6.

This practice violates GR 9 which is intended to assure that the court's rules promote justice by ensuring a fair process and one in which "All interested persons and groups receive notice and an opportunity to express views regarding proposed rules." GR 9(a)(2). The majority opinion approved the creation of a new court rule by judicial fiat, which not only violates rule-making requirements but is disapproved by this Court. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 592 n. 4 80 P.3d 587 (2003). Indeed, despite the state warning the trial court about the possibility of surprise witnesses that this *ex parte* practice encourages, the ruling in this case led to a defense expert, authorized in secret, who was not timely disclosed and was excluded from testifying, resulting in a waste

of public funds.[11] As observed by the dissent, "...where secrecy sets in, scandal follows." Dissent Op. at 3-4. The waste of public funds in this case would not have happened if there had been notice to the other parties as required by GR 15. *Id.*

The majority opinion attempts to rely on RCW 2.28.150, which permits a court to adopt "any suitable process" if the course of proceeding "is not specifically pointed out by statute." Majority at 21, n. 11. But, the appropriate course of proceeding is already provided for in GR 15; the dependency statutes; and in the civil rules governing motions. *See* Dissent Op. at 6, RCW 13.34.090; CR 5; KCLCR 7(b)(4); LJuCR 3.12(c)(2)(i); *In re Dependency of R.H.*, 129 Wn. App. 83, 117 P. 3d 1179 (2005).

No published case has approved RCW 2.28.150 to create a system-wide method of handling motions outside the formal rule making process. To the contrary, this Court has strictly construed application of that statute

[11] The majority glosses over the absence of formal rule making that occurred by noting in a footnote that King County's local rule of general application was amended during the pendency of this appeal and the majority concludes that it essentially codified the *ex parte* practice used here. Majority Op. at 18, n. 10. But the amendments to KCLGR 15 that went into effect in September of 2013 did not create a rule for the appointment of experts in juvenile dependency and termination cases, they simply referred to a "published protocol" that had yet to be developed or written when the rules were published for comment and subsequently went into effect. *See* KCLGR 15(2)(C). At no time has that "protocol" been open for public comment. Even if it were considered properly adopted as a local rule, the "protocol" plainly violates GR 15(c)(1), and article 1, § 10 in so far as it presumes total closure of every proceeding related to the sealing of court records in these cases, and is therefore unconstitutional and void. *In the matter of Detention of D.F.F.*, 144 Wn. App. 214, 183 P. 3d 302 (2008), *affirmed*, 172 Wn. 2d 37, 256 P 3d 357 (2011)(a local rule containing a presumption of closure in every proceeding is unconstitutionally broad); *Hessler Constr. Co. v. Looney*, 52 Wn. App. 110, 757 P. 2d 988 (1988)(a local rule inconsistent with the state rules is void).

where liberty interests are involved. *In re Cross*, 99 Wn. 2d 373, 380, 662 P. 2d 828 (1983). Other Court of Appeals decisions have held that resort to RCW 2.28.150 is not appropriate if alternatives exist that accomplish the same goal. *State v. Masangkay*, 121 Wn. App. 904, 91 P. 3d 140, 143, *rev. granted*, 153 Wn. 2d 1017, 108 P. 3d 1228 (2004).

There are multiple alternatives to the secret process approved by the majority opinion. As discussed above, redaction of confidential attorney/client communication, work product, and the name of the consulting expert appointed, is one alternative. Another alternative not mentioned by the majority opinion but acknowledged in the memorandum opinion of the trial court below, is that King County could choose to appoint experts through an administrative process as other counties do that does not involve the court and does not involve sealing court proceedings. Appendix B at 2 n.2.

V. CONCLUSION

The majority opinion below conflicts with Washington's Constitution, and with multiple decisions by this Court and the Court of Appeals governing the sealing of court records, the creation of court rules, and the protection of Washington's youngest and most vulnerable citizens.

RESPECTFULLY SUBMITTED this 8th day of July, 2014.

ROBERT W. FERGUSON
Attorney General

19375

TRISHA MCARDLE
Senior Counsel
WSBN 16371
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7045
OID #91016

Court of Appeals No. 68772-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF: M.H.P., Minor Child, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Petitioner, P. PARVIN AND L. BRAMLETT, Respondents.	DECLARATION OF SERVICE

I, Nick Baluca, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On July 8, 2014, I sent a copy of: Petition for Discretionary Review with Appendices; and Declaration of Service.

Said copies were sent by US Mail, Legal Messenger and/or Electronic Mail, on the 8th day of July, 2014, to: **Supreme Court**, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929; e-mail address: Supreme@courts.wa.gov; **Suzanne Elliott,** 705 2nd Avenue, Suite 1300, Seattle, WA 98104-1797; e-mail address: suzanne-elliot@msn.com; and **Kathryn Barnhouse and Kathleen Martin**, King County CASA

ORIGINAL

Program, 401 4th Avenue N, Suite A2239, Kent, WA 98032-4429; e-mail: addresses: Kathryn.Barnhouse@kingcounty.gov; and Kathleen.Martin@kingcounty.gov.

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 8th day of July, 2014 at Seattle, Washington.

NICK BALUCA
Legal Assistant
OID #91016

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, July 08, 2014 12:55 PM
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Cc: McArdle, Trisha (ATG)
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Rec'd 7-8-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Baluca, Nick (ATG) [mailto:NickB@ATG.WA.GOV]
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To: OFFICE RECEPTIONIST, CLERK
Cc: McArdle, Trisha (ATG)
Subject: Petition - In Re the Dependency of M.H.P.

Attached please find a copy of Petition for Discretionary Review; and *Declaration of Service* for Filing. As discussed with the Supreme Court Clerk's office, the 56-page appendices will be mailed separately.

This is in reference to the following Case:

Case Name: In Re the Dependency of M.H.P. minor child, State of Washington, Department of Social and Health Services, Petitioner v. P. Parvin and L. Bramlett, Respondents.
Court of Appeals No.: 68772-7-I
Contact Name: Nick Baluca, Legal Assistant/Trisha L. McArdle, Assistant Attorney General
Contact #: (206) 389-3016/206-464-6708
Attorney Name: Trisha L. McArdle, WSBA# 16371
Email: nickb@ATG.WA.GOV
TrishaM@ATG.WA.GOV

If you have any questions, please let me know. Thank you.

Nick Baluca
LEGAL ASSISTANT 2/POWER USER
SOCIAL AND HEALTH SERVICES
206-389-3016 (w) | 206-464-6338 (f) |
nickb@atg.wa.gov

Washington State Attorney General's Office
800 5th Ave. Suite 2000 | Seattle, WA 98104

90468-5

Baluca, Nick (ATG)

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Sent: Tuesday, July 08, 2014 12:55 PM
To: Baluca, Nick (ATG)
Cc: McArdle, Trisha (ATG)
Subject: RE: Petition - In Re the Dependency of M.H.P.

Rec'd 7-8-14

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From: Baluca, Nick (ATG) [mailto:NickB@ATG.WA.GOV]
Sent: Tuesday, July 08, 2014 12:52 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: McArdle, Trisha (ATG)
Subject: Petition - In Re the Dependency of M.H.P.

Attached please find a copy of Petition for Discretionary Review; and *Declaration of Service* for Filing. As discussed with the Supreme Court Clerk's office, the 56-page appendices will be mailed separately.

This is in reference to the following Case:

Case Name: In Re the Dependency of M.H.P. minor child, State of Washington, Department of Social and Health Services, Petitioner v. P. Parvin and L. Bramlett, Respondents.
Court of Appeals No.: 68772-7-I
Contact Name: Nick Baluca, Legal Assistant/Trisha L. McArdle, Assistant Attorney General
Contact #: (206) 389-3016/206-464-6708
Attorney Name: Trisha L. McArdle, WSBA# 16371
Email: nickb@ATG.WA.GOV
TrishaM@ATG.WA.GOV

If you have any questions, please let me know. Thank you.

Nick Baluca
LEGAL ASSISTANT 2/POWER USER
SOCIAL AND HEALTH SERVICES
206-389-3016 (w) | 206-464-6338 (f) |
nickb@atg.wa.gov

Washington State Attorney General's Office
[illegible] Suite 2000 | Seattle, WA 98104

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Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, M.H.P., a Minor,	)	No. 68772-7-I
Petitioners,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
PAUL PARVIN and LESLIE BRAMLETT,	)	
Respondents.	)	FILED: June 9, 2014

SPEARMAN, C.J. — In termination of parental rights cases, indigent parents represented by appointed counsel must petition the government for public funding for expert witnesses and other services necessary in the course of their defense. In King County Superior Court, parents may move the court *ex parte* for such funding, as well as for orders to seal the moving documents. The Department of Social and Health Services (the State) asserts that this *ex parte* motion practice improperly denies the other parties notice and opportunity to be heard on the motions. The State contends that this practice violates GR 15, which generally governs the sealing of court records. The State also contends

that this practice violates the right of the public to open court proceedings and improperly applies a criminal court rule, CrR 3.1(f), to civil cases.

We conclude that the notice requirements of GR 15(c)(1) do not adequately safeguard the due process guarantees of indigent parents involved in termination proceedings seeking public funding for expert and other services. Accordingly, we hold that motions for such services, including motions to seal the moving papers, are exempt from the notice requirements of the rule. We further hold that the trial court's orders to seal records in this case meet the standard set forth in Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861 (2004), which adopts the well-established analytical approach announced in Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Lastly, we hold that the trial court was within its discretion to adopt the CrR 3.1(f) *ex parte* motion procedure as the proper method for the parents to seek public funding for expert services and orders to seal because no other statute or enforceable court rule prescribed the mode of proceeding. We affirm the ruling of the trial court.

FACTS

Paul Parvin and Leslie Bramlett are the parents of M.H.P. At the time of trial, four-year-old M.H.P. had already been found dependent and removed from his parents, based on their mental illness, substance abuse, history of violence,

and resulting neglect of the child. The State filed a petition for termination of Parvin and Bramlett's parental rights on August 31, 2011.

The court issued a case schedule in the termination proceeding, which established the deadline for the exchange of witness lists and a discovery cutoff in December 2011. After all discovery deadlines had passed, the parents brought multiple *ex parte* motions for public funding for expert defense services and orders to seal the moving papers.[1] The parents never advised the court of the applicable discovery deadlines or requested that they be extended. The record does not disclose whether the judge who heard the *ex parte* motions and entered the orders to seal was aware of the discovery deadlines in the case.

Neither of the other parties to the matter, the State and the child's Court Appointed Special Advocate (CASA), was provided notice of these motions or given the opportunity to be heard in opposition. The *ex parte* orders were only discovered by the CASA when reviewing the legal file after the parents made a joint motion to continue the trial date.

On March 15, 2012, the State challenged the *ex parte* orders in this case, along with similar orders in four other cases involving juvenile dependency and termination of parental rights. The State brought a motion to vacate the *ex parte*

[1] The first was brought on January 11, 2012, more than one month after the discovery cutoff and witness disclosure deadline had passed, when counsel for the mother sought and obtained an *ex parte* order for expert services and an *ex parte* order to seal. The second was brought on February 2, 2012, two months after the discovery cutoff and witness disclosure deadline had passed, when counsel for the father brought an *ex parte* motion to appoint a defense expert. The third request was brought on March 10, 2012, a full three months after the discovery cutoff and witness disclosure deadline, when counsel for the mother again sought and obtained an *ex parte* order for expert services and an *ex parte* order to seal.

orders on the basis of GR 15. The State also requested identification of other cases in which this *ex parte* motion practice had occurred so that relief could be sought. The State's motion was denied in a memorandum opinion on April 10, 2012, as was its subsequent requests for clarification and entry of an order containing findings of fact and conclusions of law.

In May 2012, after the trial court's ruling, the mother sought additional *ex parte* orders appointing another expert and sealing the documents supporting her motion. As before, neither the State nor the child's CASA was provided notice of these motions.

On August 14, 2012, two weeks before trial, the mother's counsel served the State with a witness list that, for the first time, identified Dr. Makiko Guji as an expert witness for the mother. The mother asserted that Dr. Guji had treated her for the past year, and would testify that she had made good progress in mental health treatment and that her medications controlled her symptoms. No information verifying Dr. Guji's expected testimony was provided to the State at that time.

On Friday, August 24, 2012, just one business day before trial was set to start, a second previously undisclosed defense expert was identified when counsel for the mother sent the State an evaluation by Dr. Carmela Washington-Harvey. This was the first time the State learned that Dr. Washington-Harvey had evaluated the mother and would be called as an expert witness.

The State filed a motion, joined by the CASA, to exclude the testimony of Dr. Guji and Dr. Washington-Harvey. The trial judge granted the motion. In his ruling, the judge explained that, although the defense had the right to seek expert funding *ex parte*, it still had an obligation to timely disclose the experts when it became clear they would testify.

The State seeks review of the order denying its motion to vacate the *ex parte* orders, as well as the order denying the State's motion for clarification and entry of findings of fact.[2]

DISCUSSION

The issue in this case is whether indigent parents involved in termination proceedings may move the court *ex parte* for orders authorizing the expenditure of public funding to obtain the assistance of experts and to seal documents regarding those motions without notice to other parties.

GR 15 generally governs the procedure for sealing court records. King County has adopted Local General Rule (LGR) 15 which provides further guidance in civil cases.[3] Under CrR 3.1(f), attorneys representing indigent criminal defendants may move the court *ex parte* to obtain expert or other services necessary to the defense, along with orders to seal the moving papers;

[2] The judge deciding the State's motions challenging the *ex parte* motion practice is different from the judge hearing the trial. None of the trial judge's rulings are before us in this appeal.

[3] Our Supreme Court held the rule to be inapplicable to criminal cases in State v. McEnroe, 174 Wn.2d 795, 802-03, 279 P.3d 861 (2012).

these *ex parte* motions are exempt from the notice requirements of GR 15. GR 15(c)(1).[4]

King County has adopted the *ex parte* motion practice outlined at CrR 3.1(f) as a means for attorneys of indigent parents to obtain expert services and orders to seal the moving papers in dependency and termination cases. The State asserts that this practice is improper because it: (1) unfairly denies the other parties notice and opportunity to be heard under GR 15, (2) violates the public's right to open proceedings, and (3) improperly applies criminal rules to civil cases. The parents do not dispute that the *ex parte* motion practice at issue in this case does not comply with GR 15. They argue however, that application of

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[4] GR 15(c)(1) provides:

> (c) Sealing or Redacting Court Records.
> (1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, a party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

CrR 3.1(f)(1)(2) provide:

> (f) Services Other Than a Lawyer.
> (1) A lawyer for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the case may request them by a motion to the court.
> (2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to which the administration of the program may have been delegated by local court rule, shall authorize the services. The motion may be made ex parte and, upon a showing of good cause, the moving papers may be ordered sealed by the court and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

the rule to the motions at issue impinges on their due process rights to effective assistance of counsel and a fair trial. They contend that providing notice to the State of experts with whom they intend to consult, in advance of a determination to call the expert as a witness, compromises their ability to prepare for trial and causes them to be treated differently than parents with the means to obtain those services without public assistance. For the reasons set forth below, we agree with the parents.

I.

Resolution of this case requires interpretation of a court rule, which we review de novo. State v. McEnroe, 174 Wn.2d at 800.

In determining the precise nature of due process rights to which parents in termination proceedings are entitled and whether GR 15(c)(1) unduly infringes upon those rights, we balance: (1) the private interest affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest which militates against the use of the challenged procedure. In re Welfare of S.E., 63 Wn. App. 244, 249-50, 820 P.2d 47 (1991).

We first consider the private interest affected by the termination proceeding. Here, it is indisputable that the interest of the parents is great. It is well-established that parents have a fundamental liberty interest in the custody and care of their children, protected by the due process requirements of the Fourteenth Amendment and article I, section 3 of the Washington State

Constitution. Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Skinner v. State of Okla., ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942), overruled in part on other grounds in Edelman v. Jordan, 415 U.S. 651, 652, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); In re Dependency of J.B.S., 123 Wn.2d 1, 12, 863 P.2d 1344 (1993); In re Luscier, 84 Wn.2d 135, 139, 524 P.2d 906 (1974). In termination cases, this liberty interest gives rise to the full panoply of due process safeguards. In re Grove, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995); In re Luscier, 84 Wn.2d at 137, abrogated in part by Lassiter v. Dep't of Soc. Servs. of Durham County, N. C., 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). These safeguards include the right to a fair trial and the right to effective legal assistance. RCW 10.101.005; In re Welfare of J.M., 130 Wn. App. 912, 922, 125 P.3d 245 (2005); In re Luscier, 84 Wn.2d at 139.[5]

Attorneys representing parents in termination proceedings are charged with responding to allegations of parental deficiencies and refuting testimony from lay and expert witnesses. Counsel is ineffective if he or she has not had the opportunity to interview the State's witnesses, or had the opportunity to obtain independent evaluations to rebut those obtained by the State. In re Dependency of V.R.R., 134 Wn. App. 573, 585-86, 141 P.3d 85 (2006).

[5] In re Luscier's Welfare was decided on state and federal constitutional grounds. Insofar as it interpreted a right to counsel stemming from the federal constitution, the decision was overruled by Lassiter.

The State contends that parents' interest in effective legal assistance, and thus, a fair trial, is not implicated by the GR 15(c)(1) notice requirement. Specifically, the State claims that defense requests for public funding for expert services are not inherently confidential; therefore, any disclosure of such requests incidental to notice under GR 15(c)(1) does not prejudice the parents' rights. The State cites State v. Mendez, 157 Wn. App. 565, 238 P.3d 517 (2010); In re Pers. Restraint of Gentry, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999); and the Public Records Act, RCW 42.56.904. This authority is distinguishable and therefore unpersuasive.

In Mendez, 157 Wn. App. at 565, we held that attorney billing records did not warrant post-trial sealing to protect the defendant's right to a fair trial. Our Supreme Court reached a similar conclusion in In re Gentry, 137 Wn.2d at 378, in which it considered the validity of post-trial orders to unseal documents related to motions for public funding for investigative services. In each case, the appellate court affirmed the trial court's ruling that the defendant presented insufficiently compelling circumstances to warrant continued sealing of court records. Mendez, 157 Wn. App. at 565; In re Gentry, 137 Wn.2d at 378. Both cases are distinguishable because, in each case, the defense motions to continue sealing the records were brought after the defendants had been tried and convicted. Mendez, 157 Wn. App. at 586; Gentry, 137 Wn.2d at 389-90. The holding in each case rests on the fact that the defendant no longer had any interest in a fair trial to weigh against the public's right to open proceedings. Ibid.

In contrast, here the defense motions to seal were brought during the course of trial when the parents' right to a fair trial was still very much alive.[6]

The State's reliance on the Public Records Act is also misplaced. The provision cited calls for public disclosure of attorney invoices, redacted as may be necessary to protect work product. RCW 42.56.904. In considering this authority, we cannot overlook the inherent differences between attorney invoices and motions for public funding of expert services. Once redacted of work product, attorney invoices are merely accounting documents, unrelated to any issue to be determined at trial. In contrast, motions for public funding for expert witnesses and the supporting documentation will almost certainly contain confidential communications, work product, and clues about trial strategy. The State suggests that this problem can be mitigated by filing of the motions under seal, while still providing notice and opportunity to all parties. In its opening brief, the State notes:

> nothing in GR 15 prevents [parents] from filing their motions for expert expenses, with notice to all parties but without attorney-client and/or work product information, and asking the court prospectively to permit the filing of a declaration under seal or that redacts those portions containing mental impressions, theories, opinions, or legal advice...The court could then conduct an in-camera review of the particular pleading at issue and redact those portions that would otherwise reveal attorney-client confidences or work product, leaving the rest of the pleading unsealed. This would give all parties

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[6] Mendez and Gentry also involved different types of records (attorney billing and motions for public funding for investigative services) than those present here. Neither type of document implicates the rights to counsel and fair trial at issue in this case. As discussed infra., attorney billing invoices are merely accounting documents, unrelated to any issue to be determined at trial. Requests for funding for investigative services are much more generalized and vague than requests for expert services.

> the requisite notice of the motion...so they would have the opportunity provided in GR 15 to object.

Brief of Appellant (App. Br.) at 23-24. However, assuming that the motions were sufficiently redacted to protect confidential information and work product, it is difficult to imagine, and the State offers no suggestion, what meaningful notice the opposing parties would be entitled to under GR 15(c)(1). As the trial court noted in its order, "the only notice the indigent parent could provide would be that the parent is seeking the sealing of a motion, declaration and order without disclosing the nature of the motion other than, perhaps, that it concerns services for an indigent parent other than counsel; such notice is meaningless since the only objection the government could make is a general objection." Memorandum Opinion at 5.

Additionally, revelation of the names or expertise of potential experts would be prejudicial to parents because, once potential experts are identified, they are available for questioning by the State. Thus, disclosure of such information would provide a considerable tactical advantage to the State, which would not exist in cases involving parents with means, who need neither petition the court to obtain expert services, nor disclose the identity of an expert witness until they decide the expert will testify at trial.

In this case, strict adherence to the GR 15(c)(1) notice requirement would present defense counsel with a choice between, on the one hand, competently and diligently seeking independent expert services while risking disclosure of confidential information and, on the other hand, forgoing their duty to obtain

independent evaluations in order to protect confidences and trial strategy. This choice limits counsel's ability to be an effective advocate and impinges the parents' right to counsel.

Next, we consider the risk of error created by enforcement of the GR 15(c)(1) notice requirement. The State argues that notice and opportunity to object would actually improve the trial court's ability as fact finder. We disagree. As discussed above, a notice requirement would likely chill defense use of experts, at least in cases where the value of the expert was outweighed by the tactical advantage of maintaining confidentiality. This result limits the relevant information available to judges and increases the risk of ill-informed decisions regarding parents' fitness.

Lastly, we consider the governmental interests that support notice under GR 15(c)(1). The State has an interest in protecting the best interests of the child. In re Welfare of Sumey, 94 Wn.2d 757, 763, 621 P.2d 108 (1980). A child's welfare is the court's primary consideration. In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). Children involved in termination proceedings have the right to safety and well-being, a right to speedy resolution, and a right to a permanent home early in the process. Id.; RCW 13.34.020. Consequently, when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail. In re Dependency of J.B.S., 123 Wn.2d 1, 8-9, 863 P.2d 1344 (1993); In re Sego, 82 Wn.2d at 738 (citing In re Day, 189 Wash. 368, 65 P.2d 1049 (1937); RCW 13.34.020.

The State argues that if it does not receive notice of an indigent parent's motion for expert services, the children's interest in prompt resolution of the termination proceedings is at risk. We disagree. Children have an interest in both a prompt and fair resolution of the proceedings, including the right to remain with fit parents when possible. See, In re Adoption of Lybbert, 75 Wn.2d 671, 453 P.2d 650 (1969) ("It is the general rule that courts zealously guard the integrity of the natural relation of parent and child"). It follows that children involved in termination proceedings have an interest in their parents' ability to properly make a case for preservation of their familial ties, including a meaningful opportunity to obtain expert services without risk of disclosure to opposing parties.

The State also has an interest in the expedient resolution of cases, the orderly administration of justice, and the careful stewardship of public funds. The State argues that the *ex parte* orders at issue here unfairly increase the burden to the State, CASA, and guardian ad litem in termination cases because they must depose and otherwise prepare to address testimony offered by experts even though they had no say in whether the experts were appointed. The State does not explain why these realities of trial preparation should weigh more in our analysis than the experts' ability to aid the fact finder in finding a resolution that is most favorable to the best interest of the child. We cannot conclude that they do. And, while we credit the State's argument that the *ex parte* practice seen here is linked to the discovery violations, delay, and possible waste of public funds

evident in this case, on balance, this interest does not outweigh the fundamental liberty interests of the parents and the best interests of the child.[7]

In summary, the due process protections afforded to parents seeking expert and other services in termination proceedings and the increased likelihood of error stemming from the chilling effect the GR 15(c)(1) notice requirement has on the ability to seek these services outweigh the countervailing interests. We therefore find the motions at issue in this case exempt from the rule's notice requirements.

II.

Next, the State contends that King County's practice of granting *ex parte* orders to seal violates the public's right to open proceedings. Article I, section 10 of the Washington State Constitution provides that "[j]ustice in all cases shall be administered openly. . . ." The presumption of open proceedings and court records extends to cases involving the termination of parental rights. See, In re Dependency of J.A.F., E.M.F., V.R.F., 168 Wn. App. 653, 278 P.3d 673 (2012) (closing the courtroom to take the testimony of one witness in a termination proceeding violates article 1, section 10). Although openness is presumed, it is not absolute. Dreiling v. Jain, 151 Wn.2d 900, 909, 93 P.3d 861 (2004). "The

[7] In this case, several *ex parte* orders authorizing public funding for experts were entered well after the discovery deadline had passed and public funds were expended for experts whose testimony was subsequently excluded from trial. Trial courts are admonished to consider the established case schedule and discovery rules in determining whether to authorize public funding for expert services. Motions that do not include this information or are made beyond the established discovery cut-off dates should ordinarily be denied.

public's right of access may be limited to protect other significant and fundamental rights, such as a defendant's right to a fair trial." Id.

In determining whether sealing is appropriate, Washington courts apply and weigh the five factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Dreiling, 151 Wn.2d at 900 (extending the Ishikawa analysis for court closure to request to seal court records); accord, Rufer v. Abbot Laboratories, 154 Wn.2d 530, 543-44 n.7, 114 P.3d 1182 (2005). "Generally, we review a trial court's decision to seal records for abuse of discretion.[8] King v. Olympic Pipe Line Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000); accord Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). However, if the trial court's decision rests on an improper legal rule, the appropriate course of action is to remand to the trial judge to apply the correct rule." Dreiling v. Jain, 151 Wn.2d at 907-08 (citing King, 104 Wn. App. at 369).

The State asserts that none of the Ishikawa factors was met and, thus, the public's right to open proceedings was violated in this case. The trial court did not address each of the factors explicitly in either the orders to seal or in its memorandum opinion. Nevertheless, it is evident from the language of the orders

[8] "An abuse of discretion occurs when a decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (internal citations omitted).

that he considered them.[9] Because the record indicates that all five Ishikawa factors were satisfied, we find no abuse of discretion.

Under Ishikawa, the proponent of sealing must first make a showing of need. Our Supreme Court stated, in part:

> The proponent of closure and/or sealing must make some showing of the need therefore. . . . In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests.
>
> The quantum of need which would justify restrictions on access differs depending on whether a defendant's ... right to a fair trial would be threatened. When closure and/or sealing is sought to protect that interest, only a "likelihood of jeopardy" must be shown. Kurtz, 94 Wn.2d at 62, 593 P.2d 1330. See Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 400, 99 S.Ct. 2898, 2916, 61 L.Ed.2d 608 (1979) (Powell, J., concurring).

Id. at 37. The State argues that there was no "need for sealing" the motions in this case. However, as discussed above, the GR 15(c)(1) notice requirement impinges a parent's right to the effective assistance of counsel in termination proceedings. It is clear from the memorandum opinion that the judge considered this fact when determining to seal the records in this case. We find sufficient

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[9] In Rufer, 154 Wn.2d 530, our Supreme Court reviewed a decision regarding sealing of court records. Both the Superior Court and Court of Appeals rulings in that case occurred prior to our Supreme Court's clarification in Dreiling, 151 Wn.2d at 913-14, that Ishikawa set forth the proper standard for sealing court records. Nevertheless, the Supreme Court upheld the lower courts' rulings, finding that, "although Dreiling was not yet decided (and thus courts were not yet explicitly directed to apply Ishikawa to civil proceedings), the trial court properly applied the compelling interest test to most of the records at issue and provided a sufficient rationale for its decision... Thus, although the trial court did not specifically apply the Ishikawa analysis... it effectively did so by allowing all parties to assert their respective interests, weighing those interests, and applying the compelling interest standard in making its determination." Rufer, 154 Wn.2d at 550-51. Accordingly, we look to the record for indicia that Judge Kessler applied the Ishikawa analysis in this case even though he did not specifically mention the standard in his orders or memorandum opinion.

showing to meet the "likelihood of jeopardy" threshold under Ishikawa, 97 Wn.2d at 37.

The second Ishikawa factor is:

> "Anyone present when the closure (and/or sealing) motion is made must be given an opportunity to object to the (suggested restriction)". Kurtz, 94 Wash.2d at 62, 615 P.2d 440.

Id. at 38. The State contends that factor two was not satisfied because all parties were not notified of the parents' *ex parte* motions and given opportunity to object. We reject this contention for two reasons.

First, for the reasons discussed above, a notice requirement under the circumstances in this case impinges on parents' constitutional rights to counsel and a fair trial. Second, this Ishikawa factor is addressed to members of the general public, giving anyone present in the courtroom the opportunity to be heard on the proposed closure or sealing. It does not speak to the State's particular objection here, that as a party to the litigation they were not given notice of the motion, an objection more properly rooted in GR 15(c)(1). See Rufer, 154 Wn.2d at 549 ("[W]e have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.") (citing Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993)).

The third requirement under Ishikawa is that sealing, if necessary, must be accomplished in the least restrictive means available to effectively protect the threatened interests. Ishikawa, 97 Wn.2d at 38. The State argues that there was

a less restrictive means available to protect the parents' rights in this case. Specifically, it asserts that, instead of the *ex parte* process used here, the court could conduct an in-camera review of the documents sought to be sealed and make specific findings directed at the basis for sealing or redaction of the documents. See former KCLGR 15(c)(3) (2010).[10] This proposed process is nearly identical to that set out in CrR 3.1(f), which was applied in this case. The difference is that under KCLGR 15(c)(3) notice is required pursuant GR 15(c)(1), while CrR 3.1(f) is exempt from the notice requirement. Because a notice requirement regarding the motions at issue in this case is inconsistent with parents' due process safeguards, we disagree that the State's proposed less restrictive alternative is a workable one.

The fourth Ishikawa factor mandates:

> "The court must weigh the competing interests of the defendant and the public," Kurtz at 64, 615 P.2d 440, and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory. See People v. Jones, 47 N.Y.2d 409, 415, 391 N.E.2d 1335, 418 N.Y.S.2d 359 (1979).

Ishikawa, 97 Wn.2d at 38. The record does not contain extensive findings with respect to this factor. Nevertheless, it is apparent from the court's memorandum

[10] KCLGR 15 was substantially amended during the pendency of this appeal. The new rule, which took effect on September 2, 2013 codifies the *ex parte* practice used here, though it does not mention whether defense must provide notice to the other parties of such motions. The State did not address the revision in its Statement of Additional Authorities, filed with the Court September 16, 2013.

opinion that it considered the competing interests in this case. Memorandum opinion at 3 states two justifications for sealing:

> 1. the motion, declaration and order contain privileged information including disclosures by the client to counsel and work product...and
> 2. to keep from an adverse party the name of an expert who may not be used by the defense, so that the adverse party does not obtain an advantage that the adverse party would not have if the parent were wealthy or if the funding came from the budget of the attorney. . . .

These findings are an apparent effort by the court to balance the parents' due process protections with the public's right to open proceedings. Therefore, we find that the fourth Ishikawa factor is satisfied.

The fifth and final Ishikawa factor requires that orders to seal records be limited in duration with a burden on the proponent to come before the court at a time specified to justify continued sealing. Ishikawa, 97 Wn.2d at 39. The trial court expressly limited the duration of his orders to seal in his Memorandum Opinion at 5. Ishikawa factor five is satisfied.

The trial court did not abuse its discretion in applying the Ishikawa factors.

III.

Lastly, the State argues the trial court exceeded its authority when it applied CrR 3.1(f), a criminal rule, to the motions at issue in a civil case. The State contends that in so doing, the trial court created a new court rule by judicial fiat and violated normal rule-making procedures. We review a challenge to the authority of the court de novo. State v. W.S., 176 Wn. App. 231, 236, 309 P.3d

589 (2013) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The State cites In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 80 P.3d 587 (2003), in support of its argument. In Carlstad and the companion case, State v. McLean, the Supreme Court refused to adopt the "mailbox rule" for determining whether a pleading was timely filed. The court concluded it would not because the pertinent court rules defined with specificity that "[f]iling occurs when the papers are filed with the clerk of the court[.]" Id. at 592. The court noted that any change in the rule should be accomplished by normal rule making procedures and not "by judicial fiat." Id. at 592, n.4.

By contrast, in this case, there is no specific civil or juvenile court rule that establishes a procedure for indigent parents in termination proceedings to obtain public funding for expert services. As the trial court correctly observed, where the criminal court rules are silent on the issue at hand, we look to the civil rules for guidance. State v. Cronin, 130 wn.2d 392, 397 (1996), State v. Clark, 129 Wn.2d 805, 815 (1996), State v. Hackett, 122 Wn.2d 165, 170 (1993), State v. Gonzalez, 110 Wn.2d 738, 744 (1988). Here, where the civil and juvenile court rules are silent on the issue, the trial court properly looked to the criminal rules

for guidance.[11] Thus, Carlstad is distinguishable and not controlling.

The State also claims the court "ignored the significant differences between juvenile dependency/termination cases and criminal proceedings." Brief of Appellant at 17. While there are indeed differences between criminal, civil and juvenile court proceedings, those differences have little bearing on the issues presented in this case. The purpose of the court rules, whether civil or criminal, is to facilitate the ability of the parties to receive a fair and just determination in the case before the court.[12] Because no civil or juvenile rule provided a process for

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[11] In addition, although not cited by the parties, RCW 2.28.150 provides additional authority for the trial court to look to the criminal court rules for guidance. That statute provides:

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

We have held that RCW 2.28.150 "is sufficiently broad to supply any deficiency of procedure which has been omitted in the primary grant of jurisdiction." State ex rel. McCool v. Small Claims Court of Jefferson County Dist. Court of Port Townsend, 12 Wn. App. 799, 802, 532 P.2d 1191 (1975). In addition, our Supreme Court has made clear that statutes and court rules should be treated equally for the purposes of RCW 2.28.150. In re Cross, 99 Wn.2d 373, 380-81, 662 P.2d 828 (1983).

[12] See CR 1:

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. (Emphasis added.)

See CrR 1.2:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay. (Emphasis added.)

indigent parents in termination proceedings to confidentially obtain funding for expert services, the trial court properly relied on an appropriate criminal rule.

In summary, we hold that because the notice requirements of GR 15(c)(1) do not adequately safeguard the due process guarantees of indigent parents involved in termination proceedings when seeking public funding for expert services and because no other civil or juvenile court rule provided a process for seeking such funding, the trial court properly looked to CrR 3.1(f) to fashion an appropriate process. We further hold that the trial court properly applied the Ishikawa factors when it sealed the records at issue in this case.

Affirmed.

Spearman, C.J.

WE CONCUR:

Dwyer, J.

Dependency of M.H.P., 68772-7-I

BECKER, J. (dissenting) — King County Superior Court secretly orders the expenditure of public funds to pay for expert witnesses requested by indigent parents in termination and dependency cases. The majority's endorsement of this practice gives short shrift to the interests of the children and taxpayers affected by it. It insulates judges from the constitutional presumption that courts do business in the open. And the majority unwisely expands the court's authority to create its own procedures outside the rule-making process. I respectfully dissent.

1. The children

Thanks to decades of committed effort by the three branches of government as well as many private agencies and citizen advocates, delay in finding safe and permanent homes for abused and neglected children is no longer an accepted norm in Washington. Statutes impose deadlines. See, e.g., RCW 13.34.070(1) (fact-finding hearing must be held no later than 75 days after the filing of the dependency or termination petition, absent special circumstances); RCW 13.34.138(1) (court must review the status of all dependent children at least every six months); RCW 13.34.145(1)(a) ("permanency planning hearing" must be held if child has been out of the home for at least nine months and no permanent placement decision has been made). Courts enforce the deadlines, recognizing that although one year may not be a long time for an adult decision maker, "for a young child it may seem like forever." In re Dependency of A.W., 53 Wn. App. 22, 32, 765 P.2d 307 (1988), review denied, 112

Wn.2d 1017 (1989). Children's advocates are trained to keep these cases moving so that children will not remain long "in the limbo of foster care." A.W., 53 Wn. App. at 33.

The secret ex parte motion practice takes a step backward. It is a formula for unnecessary delay and expense, as the facts of this case illustrate. A judge rubber-stamped orders authorizing payment of expert witnesses and sealed the applications and the orders. Because the State was not made aware of the request, the judge was unaware that the discovery deadlines for witness disclosure had long passed, trial was imminent, and allowing the witnesses to testify would require a lengthy continuance.

The judge was acting in accordance with an established, though secret, practice. The practice came to light only when a child's CASA (Court Appointed Special Advocate) accidentally discovered the sealed orders. That discovery led to the State's motion to vacate the sealed orders, and in turn to the memorandum opinion under review. The memorandum opinion denied the State's motion to vacate the sealed orders and offered a justification for the secret ex parte practice.

2. The constitutional requirement for open courts

Court records and courtrooms are presumptively open. The presumption is not supposed to be easy to overcome. Secrecy is permitted only when a trial court makes an individualized finding that closure is justified. State v. Chen, 178 Wn.2d 350, 355-56, 309 P.3d 410 (2013). The rule that implements the presumption of openness is GR 15. Here, that rule was not followed.

In a civil case, any party may request a hearing to seal or redact court records under GR 15(c). *Notice of the hearing must be given to adverse parties.* The court may grant the request to seal or redact *only after making findings* "that the specific sealing or

redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). The secret ex parte procedure in King County is out of compliance with GR 15(c) in two ways. First, no notice was given to adverse parties. Second, no individualized findings were made of compelling concerns justifying secrecy.

The majority asserts that the notice required by GR 15(c), if sufficiently redacted to give parents a meaningful opportunity to consult privately with expert witnesses, would be meaningless. Majority at 11. In general, I agree that indigent parents must have a meaningful opportunity to consult with potential expert witnesses without disclosing to the State the names of the experts or the nature of the consultation. The question, however, is whether a secret ex parte process divorced from the discovery deadlines is the only way to give parents that opportunity. The answer is no. The State and the children's advocates could have simply been notified of the date of a hearing at which the court would consider a request by the parents for public funds in this particular case. The State could then have informed the court about the case schedule, which then should have caused the court to ask some questions and enter case-specific findings before signing the order. Notice to adverse parties is not only meaningful, it is essential because without it, the court is making a decision based on one-sided information.

In government, where secrecy sets in, scandal follows. Public funds were wasted in this case. The money was spent to hire new witnesses well after the deadline for disclosure and discovery. Because of the prejudice caused by the late disclosure,

the trial judge excluded the witnesses and their work was for naught. This would not have happened if there had been notice to adverse parties as required by GR 15.

Not only did the court order the sealing of the request for funds without giving notice to adverse parties, the court also ignored the requirement in GR 15(c)(2) for written findings that identify the "compelling privacy or safety concerns that outweigh the public interest in access to the court record." The majority glides over this failing with the rationalization that the memorandum opinion we are reviewing reflects due consideration of the factors in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). The memorandum opinion does not cure the defect. It was written months after the sealing orders. It does not mention the Ishikawa factors and does not reflect a case-specific analysis. The purpose of the memorandum opinion is to defend the existence of a streamlined process that *categorically excludes* these ex parte applications from the constitutional presumption for open courts.

A streamlined process is likely easier for the court to administer and more convenient for the parents, but it sacrifices openness, a value that has a higher priority. Whether a particular application and order for public funds should be sealed, redacted, or left open should be decided on a case-by-case basis with case-specific findings.

3. The rule-making process

The majority claims the right to borrow CrR 3.1(f), an established rule for *criminal* cases, and apply it in these *civil* cases.

CrR 3.1(f) allows ex parte applications for money to pay defense expert witnesses in *criminal* cases; the rule also permits the sealing of the moving papers upon a showing of good cause. Motions brought under the *criminal* rule are exempt from the

notice requirement of GR 15(c). The 1986 comment to CrR 3.1(f) explains that it was intended to ensure that the obligation to show a need for publicly funded services does not force an indigent defendant to reveal defense tactics to the prosecution, a disadvantage not experienced by a defendant who can pay for services.

Without inviting comment from advocates for children, King County Superior Court secretly decided to apply the *criminal* rule in dependency and termination cases. The memorandum opinion under review adopts the rationale of the comment to the *criminal* rule. "This court concludes that CrR 3.1(f) applies to dependency and termination cases as the Juvenile Court rules are silent on the issue at hand and the need for a process shielding parents' needs for experts from the voyeuristic eyes of the government *is identical.*" (Emphasis added.)[1]

The need for a secret process in dependency and termination cases is *not* identical to the need in criminal cases. In a criminal case, the defendant holds both the right to speedy trial and the right to present a defense. The defendant can decide for himself without affecting the rights of another person whether it is worth giving up his right to a speedy trial for the extra time it takes to consult experts. But here, the child is a party. The child's interest in bringing dependency status to an end may conflict with the parent's desire to consult more experts. Any time a judge is asked to make a decision that will potentially prolong the proceedings, the child's advocates must be notified and given the opportunity to be heard.

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[1] In re Dependency of M.H.P., No. 11-7-02455-3, at 5 (King County Super. Ct., Wash. Apr. 10, 2012), memorandum opinion attached to amended notice of appeal, In re Dependency of M.H.P., No. 68772-7-I, filed July 9, 2012.

A second difference is that in dependency and termination cases, typically the parents have already been receiving professional services for some time. A judge who is requested to authorize funds for more professional evaluations needs objective information about the nature and adequacy of services already rendered. The judge will not receive such information in a secret ex parte proceeding.

In short, CrR 3.1(f) does not fit this situation and should not have been applied as if it did. The majority recognizes that ordinarily new court rules are to be devised by the rule-making process, not by "'judicial fiat.'" Majority at 20, quoting In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 592 n.4, 80 P.3d 587 (2003). The rule-making process makes it possible for all persons potentially affected to participate and have their interests considered. Because King County Superior Court implemented the secret motion practice informally at the request of indigent parents without inviting public comment, only the parents' interests were considered. The interests of the children and the State were not.

The majority concludes that the superior court acted within the authority provided by RCW 2.28.150. That statute permits a court to adopt "'any suitable process'" in the exercise of its jurisdiction "'if the course of proceeding is not specifically pointed out by statute.'" Majority at 21 n.11, quoting RCW 2.28.150. As discussed above, the appropriate course of proceeding is already pointed out by GR 15. The superior court exceeded its authority by adopting an unsuitable *criminal* rule for prospective application in all dependency and termination cases without going through a formal, open rule-making process.

The majority "admonishes" the trial judges who issue the secret orders to do a better job of coordinating with established case schedules. Majority at 14 n.7. Admonishment is an ineffective remedy. The secret practice needs to be ended.

I would reverse the order denying the motion to vacate and hold that GR 15(c) and Ishikawa apply to requests for public funds for expert witness services in dependency and termination cases.

Becker, J.

Appendix B

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FILED
KING COUNTY, WASHINGTON
APR 10 2012
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Dependency of: HTS. AJRS. VW-C, MW-C, DW-C, IK, MHP, AL, EL and KL

Case Nos. 11-7-02695-5, 11-7-02696-3, 10-7-03414-3, 10-7-03360-1, 10-7-03361-9, 10-7-03362-7, 10-7-03707-0, 11-7-02455-3, 11-7-01615-1, 11-7-01616-0, 11-7-01614-3

MEMORANDUM OPINION AND ORDER DENYING MOTION TO SHOW CAUSE WHY SEALED *EX PARTE* DOCUMENTS SHOULD NOT BE VACATED

The State of Washington filed dependency and termination petitions claiming that children are dependent and that parents are so unfit that their parental rights should be permanently terminated. Counsel for indigent respondents have obtained *ex parte* orders providing expert and other services, and have obtained orders sealing the motions, declarations and orders approving those services at public expense[1]. The Attorney General, representing petitioner Department of Social and Health Services, and counsel for the guardians *ad litem* have moved for orders vacating the orders to seal.

The Washington State Legislature has set forth the legislative branch position relative to counsel:

> The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

[1] While most of the approvals of the funds for services other than counsel were made by an executive branch agency, the King County Office of Public Defense, and thus are not court orders, and others are by orders of Superior Court judges, this opinion will refer to approvals and orders interchangeably.

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Seattle, Washington 98115

RCW 10.101.005. The Supreme Court has expressly applied this statute to dependency and termination actions; *Dependency of Grove*, 127 Wn.2d 221 (1995), recognizing that it applies even though it is housed in a criminal procedure chapter of the Revised Code of Washington; the court applied the Equal Protection clause of the United States Constitution to the analysis, *Grove*, at 229. The Court, in *Grove*, was addressing whether a dependency respondent has the right to counsel on appeal; the court held that there is such a right. The Court, in addressing the question of whether a right to counsel on appeal includes the right to the record on appeal, wrote:

> The right to counsel without a corresponding right to present a record to the reviewing court is an empty right. The Legislature's intent, as evidenced from its finding that indigent litigants who have a right to counsel should have "*effective* legal representation", would be thwarted were we to hold that the statutory right to counsel on appeal did not include the instruments necessary to permit effective presentation of the issues on appeal.

Grove, at 234. Parents are thus entitled to counsel on appeal and, when they cannot afford counsel, a lawyer is provided at public expense and indigent parents are entitled to a transcript of the hearings below.

The relationship between a parent and his or her lawyer is identical whether counsel is paid for by the parent, a private third party, the government, or where counsel is appearing *pro bono publico*. Services other than counsel are frequently needed for a parent to defend against a dependency or termination petition. A wealthy parent retains counsel and employs whatever services are deemed necessary by counsel and the parent in order to defend; the wealthy parent may choose to disclose to other parties who has been retained to provide the services other than counsel and must disclose to other parties expert witnesses or services that the parent decides will be used in court. Those services not used in court and not disclosed remain a secret forever. So that impoverished parents may also defend against dependency and termination petitions, counsel is authorized to seek funding by court order for those services. King County and, in some circumstances, the State of Washington, pays for those services[2]. The process for obtaining

[2] In other jurisdictions, the government assigns the budget for expert services to the defense agency providing those services. In those jurisdictions, counsel retains the expert without having to seek authorization from another executive branch agency or the court. No order sealing files is needed in that system.

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funding for those services is that counsel applies to the King County Office of Public Defense, setting forth in a request and declaration the reason why the services are necessary. The declaration of counsel often contains work product, defined as "factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions," *West v. Thurston County*, 144 Wn.App. 573 (2008), including "materials created in anticipation of litigation, even after that litigation has terminated"; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 732 (2007).

The Office of Public Defense either approves the request and provides the funding or denies the request. Where denied, parents may seek review *de novo* from the Superior Court. Often, the parent seeks to seal the pleadings and the authorization from the Office of Public Defense or the order of the court approving or denying the request for services. The purpose of a motion to seal in these circumstances is twofold: 1. the motion, declaration and order contain privileged information including disclosures by the client to counsel and work product, *i.e.*, "the mental impressions, conclusions, opinions, or legal theories of an attorney...concerning the litigation," CR 26(b)(4), and 2. to keep from an adverse party the name of an expert who may not be used by the defense, so that the adverse party does not obtain an advantage that the adverse party would not have if the parent were wealthy or if the funding came from the budget of the attorney, *see*: note 2, *supra*.

Assume that the wealthy parent retains a psychologist to evaluate the parent and render an opinion as to the parent's fitness. The retention of the psychologist has no therapeutic function; it is purely forensic. The psychologist sets forth in her report her opinion: the parent is unfit. Counsel for the wealthy parent puts that evaluation in a drawer never again to see the light of day. The wealthy parent then hires another psychologist who evaluates the parent and declares that the parent is fit. Counsel decides that this psychologist will testify for the parent, discloses the name and provides the report to the adverse parties. Counsel does not disclose his or her thought processes in retaining the psychologist. No one, other than counsel, the client and the first psychologist know of the first evaluation.

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The indigent parent in King County does not have the luxury of complete nondisclosure since the indigent parent is asking a third party, the government, to pay for the evaluation, and the government has a budgetary interest in assuring that the services are, indeed, necessary.

The State of Washington, in the within motions, seeks an advantage which only applies to the indigent parent: disclosure of the information provided by the parent and counsel to obtain the expert services and the name of the expert whether or not the parent chooses to use that expert in his or her case. The government's reason for wanting disclosure can only be for this tactical advantage. The tactic may be to obtain disclosure in order to call the witness to testify for the government, or to obtain information which may be used for cross-examination, or to persuade the court to deny providing the funding to the indigent parent. In each situation, the government's interest is to treat the poor parent differently than the wealthy parent. The discovery rules are clear:

> A party may through interrogatories require any other party to identify each person *whom the other party expects to call as an expert witness at trial*..., A party may... depose each person whom any other party *expects to call as an expert witness at trial*... A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, *only as provided in rule 35(b) or upon a showing of exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. [emphasis supplied].

CR 26(b)(5). The rule does not include the language "unless a party is poor."

The court has created a method of protecting the indigent parent from unfair advantage by allowing the parent to seek the services by an *ex parte* process and by sealing the declaration and order from the eyes of opposing counsel. The court scrutinizes the parent's motion to seal and decides whether or not the declaration contains work product and whether or not it would be inequitable to disclose the service requested and grants or denies the motion to seal.

The process the court has adopted is akin to the process in criminal cases, *i.e.*, that contemplated in CrR 3.1(f). There is no analogous rule in the Civil Rules. The Juvenile Court Rules provide for appointment of counsel in dependency and termination cases, JuCR 9.2(c), and provides a method for appointment of experts in offender cases, JuCR 9.3; curiously, this latter rule does not provide for the *ex parte* process contained in CrR 3.1(f), but the need for an *ex parte* process is obvious and is followed in juvenile offense cases and in Sexually Violent

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Predator cases, *see:* KCLCR 98.50. The Supreme Court of Washington has repeatedly held that the Civil Rules apply in criminal cases where the Criminal Rules are silent on the issue at hand, *State v. Cronin*, 130 Wn.2d 392, 397 (1996), *State v. Clark*, 129 Wn.2d 805, 815 (1996), *State v. Hackett*, 122 Wn.2d 165, 170 (1993), *State v. Gonzalez*, 110 Wn.2d 738, 744 (1988). This court concludes that CrR 3.1(f) applies to dependency and termination cases as the Juvenile Court rules are silent on the issue at hand and the need for a process shielding parents' needs for experts from the voyeuristic eyes of the government is identical. CrR 3.1(f) expressly authorizes sealing of documents relative to services other than counsel.

While arguably the notice provision of GR 15(c) applies[3], the only notice the indigent parent could provide would be that the parent is seeking the sealing of a motion, declaration and order without disclosing the nature of the motion other than, perhaps, that it concerns services for an indigent parent other than counsel; such notice is meaningless since the only objection the government could make is a general objection.

Once an appointed expert is disclosed to the adverse party, the need for sealing the order appointing the expert no longer exists; those orders should be unsealed[4]. The declaration filed in support of the motion for the expert may still contain work product or other privileged information and thus should remain sealed at least until the case is completed by dismissal or through direct appeal, if any.

The petitioner argues that orders appointing investigators should not be sealed. This court agrees and does not seal orders appointing investigators; where the declaration in support of the appointment of an investigator contains work product, then that declaration is sealed; if it does not, it is not sealed.

Consistent with this decision, and at least instructive, is the legislative exemption from the public records act of work product, RCW 42.56.290.

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[3] A prior version of GR 15(c) exempted motions to seal pursuant to CrR 3.1(f) from the notice requirement. That exemption now rests within the Criminal Rule.

[4] While court records in dependency cases are presumptively confidential, they are available to "participants in the juvenile justice...system," RCW 13.50.100(3). All court records in dependency cases are sealed so that the public does not have access. The clerk's office in King County refers to orders to seal in dependency cases as "supersealed," since the parties do not have access to those few documents.

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Petitioner's motions to unseal are denied. Petitioner's motion that respondents' lawyers provide notice to all other parties of all filings under seal not previously disclosed is denied.

All parties' motions for attorney fees and sanctions are denied.

DATED this 9th day of April, 2012.

RONALD KESSLER, Judge

King County Superior Court
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Seattle, Washington 98115

Appendix C

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KING COUNTY
SUPERIOR COURT CLERK
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OCT 27 2011

Office of the Public Defender

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

IN RE THE DEPENDENCY OF: M.H.P.	NO: ~~10-7-07201-0 KNT~~ 11-7-02455-3 KNT
DOB: 11/11/2008	MOTION AND ORDER TO SEAL (ORSD)
MINOR CHILD(REN)	CLERK'S ACTION REQUIRED

MOTION

Repondent, appearing *ex parte*, moves, pursuant to RCW 13.34.090, JuCR 9.2, and In re V.R.R., 134 Wash.App. 573, 141 P.3d 85 (2006), that the documents referenced below be placed under court seal.

The grounds for this motion are that these records are confidential, privileged and governed by rules of confidentiality and attorney work product, and may not be disseminated by counsel to any third party under the Rules of Professional Conduct. The documents listed below contain information that is work product and confidential under RCW 13.34.090, JuCR 9.2, and In re V.R.R., 134 Wash.App. 573, 141 P.3d 85 (2006). They outline the Respondent's theory of the case and identify potential experts. This motion is also based on the equal protection clauses of the Washington State and United States Constitutions, which require that all Respondents be

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affonded the same right to prepare their defense confidentially, regardless of their financial status.

DATED this 27 day of November, 2011.

Katharine Edwards, WSBA # 43093
Attorney for Respondent

ORDER

The Court finds that the documents listed below are privileged and attorney work-product under RCW 13.34.090, JuCR 9.2, and In re V.R.R., 134 Wash.App. 573, 141 P.3d 85 (2006).

IT IS ORDERED that the following documents be placed under court seal in the court file until further order of this Court: Not Disclosed to Atty Gen'l.

Order Authorizing Expert Services at Public Expense Dated: 10/27/11.

~~Motion and Declaration of Counsel for Appointment of Expert~~ for Funding of Expert Services Dated: 10/27/11

Decl of Counsel Re OPD Funding Dated: 10/27/11

Dated:

Dated:

IT IS FURTHER ORDERED that this order shall be filed in the court file, unsealed.

DATED this ____ day of JAN 10 2012, 20__.

JUDGE

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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OCT 27 2011

Office of the Public Defender

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

IN RE THE DEPENENCY OF: M.H.P.	NO: ~~10-2-07201-0 KNT~~ 11-7-02455-3 KNT
DOB: 11/11/2008	MOTION AND PROTECTIVE ORDER FOR EXPERT WITNESS AND SERVICES FUNDING REQUEST
MINOR CHILD(REN)	

MOTION

COMES NOW, Respondent Leslie Bramlett, and requests a protective order limiting the disclosure of the following documents and the information contained in these documents:

1. Motion ~~and Declaration for Appointment of Expert,~~ for Findings of Expert Services dated October 27, 2011.
2. Order Authorizing Expert Services at Public Expense, dated October 27, 2011.
3. Decl. of Counsel Re OPD Funding dated 10/27/11
4. _____ dated _____

The Defender Association
420 W Harrison Suite 202
Kent, WA 98032
253-852-1599

These documents were provided to the Office of Public Defense (OPD) and the records and information concerning these documents will be provided to various agencies in the future to conduct financial business.

This request is made pursuant to the recent Washington Supreme Court decision in *Yakima County* v. *Yakima Herald-Republic* 170 Wn. 2d 775 (2011). The Supreme Court ruled that documents prepared by court personnel in connection with court cases and maintained by the court are *judicial* documents governed by the court rules for disclosure and not the Public Records Act (PRA). In addition, such documents when transferred to non-judicial county entities, are governed by the PRA unless they are subject to a protective order. The documents listed above, contain information that is work product and confidential under RCW 13.34.090, JuCR 9.2, and In re V.R.R, 134 Wash.App. 573, 141 P.3d 85 (2006). They outline Respondent's theory of the case and identify potential experts. Thus, pursuant to the most recent Supreme Court decision, the defense requests that a protective order be issued limiting the disclosure of the documents listed above. The protective order should place restrictions on various agencies from releasing any of these materials or any information contained in these materials.

The Defender Association
420 W Harrison Suite 202
Kent, WA 98032
253-852-1599

ORDER

IT IS HEREBY ORDERED that any King County records or information that concern the above-mentioned documents and are released to a King County Agency, the Washington State Auditor, the Washington State Department of Revenue, the Internal Revenue Services pursuant to state or federal law, or a state or county government financial institution for payment purposes are subject to a protective order and, upon proper service of this order, shall not be released to any requestor, including pursuant to a PRA request, to the King County Prosecuting Attorney's Office Criminal Division, Office of the Attorney General, or to any governmental agency responsible for the investigation or prosecution of the above-listed Respondent, until records are closed further order of the court. Respondent's counsel is responsible for effecting service.

DONE this ___ day of JAN 10 2012, 20___.

JUDGE

Presented by:

s/Katharine Edwards
Attorney for Leslie Bramlett

Bar # 43093

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253-852-1599

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DEC 28 2011
Office of the Public Defender

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY, JUVENILE COURT

In re the Dependency of: M. H.P., DOB: 11/11/08, Minor Child.	No. 11-7-02455-3 KNT MOTION AND ORDER TO SEAL DOCUMENTS, CrR 3.1(f) (ORSD) CLERK'S ACTION REQUIRED

MOTION

Defendant, appearing *ex parte*, moves that the documents referenced below be placed under court seal. The grounds for this motion are that these records are confidential, privileged and governed by rules of confidentiality for attorney work product, CrR 3.1(f).

DATED this 28 day of December, 2011.

R. Daewoo Kim, WSBA #25434
Attorney for Paul Parvin, Father

FINDINGS: The court finds that said documents, pursuant to CrR 3.1(f) are protected by the attorney-client and work product privileges, and are not subject to disclosure to the state or to the public. Now, therefore,

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IT IS ORDERED that the following documents be placed under court seal, that said documents be used only by the court for purposes of the defense motion to authorize expert services at public expense, and that said documents shall not otherwise be disclosed to the public or the state absent further order of the court. No disclosure

~~Order Authorizing Expert Services at Public Expense~~ Dated: ~~12/27/11~~

~~Order Appointing Expert and Directing Payment (DSHS)~~ Dated: ~~12/28/11~~

Motion and Certification for Appointment of Expert Dated: 12/27/11

Order Denying Independent Expert as Professional Person & Directing Payment by DSHS Dated: 12/28/11

Dated:

IT IS FURTHER ORDERED that this order shall be filed in the court file, unsealed.

DATED this ____ day of FEB - 7 2012, 20____.

COMMISSIONER/JUDGE

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KING COUNTY, WASHINGTON
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SUPERIOR COURT CLERK

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Office of the Public Defender

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
REGIONAL JUSTICE CENTER, JUVENILE DIVISION

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IN RE THE DEPENDENCY OF:	)	NO. ~~10-7-10239-2 SEA~~
M.H.P.	)	ORDER AUTHORIZING
	)	EXPERT SERVICES AT
DOB: 11/11/08	)	PUBLIC EXPENSE
	)	(ORES)

THIS MATTER comes before the undersigned authorized representative of the Office of the Public Defender (OPD) on behalf of the respondent, through his/her attorney, Daewoo Kim, for expert services necessary to an adequate defense in this case to be performed at public expense. The services requested are for:

- [X] Psychological Evaluation
- [ ] Psychiatric Evaluation
- [ ] Evidence Examination
- [ ] Forensic
- [ ] Investigative
- [ ] Sexual Deviancy Evaluation
- [ ] Alternate Placement
- [X] Other: with parenting component

Defense attorney represents that previous request(s) for funding was/were dated _____ in the amount of $ _____ for the purpose of _____.

The client is: [ ] in-custody or [X] out-of-custody, and the trial date set is: 3/5/12.

The attached documentation and declaration of counsel show that such expert services are necessary to an adequate defense, the number of hours and hourly rate expected, and that the defendant is financially unable to obtain them.

NOW THEREFORE, pursuant to CrR 3.1 (f), IT IS ORDERED that Dr. Robert Deutsch is authorized to perform the expert services indicated above at public expense in the amount not to exceed $180/hr. (pretrial) for 20 hours, for a maximum of $3,600. (Amounts exceeding $250 per

SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS
420 WEST HARRISON ST. SUITE 101
KENT, WASHINGTON 98032
253-852-9460

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expert must be submitted to the OPD Administrator.) If the expert is to perform a competency or insanity defense evaluation,

☐ A FURTHER APPLICATION is submitted herewith for an additional $800 that is reimbursable by DSHS.

If expert *testimony* is permitted, it shall be compensated at not more than $240 per hour for a maximum of $960 (4 hours). (Please check item below). $960

☒ This ORDER approves this additional amount.

☐ An ADDITIONAL APPLICATION will be made for testimony if required and permitted.

PAYMENT IN EXCESS OF THE ABOVE LIMIT(S) WILL NOT BE MADE WITHOUT PRIOR AUTHORIZATION.

THIS PROVIDES notification to the Department of Adult Detention that the above-named expert be granted admittance to the King County Correctional Facility at reasonable times as necessary to perform said services, along with the following equipment:

☐ Standard psychological testing equipment and materials authorized to be admitted into DJAD facility with expert.

☐ Other electronic equipment authorized to be admitted to DJAD facility with expert, specifically: _____

IT IS FURTHER ORDERED that the attorney shall deliver to the service provider a copy of this order before the expert service begins.

☐ This Expert Order will be Sealed ☐ This Expert Order will NOT be Sealed

Attorney is: ☐ Appointed ☐ Retained ☐ Pro Bono ☐ Pro Se

PRESENTED BY:

Attorney for Respondent
Email: daewoo.kim@scraplaw.org
Telephone:206-726-7739

Date submitted: 12/27/11

☒ APPROVED
☐ DENIED

for the Office of the Public Defender

OR Trial Judge (If Less Than $250)

Date ORDERED: 12/29/11

If denied, reasons therefore: _____

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SUPERIOR COURT IN THE KING COUNTY OF WASHINGTON STATE
JUVENILE DIVISION

IN RE THE DEPENDENCY OF	) NO 11-7-~~03566-3 KNT~~ 02455-2 10-2-07201-0 KNT
M.H.P.	) MOTION FOR ORDER TO SEAL
DOB 11/11/2008	) (ORSD)
Minor Child	)

MOTION

Respondent, appearing *ex parte*, pursuant to RCW 13 34 090, JuCR 9 2 , and In re V R R , 134 Wash App 573, 141 P 3d 85 (2006), that the documents referenced below be placed under court seal

The grounds for this motion are that these records are confidential privileged and governed by rules of confidentiality and attorney work product, and may not be disseminated by counsel to any third party under the Rules of Professional Conduct The documents listed below contain information that is work product and confidential under RCW 13 34 090, JuCR 9 2, and In re V R R , 134 Wash App 573, 141 P 3d 85 (2006) They outline the Respondent's theory of the case and identify potential experts This motion is also based on the equal protection clauses of the Washington State and United States Constitutions, which require that all Respondents be afforded the same right to

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Seattle WA 98122
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prepare their defense confidentially, regardless of their financial status

DATED this 26 day of April, 2012

/S/
Devon Knowles, WSBA# 39155
Attorney for Mother

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Juvenile Division
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SUPERIOR COURT IN THE KING COUNTY OF WASHINGTON STATE
JUVENILE DIVISION

IN RE THE DEPENDENCY OF	)	NO 11-7-~~03566-3~~ 02155 KNT
	)	~~10-2-07201-0~~ KNT
M. H. P.	)	ORDER TO SEAL
Dob 11/11/2008,	)	
	)	(ORSD)
Minor Child	)	CLERK'S ACTION REQUIRED

ORDER

The Court finds that the documents listed below are privileged and attorney work-product under RCW 13 34 090, JuCR 9 2, and In re V R R 134 Wash App 573, 141 P 3d 85 (2006)

IT IS ORDERED that the following documents be placed under court seal in the court file until further order of this Court

Order Authorizing Expert Services at Public Expense Dated 4/26/2012

Motion For Funding of Expert Services Dated 4/26/2012

Declaration ~~for Appointment of Expert Services~~ of Counsel Re OPD Funding Dated 4/26/2012

IT IS FURTHER ORDERED that this order shall be filed in the court file, unsealed

DATED this 10 day of May 2012

JUDGE

1- ORDER TO SEAL

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Office of the Public Defender

SUPERIOR COURT IN THE KING COUNTY OF WASHINGTON STATE
JUVENILE DIVISION

IN RE THE DEPENDENCY OF: M. H. P. Dob:11/11/2008, Minor Child.	NO: ~~10-2-07201-0 KNT~~ 11-7-02455-3 KNT MOTION FOR PROTECTIVE ORDER FOR EXPERT WITNESS AND SERVICES FUNDING REQUEST

MOTION

COMES NOW Respondent and requests a protective order limiting the disclosure of the following documents and the information contained in these documents:

1. Motion for Funding of Expert Services, dated: 2/10/2012.
2. Declaration of Counsel Re OPD Funding, dated: 2/10/2012
3. Order Authorizing Expert Services at Public Expense, dated 2/10/2012
3. _____, dated_____
4. _____, dated_____

These documents were provided to the Office of Public Defense (OPD) and the records and information concerning these documents will be provided to various agencies in the future to conduct financial business.

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1401 E. Jefferson, Suite 400
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206-447-3900

This request is made pursuant to the recent Washington Supreme Court decision in *Yakima County v. Yakima Herald-Republic* 170 Wn. 2d 775 (2011). The Supreme Court ruled that documents prepared by court personnel in connection with court cases and maintained by the court are judicial documents governed by the court rules for disclosure and not the Public Records Act (PRA). In addition, such documents when transferred to non-judicial county entities, are governed by the PRA unless they are subject to a protective order. The documents listed above, contain information that is work product and confidential under RCW 13.34.090, JuCR 9.2, and In re V.R.R., 134 Wash.App. 573, 141 P.3d 85 (2006). They outline Respondent's theory of the case and identify potential experts. Thus, pursuant to the most recent Supreme Court decision, the defense requests that a protective order be issued limiting the disclosure of the documents listed above. The protective order should place restrictions on various agencies from releasing any of these materials or any information contained in these materials.

Presented by:

/S/
Devon Knowles, WSBA#39153
Attorney for Respondent

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JUVENILE DIVISION

IN RE THE DEPENDENCY OF M.H.P. Dob 11/11/2008, Minor Child	) NO)))))	~~16-2-07201-0 KNT~~ 11-7-02455-3 KNT **PROTECTIVE ORDER FOR EXPERT WITNESS AND SERVICES FUNDING REQUEST**

ORDER

IT IS HEREBY ORDERED that any King County records or information that concern the above-mentioned documents and are released to a King County Agency, the Washington State Auditor, the Washington State Department of Revenue, the Internal Revenue Services pursuant to state or federal law, or a state or county government financial institution for payment purposes are subject to a protective order and, upon proper service of this order, shall not be released to any requestor, including pursuant to a PRA request, to the King County Prosecuting Attorney's Office Criminal Division, Office of the Attorney General, or to any governmental agency responsible for the investigation or prosecution of the above-listed Respondent, until further order of the court Respondent's counsel is responsible for effecting service

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Juvenile Division
1401 E. Jefferson Suite 400
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206-447-3900

DONE this 10 day of May, 2012

JUDGE

Presented by

/S/
Devon Knowles
Attorney for Respondent, WSBA#39153

Law Offices of the Defender Association
Juvenile Division
1401 E. Jefferson, Suite 400
Seattle, WA 98122
206-447-3900

SUPERIOR COURT IN THE KING COUNTY OF WASHINGTON STATE
JUVENILE DIVISION

IN RE THE DEPENDENCY OF M. H. P. Dob 11/11/2008, Minor Child	NO ~~10-2-07201-0 KNT~~ 11-7-02455-3 KNT MOTION FOR PROTECTIVE ORDER FOR EXPERT WITNESS AND SERVICES FUNDING REQUEST

MOTION

COMES NOW Respondent and requests a protective order limiting the disclosure of the following documents and the information contained in these documents

1. Motion for Funding of Expert Services, dated, 4/26/2012
2. Order Authorizing Expert Services at Public Expense, dated 4/26/2012
3. Declaration of Counsel RE OPD Funding, dated 4/26/2012
4. _____, dated_____

These documents were provided to the Office of Public Defense (OPD) and the records and information concerning these documents will be provided to various agencies in the future to conduct financial business

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Presented by

/S/
Devon Knowles
Attorney for Respondent, WSBA#39153

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Seattle WA 98122
206 447-3900