Supreme Court No. 98596-1

(Court of Appeals No. 78985-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF:

E.M,

a minor child.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Julia M., mother and appellant below, seeks review of the Court of Appeals decision affirming the trial court's order striking the notice of appearance of the attorney for the child retained by child's grandmother. The order is designated in Part B.

B. COURT OF APPEALS DECISION

Julia M. appealed the King County Juvenile Court order striking the notice of appearance of Aimee Sutton, an attorney retained for Julia's son, E.M., by the maternal grandmother. The Court of Appeals granted discretionary review, but affirmed the order striking Sutton's notice of appearance in a published opinion on February 24, 2020. Appendix A. The Court denied Julia's motion for reconsideration on April 24, 2020. Appendix B. This motion is based upon RAP 13.4(b)(4).

C. ISSUE PRESENTED FOR REVIEW

RCW 13.34.100(7)(b)(i) recognizes that a private attorney may be retained for a dependent child without a motion first being filed under the appointed counsel subsection, RCW 13.34.100(7). Here, the trial court refused to allow the private attorney retained for E.M. by the child's grandmother to participate in the dependency case because she

had not gone through the court appointment process first. Does the Court of Appeals decision involve an issue of substantial public interest that merits this Court's review? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Julia M., the mother of E.M., is in the midst of a high-conflict dependency proceeding involving her four year-old son. Where the trial court improperly dismissed E.M.'s retained attorney, denying E.M. an independent voice in the courtroom, this Court should grant review.

1. Factual Background

E.M. was born on July 10, 2015. CP 1. The brief relationship between Julia and E.M.'s father, Alan M., was marred by Alan's domestic violence, substance abuse, and untreated mental illness. CP 1-3; 59-61. Alan was incarcerated when E.M. was born, and his domestic violence, incarceration, periods of homelessness, and methamphetamine and alcohol abuse, all contributed to Julia's decision to divorce. Id.

From the time of E.M.'s birth, Julia and her son lived with the maternal grandmother, Nadia B. CP 13-18; 59-77. Living with Nadia provided a stable and nurturing environment for E.M.; this also suited the Department of Children, Youth, and Families (Department), which had filed a dependency petition when E.M. was born. CP 1-6.

The Department's concerns regarding E.M. largely stemmed from the disappearance of Julia's older son in 2011, which has remained unsolved. Id.[1] Due to the prior case, the Department has required restrictions on Julia's contact with four year-old E.M., even though no charges have been brought against Julia related to S.M.'s disappearance nine years ago, and no allegations of harm to E.M. have been made. Id.

E.M. resided with his maternal grandmother from the time of his birth until the summer of 2018, and Julia lived with them for much of that time, as the court gradually liberalized the terms of her contact with her son. Dependency of E.M., No. 76959-6-I (Nov. 2, 2017), at 2.

Following violations of the court's curfew restrictions, Julia began residing with her mentor and friend, James Kelly, while E.M. stayed with his grandmother; Mr. Kelly actively participated in E.M.'s life as a visitation monitor. CP 20-24. While Mr. Kelly worked at his Redmond I.T. office, ten minutes from home, E.M. attended full-time daycare. CP 78-80. Mr. Kelly is supportive of Julia and has grown

[1] Julia cooperated with law enforcement following S.M.'s disappearance, including a search of her home, car, phone, computer, and a 24-hour interrogation by the Bellevue Police Department without counsel. CP 69. Julia then obtained counsel, who requested that police cease the interrogation. Id. S.M. has not been found and Julia has never been charged; a "founded" neglect finding remains. CP 5-6.

close to E.M., having supervised and monitored hundreds of hours of visits between Julia and E.M. CP 20-25.

In May 2018, Julia moved for a change of placement from the grandmother to "another suitable person," naming Mr. Kelly as the proposed placement. CP 7-32 (motion for placement).[2] Nadia supported placement with Mr. Kelly, as E.M. had a strong bond with Mr. Kelly, who was willing and able to monitor contact with Julia. Id. Nadia stated she remained available as a respite resource or even as the placement, should the court deny the mother's motion. CP 13-18.

The father filed a competing motion to change placement, but was not prepared for E.M. to live with him, apparently due to his ongoing substance abuse and law violations. The father argued that E.M. should instead be placed in licensed foster care, as it was a "neutral" environment he believed would eventually support E.M.'s reunification with him. CP 61; RP 18.

In June 2018, a Superior Court Commissioner granted the mother's motion for change of placement to Mr. Kelly's home, with certain conditions to ensure E.M.'s safety. CP 78-80; RP 53-58. The

[2] Julia's mother, Nadia, stated she had an opportunity to return to work, and supported E.M. spending more time with his mother.

Commissioner denied the father's motion for placement in foster care, concluding foster care was not in E.M.'s best interest. Id.

The father filed a motion to revise, and the Superior Court granted revision, on the basis that the court's concerns for E.M.'s safety were not alleviated, and that placement in foster care was in E.M's best interest. CP 81-84. E.M. was removed from Mr. Kelly's home and placed in foster care, where he has remained for nearly two years. Id. Extensive litigation has followed and a termination trial has not proceeded.

2. Attorney for Child Retained

Five days after E.M. was placed in foster care, Aimee Sutton[3] filed a notice of appearance as counsel for E.M. CP 254. Ms. Sutton had been retained by E.M.'s grandmother, Nadia, who paid a deposit into a trust account on E.M.'s behalf. Id.; CP 265-67. At the time, Ms. Sutton had been a licensed attorney for over 15 years and had represented thousands of juveniles and adults on retained and appointed cases throughout Washington. Id.

[3] On January 30, 2019, Aimee Sutton was appointed to the King County Superior Court. For purposes of this petition, Judge Sutton is referred to as in the original proceeding, without honorific. No disrespect is intended.

After Ms. Sutton filed a notice of appearance on July 18, 2018, she reached out to counsel for the Department to obtain contact information for E.M., in order to speak with her new client, E.M. RP 7, 13; Id. The Department declined. Id.

After Ms. Sutton's second attempt to reach E.M., she was informed by the Department that it would "not be providing [E.M's] contact information." CP 265-67; RP 7, 13. Ms. Sutton made a third request to meet E.M. during a scheduled supervised visitation at the Department offices. CP 265-67. This request, too, was declined by the Department. Id. Although Ms. Sutton had not withdrawn any of the funds on deposit in the trust account paid for her representation, she filed a motion to reconsider E.M.'s placement in foster care, based upon E.M.'s legal interest in family integrity. Id.; CP 1918-25. The mother supported Ms. Sutton's motion for reconsideration. CP 1953.

On August 2, 2018, the parties appeared before the juvenile court on the motion to reconsider placement. RP 4-22. The court refused to hear argument from Ms. Sutton on her motion to reconsider E.M.'s placement in foster care, stating it was not properly before the court. RP 5; CP 263-64. The court requested argument exclusively on Ms. Sutton's notice of appearance, improperly creating a gladiator-like

scenario, whereby the parties disparaged Ms. Sutton's ethics. RP 5. The Department and the father requested that Ms. Sutton's notice of appearance be stricken, along with the motion to reconsider E.M.'s placement. RP 7-10. The court agreed and issued an order striking Ms. Sutton's appearance and motion for reconsideration. CP 263-64; RP 14-21 (stating the court relied on RPC 1.2, 1.4, 1.8, and APR 5).

The Court of Appeals granted discretionary review and heard argument. RAP 2.3(b)(2), (3). The Court of Appeals found the Department's position on mootness "too narrow," and determined the court can provide effective relief; therefore, the case is not moot. Appendix A at 6.

The Court of Appeals also determined the trial court acted within its authority under RCW 13.34.100(7)(b)(i) to strike Ms. Sutton's appearance.

Ms. M. now seeks this Court's review of the Court of Appeals published opinion, as it involves an issue of substantial public interest. This Court should accept review pursuant to RAP 13.4(b)(4).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, BECAUSE THE JUVENILE COURT'S INTERFERENCE IN THE ATTORNEY-CLIENT RELATIONSHIP CONSTITUTES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(4).

The juvenile court misapplied RCW 13.34.100(7) when it interfered with the relationship between an attorney and her young client, E.M. The court's error was repeated by the Court of Appeals when it affirmed the court's order. Appendix A at 12.

1. Review is de novo, since this is a matter of statutory interpretation.

Statutory interpretation is a question of law reviewed de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014); In re Welfare of K.M.M., 187 Wn. App. 545, 572, 349 P.3d 929 (2015). The goal of the inquiry is to ascertain and to carry out the legislature's intent. Jametsky, 179 Wn.2d at 762.

The Court of Appeals reviewed the trial court's decision here under the lower abuse of discretion standard, noting the dependency court's "oversight role in the appointment of private counsel for dependent children." Appendix A at 6.

The law does not support a different or a less rigorous standard of review in a case regarding the right to counsel for dependent children.

The Court's reliance on Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co. does not support the abuse of discretion standard. 124 Wn.2d 789, 812, 881 P.2d 1020 (1994). This insurance coverage case is inapposite to both the statute and the issues considered here. This public utility dispute did not involve interpretation of a statute, as does the instant case.

The Court of Appeals opinion discusses the legislature's recognition "that dependent children may need appointed counsel," and that RCW 13.34.100(7)(b)(i) provides that a child may already be "represented by a privately retained attorney." Appendix A at 8 (emphasis provided by Court of Appeals). However, the Court does not clarify how it has assessed the juvenile court's "gatekeeping" role without performing de novo review, and thereby assessing whether the court has, essentially, carried out the legislative intent of RCW 13.34.100(7).

In short, this Court should grant review and perform de novo review, as is required for an issue of statutory interpretation. Under either standard of review, the Court of Appeals should have reversed based upon the juvenile court's erroneous interpretation of RCW 13.34.100(7).

2. The statute contemplates that dependent children may be represented by privately retained counsel; therefore, excluding E.M.'s retained attorney from the proceedings impermissibly interfered with the attorney-client relationship.

It is beyond dispute that children in Washington have fundamental liberty interests at stake in dependency and termination of parental rights proceedings. In re Dependency of M.S.R., 174 Wn.2d 1, 22, 271 P.3d 234 (2012).

An attorney may represent a child's position during a dependency action "upon request of a parent, the child, a guardian ad litem, a caregiver, or the Department." RCW 13.34.100(7)(a). This same statute recognizes that some children may be represented by privately retained counsel, as was E.M., when Ms. Sutton was retained. RCW 13.34.100(7)(b)(i). The Department has acknowledged that this section of the statute envisions privately retained counsel for children in some circumstances. Appendix A at 8.

The Court of Appeals chooses to adopt the Department's suggestion that "when drafting RCW 13.34.100, the legislature envisioned a gatekeeping role being performed by the dependency court." Appendix A at 9. In support of this interpretation, the Court relies upon, among other support, legislative history, as well as the 2010

and 2014 amendments to RCW 13.34.100. Appendix A at 9-10. The Court of Appeals errs when it relies upon the previous amendments to RCW 13.34.100 to support its opinion. The acknowledged statutory amendments that allow dependent children age 12 and older to be advised of their right to counsel (RCW 13.34.100(7)(c)), and the right of legally free children to be represented by counsel after six months (RCW 13.34.100(6)(a)), are certainly helpful generally to dependent children, but are irrelevant to this appeal.

The Court specifically notes that RCW 13.34.100(7)(b) was also amended in 2010. The legislature found it imperative that during dependency proceedings, children should be provided "with well-trained advocates so that their legal rights around health, safety, and well-being are protected." Appendix A at 9. The Court specifically found, "It is clear from the record that Sutton was qualified and well-trained in dependency matters." Id. at 10, n. 6. Thus, the Court of Appeals decision that the juvenile court was simply exercising its gatekeeping function is not supported by the juvenile court's own findings; rather, the record shows that the court overstepped its gatekeeping function, to the degree it has one, when it ordered Ms. Sutton's appearance and her pleadings stricken.

Further, the Court relies upon the premise that RCW 13.34.100 uses the word "appoint" or "appointment" 35 times. Appendix A at 9, n.5. This does not support the Court's position that a privately retained attorney must first pass through the court appointment process. Although there are 35 usages of the word in the statute, only 13 relate to the court's authority to appoint attorneys; the remainder relate to the appointment of GAL's. RCW 13.34.100. To the degree the Court of Appeals relied on this factor, the Court's reasoning was flawed and should be reviewed by this Court.

3. <u>This Court should accept review because the juvenile court's findings were insufficient, resulting in a procedure fundamentally unfair to E.M.</u>

Even if this Court determines the juvenile court does, in fact, have a gatekeeper role in the statutory scheme, the court goes beyond its gatekeeper role when it interferes with an attorney's relationship with her client. The Department has argued that Ms. Sutton could not represent E.M.'s position because she had not met with him; however, Ms. Sutton was thwarted at every turn by the Department. CP 265-67; RP 12-13.

The juvenile court stated it relied upon several RPCs in its decision to strike Ms. Sutton's appearance, including RPC 1.2, 1.4, and 1.8, as well as Admission to Practice Rule (APR) 5(g). CP 263-64; RP

14-21. In addition, the court improperly solicited objections and argument against Ms. Sutton from opposing parties on the representation issue. RP 5. The RPCs may not be invoked by opposing parties, or deployed as litigation tactics. RPC Preamble (20).

Parties do not get to pick their opponents. The Department's and the father's objections to Ms. Sutton's representation of E.M. were invoked "as procedural weapons" in juvenile court. RPC Preamble (20). At the very least, the RPCs clearly state that the Department and the father, as "antagonist[s]" in the litigation, had no standing to seek enforcement of the RPCs against Ms. Sutton, as they did here. Id.

The Court of Appeals, applying the abuse of discretion standard of review, found the juvenile court acted within its discretion by "considering the RPCs" in reaching its decision to strike Ms. Sutton's notice of appearance. Appendix A at 12. However, the Court did not resolve the fact that the juvenile court's findings were insufficient.

Even if the court had properly invoked the RPCs, the court erred when it found E.M.'s attorney had not – and seemingly could not – comply with them. CP 263-64. The court stated it "relied" upon RPC 1.2 (including the comment section), 1.4, and 1.8. CP 263-64. These rules govern the scope of representation (1.2), communication with a

client (1.4), and conflict of interest (1.8). The court found that considering E.M.'s young age, this "really begs the question whether Ms. Sutton can properly comply" with these ethical duties to communicate with her client. RP 17 (emphasis provided).[4]

The court expressed concern with the retainer paid by E.M.'s maternal grandmother; however, this ignores the reality that third-party fee agreements are common where a client is incapacitated or otherwise unable to pay for his or her own counsel. This does not change the ethical duty of the retained attorney to represent the client, rather than the payor. See, e.g., RPC 1.14, Comment 1. The court also cited APR 5(g), which states in part, "I will accept no compensation … [without] approval of the Court." RP 15. However, the court acknowledged that Ms. Sutton had not drawn from the retainer. RP 15.

Whether or not the juvenile court was correct to consider the RPCs, as the Court of Appeals found, there was an inadequate basis for the court's findings that Ms. Sutton's representation was not in compliance with them. This Court should grant review of this important issue affecting the attorney-client relationship and the right to

[4] Clearly RPC 1.2 and RPC 1.4 contemplate clients with diminished capacity and/or infancy. See also RPC 1.4, Comment 6; RPC 1.14 (Clients with Diminished Capacity, including minority).

counsel for dependent children, as a matter of significant public interest. RAP 13.4(b)(4).

4. This Court should also accept review in light of the circumstances, which highlighted the fact that E.M. had no voice in the courtroom at the time of the court's order.

Due to the high conflict amongst parties in dependencies, as well as the gaps without a GAL during critical junctures in the litigation, this Court should accept review as it involves an issue of substantial public interest. RAP 13.4(b)(4).

This Court has recognized that children in dependency proceedings have a fundamental liberty interest at stake and, as such, may be entitled to independent counsel. M.S.R., 174 Wn.2d at 14. As this Court explained, "the child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's." 174 Wn.2d at 17-18. In fact, children have even more to lose during the dependency process than do their parents. See also Braam v. State, 150 Wn.2d 689, 694, 81 P.3d 851 (2003).[5]

Even when a GAL or CASA has been appointed for a child for a lengthy period of time – which was not the case here – the risk of error

[5] "It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." M.S.R., 174 Wn.2d at 16.

remains unacceptably high. A CASA does not share the same obligations to the child that an attorney has, nor does the CASA share the same training or ethical duties to a client. See M.S.R., 174 Wn.2d at 21.

Particularly where, as here, a child's interests may not be aligned with the Department's or with either parent's interests, independent counsel is appropriate and vital to represent E.M.'s direct interest in the proceedings. Counsel was retained for E.M. and appeared on his behalf. E.M.'s counsel filed a motion to reconsider his placement in foster care, in an effort to advocate for E.M.'s right to family integrity – a fundamental legal right – a unique position not argued by the CASA program, nor by the Department. CP 265-67.

As the Court of Appeals Commissioner found below, "it is concerning that E.M. was without a CASA for extended periods of time during this ongoing dependency, including at the time of the key events here." In re E.J.M., No. 78985-6, Commissioner's ruling, at 4. In fact, E.M. languished without a CASA for over two years of this dependency. Id. at 3-4.[6]

[6] The Court of Appeals notes there had not been a CASA or GAL for E.M. for the previous nine months; the Court makes no mention of the 15-month gap during 2016-17, as well as other gaps, which Commissioner Neel's ruling addressed as well.

Although a GAL/CASA is not a substitute for an independent attorney representing the child, to the degree a CASA should function as a safeguard or protective factor for a child, E.M. did not benefit from such protection here. As the Court of Appeals found, E.M. had no CASA for (at the very least) the nine months leading up to Ms. Sutton's retention as his attorney. Appendix A at 4; In re E.J.M., No. 78985-6, at 4 (finding no CASA during "key events" of case). This militates in favor of E.M.'s need for counsel, which E.M. actually had – and which the juvenile court impermissibly dismissed.

This Court should grant review, to provide clarification as to the statutory framework for dependent children in need of counsel – whether they can obtain retained counsel or whether they are provided appointed counsel. The guidance of this Court is needed so that these vulnerable children's voices can be clearly heard in these proceedings. RAP 13.4(b)(4).

F. CONCLUSION

This Court should grant review, as the matter of independent counsel for dependent children – and the juvenile court's gatekeeper role – are issues of substantial public interest. RAP 13.4(b)(4).

DATED this 26th day of May, 2020.

Respectfully submitted,

s/ Jan Trasen

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JAN TRASEN (WSBA 41177)
Washington Appellate Project
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APPENDIX A

FILED
2/24/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of	)	No. 78985-6-I
E.M. (D.O.B.: 07/10/15),	)	DIVISION ONE
A Minor Child.	)	
JULIA MORGAN BIRYUKOVA,	)	PUBLISHED OPINION
Appellant,	)	
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF CHILD, YOUTH, AND FAMILIES,	)	
Respondent.	)	FILED: February 24, 2020

MANN, A.C.J. — We granted discretionary review in this dependency action to determine whether a family member can retain counsel for a dependent child, without seeking appointment by the trial court. Julia Morgan, E.M.'s mother, appeals the trial court's order striking the notice of appearance of an attorney retained by E.M.'s maternal grandmother. Morgan contends that the trial court erred in concluding that RCW 13.34.100(7) applies to privately retained attorneys. We disagree and affirm.

I.

Morgan has three children; her youngest, E.M. is the subject of this dependency. Morgan's other two children from a previous relationship are M.M. and S.M. M.M. is in the care of her father and lives in Florida. Morgan does not have contact with M.M.

In November 2011, S.M. disappeared. Morgan's car ran out of gas so she and M.M. walked to a gas station, leaving two-year-old S.M. in the car. When Morgan returned to the car, S.M. was gone. Law enforcement confirmed that Morgan's car had not run out of gas but were unable to locate S.M. To this day, S.M. has never been found. Criminal charges have not been filed, but the case remains open and ongoing.

When E.M. was born July 2015, the hospital contacted Child Protective Services (CPS) expressing concerns about Morgan's mental health. Morgan has been diagnosed with obsessive compulsive disorder (OCD). E.M.'s father was incarcerated when E.M. was born, has a significant criminal history including domestic violence and violations of no-contact orders, and a history of substance abuse.

The Department filed a dependency petition for E.M. shortly after he was born. Morgan agreed to the dependency and the court placed E.M. in the care of his maternal grandmother, Nadia Biryukova. The dependency order allowed Morgan to live in Biryukova's home with E.M., but required supervision of Morgan's contact with E.M. As time went on, the court relaxed Morgan's supervision requirements.

In April 2017, Biryukova reported to the Department that Morgan took E.M. out of her home around 8:30 p.m., bathes E.M. late at night, and that she was concerned for E.M.'s wellbeing and would lose another grandchild. The Department filed a motion to place E.M. in foster care. The trial court ordered that Morgan move out of Biryukova's

home, rather than placing E.M. in foster care. Morgan sought discretionary review of the trial court order, but this court denied her request. In addition, the Department sought new psychological evaluations to address S.M.'s disappearance and Morgan's trauma associated with not having S.M. or M.M. in her life. Morgan refused to discuss S.M.'s disappearance at the recommendation of her criminal attorney.

Morgan began residing with her friend and mentor James Kelly. Kelly actively participated in E.M.'s life as a visitation monitor for Morgan. In May 2018, Morgan moved for a change of placement from Biryukova to "another suitable person," naming Kelly as the proposed placement. Biryukova supported the placement. E.M.'s father filed a competing motion to change placement, contending that E.M. should be placed in a licensed foster home because it was a more neutral environment that would support his reunification with E.M. The Department opposed placement with Kelly and deferred to the court on the father's placement suggestion.

A King County Court Commissioner heard argument on Morgan's motion to change placement on June 1, 2018. The Commissioner granted Morgan's motion with certain conditions and denied the father's motion, concluding that foster care was not in E.M.'s best interest.

E.M.'s father filed a motion to revise the Commissioner's order, which the Superior Court granted. The court cited concerns for E.M.'s safety and indicated that placement in foster care was in E.M.'s best interest. The Department removed E.M. from Kelly's home and placed him in foster care, where he has remained for the past year.

Five days after E.M. was placed in foster care, attorney Aimee Sutton[1] filed a notice of appearance as counsel for E.M. Biryukova retained Sutton for E.M. and paid a deposit into a trust account on E.M.'s behalf. On July 18, 2018, Sutton contacted the Department's counsel, Mary Ann Comiskey, to get E.M.'s contact information. Comiskey indicated that she needed "a few days to determine whether [she was] going to oppose this 'representation' or not." At the time, the Department did not know who had retained Sutton on E.M.'s behalf.

On July 19, 2018, a court appointed special advocate (CASA), Emma Bergin, appeared in the case.[2] Sutton attempted contact with the Department again on July 23, 2018. Sutton filed a motion to reconsider E.M.'s placement in foster care on July 23, 2018, without meeting E.M. because "the right to family integrity is a legal right" and Sutton "believed that E.M. was more likely than not to suffer harm unless an action to reconsider placement in foster care was taken." On July 24, 2018, Comiskey responded that she would not provide E.M.'s contact information and that "[u]ntil the Judge makes a decision about [Sutton's] representation, the Department will not allow [Sutton] to attend a visit with [Morgan]."

In addition to the motion for reconsideration, Sutton requested an evidentiary hearing on the proposed change of placement, arguing that the trial court violated state law by not deferring to Morgan's wishes in regards to E.M.'s placement. The trial court issued a preliminary order denying Sutton's request for an evidentiary hearing on the

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[1] Aimee Sutton was appointed to serve as a Judge with the King County Superior Court on January 30, 2019. We refer to Judge Sutton without the honorific, as in the original proceeding. No disrespect to Judge Sutton is intended.

[2] There had not been a CASA or guardian ad litem (GAL) appointed to the case for the previous nine months.

motion for reconsideration. The trial court required all parties to file a written response to "address the child's request for alternate placement with the maternal grandmother."

On July 30, 2018, the Department filed an objection to the notice of appearance by Sutton and its response to the motion for reconsideration. The Department social worker provided a declaration explaining her "serious concerns" about placing E.M. in Biryukova's care due to a contentious relationship between Morgan and Biryukova. E.M.'s father filed a response to the motion for reconsideration and moved to strike Sutton's appearance. Morgan filed a motion for reconsideration, supporting Sutton's motion. Bergin filed a response to Sutton's motion and stated she took "no position on the placement motion due to her recent appointment." Kathleen Martin, attorney for the CASA program, argued that the notice of appearance by Sutton was "contrary to the procedure required by RCW 13.34.100" because Sutton was attempting to appear "without an order for appointment of counsel for the child."

The dependency court struck Sutton's notice of appearance and determined that the motion for reconsideration was not properly before the court. The court relied on RCW 13.34.100 and Rules of Professional Conduct (RPC) 1.2, 1.4, and 1.8. The court concluded that "if anyone seeks to have an attorney appointed for [E.M.], they must follow the provisions set forth in RCW 13.34.100(7)." Morgan sought discretionary review of this decision. We granted review.

II.

Morgan argues that the dependency court lacked authority under RCW 13.34.100 to strike Sutton's notice of appearance. Statutory interpretation is a question of law and is reviewed de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761-62, 317 P.3d

1003 (2014). When determining the meaning of a statute, we give effect to the plain meaning of the language. Jametsky, 179 Wn.2d at 762. If the statute is ambiguous, the court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. Jametsky, 179 Wn.2d at 762. Juvenile court statutes are to be liberally construed, with the welfare of the minor children being the primary consideration. State ex rel. Smith v. Superior Court of King County, 23 Wn.2d 357, 360, 161 P.2d 188 (1945).

If, however, the dependency court does have an oversight role in the appointment of private counsel for dependent children, our review is for abuse of discretion. Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) (finding the trial court did not abuse its discretion when it refused to disqualify insured public utility district's counsel due to potential prejudice to insureds).

A.

At the outset, the State contends that this case is moot because attorney Sutton is now a judge on the King County Superior Court and cannot serve as E.M.'s counsel. "A case is moot if a court can no longer provide effective relief." Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). The Department's position on mootness in this case is too narrow. We can provide effective relief because, if we reverse, Biryukova could retain other private counsel. Thus, this case is not moot.

B.

Morgan contends that the trial court lacked authority under RCW 13.34.100(7)(b)(i) to strike Sutton's appearance. We disagree.

In Washington, children in dependency or termination proceedings do not have a categorical due process right to court-appointed counsel. In re Dependency of S.K.-P., 200 Wn. App. 86, 95, 401 P.3d 442 (2017). "Statutory law and court rules grant juvenile courts the discretion to decide whether to appoint counsel to a child during dependency proceedings." S.K.-P., 200 Wn. App. at 95. To determine whether the circumstances require appointment of counsel, the trial court examines the facts on a case-by-case determination using the three-part test from Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In re Dependency of M.S.R., 174 Wn.2d 1, 14, 271 P.3d 234 (2012). Under Mathews, the court considers "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." M.S.R., 174 Wn.2d at 14 (citation omitted).

GALs and CASAs provide invaluable information to the courts, but "GALs and CASAs are not trained to, nor is it their role to, protect the legal rights of the child."[3] M.S.R., 174 Wn.2d at 20. Only legal counsel can advocate for the legal rights and interests of a child. M.S.R., 174 Wn.2d at 21 (attorneys "can facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders"); In re Dependency of Lee, 200 Wn. App. 414, 453, 404 P.3d 575 (2017) (describing the way an attorney may counsel a disabled child, which included appealing the denial of Developmental Disabilities Administration services, applying for a Medicaid waiver, and representing the child at administrative hearings with the Department). "[T]he GAL is

[3] RCW 13.34.030(11) defines guardian ad litem to mean "a person, appointed by the court to represent the best interests of a child in a proceeding under this chapter, or in any matter which may be consolidated with a proceeding under this chapter." This section also states that a CASA "appointed by the court to be the guardian ad litem for the child, or to perform substantially the same duties and functions as a guardian ad litem, shall be deemed to be guardian ad litem for all purposes and uses of this chapter."

required to advocate for the child's interest and is required to inform the court of any 'views or positions expressed by the child on issues pending before the court' and to 'represent and be an advocate for the best interests of the child.'" M.S.R., 174 Wn.2d at 20 (citing RCW 13.34.105(b), (f)). Because of their differing roles and the factual nature of dependency actions, both a GAL and an attorney may be necessary and beneficial in certain cases.

The legislature has recognized that dependent children may need appointed counsel. Accordingly, RCW 13.34.100(7) provides that

> (a) The court may appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.
>
> (b)(i) If the court has not already appointed an attorney for a child, or the child is not represented by a privately retained attorney:
>
> (A) The child's caregiver, or any individual, may refer the child to an attorney for the purposes of filing a motion to request appointment of an attorney at public expense; or
>
> (B) The child or any individual may retain an attorney for the child for the purposes of filing a motion to request appointment of an attorney at public expense.[4]

Morgan contends that the statute's reference to "a privately retained attorney" in RCW 13.34.100(7)(b)(i) demonstrates that a family member can retain private counsel for a dependent child, without seeking court appointment. The Department agrees that read in isolation, RCW 13.34.100(7)(b)(i) suggests the legislature envisioned a privately retained attorney for a child in at least some circumstances. But words in a statute should not be read in isolation from the remainder of the statute. State v Lilyblad, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). The Department urges that we read RCW

[4] (Emphasis added.)

13.34.100(7)(b)(i) in conjunction with RCW 13.34.100(7)(a) which generally authorizes the dependency court to appoint an attorney to represent the child on its own initiative or upon request of an interested party. We agree with the Department that when drafting RCW 13.34.100, the legislature envisioned a gatekeeping role being performed by the dependency court.[5]

The legislative history supports our interpretation. In 2010, the legislature amended RCW 13.34.100(6). There, the legislature required the Department or the child's GAL to inform the child of his or her right to be represented by counsel on his or her twelfth birthday, and each year thereafter. LAWS OF 2010, ch. 180 § 2 (now codified as RCW 13.34.100(7)(c)). In 2014, the legislature amended RCW 13.34.100(6), requiring mandatory appointment of counsel to a child, within six months of granting a petition to terminate the parent and child relationship and when there is no remaining parent with parental rights. LAWS OF 2014, ch.108 § 2 (now codified as RCW 13.34.100(6)(a)). At the same time, the legislature also amended RCW 13.34.100(7)(a) and (b) to provide for discretionary appointment of counsel to children. LAWS OF 2014, ch. 108 § 2 (now codified as RCW 13.34.100(7)(a), (b)). These successive amendments demonstrate the legislature's concern that certain children in dependency actions have counsel representing their rights and interests.

In the 2010 amendment, the legislature added the following findings:

> The legislature recognizes that when children are provided attorneys in their dependency and termination proceedings, it is imperative to provide them with well-trained advocates so that their legal rights around health, safety, and well-being are protected. Attorneys, who have different skills

[5] The Department correctly points out that RCW 13.34.100 contains the term "appoint" or "appointment" 35 times, repeatedly referring to the court's authority to decide when appointment of a GAL and or attorney is appropriate.

> and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child, should be trained in meaningful and effective child advocacy, the child welfare system and services available to a child client, child and adolescent brain development, child and adolescent mental health, and the distinct legal rights of dependent youth, among other things. Well-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care.

LAWS OF 2010, ch. 180. These findings demonstrate that the legislature was concerned with more than just a child's access to an attorney; the legislature wanted to ensure that attorneys representing children are trained in dependency issues and subject to the court's oversight. [6]

We hold that, while RCW 13.34.100(7) contemplates both privately retained counsel and publicly funded counsel in dependency proceedings, privately retained counsel must seek appointment by the trial court under RCW 13.34.100(7).

C.

We next consider whether the trial court abused its discretion in striking the notice of appearance. In making its decision the dependency court relied, in part, on RPC 1.2, 1.4, and 1.8. Morgan argues that supervision of the RPCs is delegated to the state bar association and not individual judges. We disagree to the extent that the trial court considered whether the appearance of privately retained counsel without appointment was consistent with the RPCs.

RCW 13.34.100(6)(a) addresses potential conflicts of interest. The statute provides that "[t]he court may appoint one attorney to a group of siblings, unless there is

[6] It is clear from the record that Sutton was qualified and well-trained in dependency matters. This court must be mindful, however, of the need recognized by the legislature that requires judicial oversight of appointment of all attorneys representing children in dependencies.

a conflict of interest or such representation is otherwise inconsistent with the rules of professional conduct." RCW 13.34.100(6)(a). This again demonstrates the legislature's concern that courts have oversight of the appointment process to all dependent children.

Here, the dependency court expressed concerns about privately retained counsel's ability to comply with RPC 1.2, the duty to consult with the client about the scope of representation, RPC 1.4, the duty to communicate promptly with the client because of E.M.'s infancy, and RPC 1.8. RPC 1.8(f) states:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0A(e).

Once a child is declared "dependent," legal custody is transferred to the State. In re Dependency of Schermer, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). E.M. is an infant and cannot give informed consent. Here, Sutton placed Biryukova's payment in a trust account and did not draw on that payment, recognizing that E.M. could not give informed consent and that Biryukova did not have authority to consent on E.M.'s behalf.

This was entirely appropriate. The error was in not seeking appointment by the superior court in advance of seeking access and bringing motions.

The trial court did not abuse its discretion in considering the RPCs in reaching its decision to strike Sutton's notice of appearance.

We affirm.

Mann, ACJ

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of E.M. (D.O.B.: 07/10/15), A Minor Child. JULIA MORGAN BIRYUKOVA, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, Respondent.	)	No. 78985-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Julia Morgan filed a motion to reconsider the court's opinion filed on February 24, 2020. The State of Washington, Department of Children, Youth, and Families filed a response. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original **Petition for Review** was filed in the **Court of Appeals** under **Case No. 78985-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence or e-mail (when agreed upon by the parties) address as listed on ACORDS/WSBA website directory:

☒ respondent Kelly Taylor, Assistant Attorney General
[SHSSeaEF@atg.wa.gov] [kellyt1@atg.wa.gov]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 26, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 26, 2020 - 4:30 PM

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