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Supreme Court No.84132-2

C/A Nos. 27394-6-III  
(consolidated with 27395-4-III)

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

**In Re the Termination of D.R. and A.R.**

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**Amicus Curiae Brief of Foster Parent  
Association of Washington State**  
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**A. INTRODUCTION**

In the underlying cause, dependency proceedings for D.R. and A.R. (the Children) were determined to be faulty due to failure to appoint counsel for the children. This issue has been conceded by the state. The sole matter on review is whether every child is entitled as a matter of constitutional right to representation of counsel in termination of parental rights proceedings. The Foster Parent Association of Washington State joins in the arguments of counsel for the Children in support of constitutional protections of the liberty interests of every child in foster care and provides additional arguments regarding the nature of the liberty interest to be protected and the statutory flaw of RCW 13.34.100 which imperils that interest.

**B. ARGUMENT**

The Foster Parent Association of Washington State (FPAWS) Concurs in the arguments of counsel for D.R. and A.R. as presented in their original and reply briefs and the authorities cited and adopts those arguments and authorities herein by reference.

In addition, FPAWS provides the Court with authorities and arguments that (A) Children have a fundamental liberty interest equal to or greater than those of other represented parties that may be disturbed in a termination of parental rights (TPR) proceeding; (B) There is an inherent flaw and discord found in the statutory scheme of Chapter 13.34 between a statement on one hand (RCW §13.34.02) that the state finds a priority in protecting the liberty interests of children over that of their biological parents and the scheme for protection (RCW §13.34.090, 13.34.100) that permits biological parents appointment of counsel and restricts appointment for children; and (C) That the liberty interest of children in a TPR proceeding cannot be adequately addressed through the filtered voice of counsel for other parties.

**1. The Protected Liberty Interests of Children in Dependency Proceedings Are Equal To or Greater Than Those of Their Parents.**

It is difficult to imagine a situation where the outcome of judicial action will be more closely tied to the liberty interests of a citizen than the results of a dependency proceeding on the dependant. It is inconsistent with the legal precedents of this and nearly every other court in the nation to find that this liberty interest is undeserving of the greatest protections we can afford. The Supreme Court of the United States has been clear in declaring that children are persons whose rights are protected by the United States Constitution, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); See also *In re Gault*, 387 U.S. 1, 13 (1967), holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." And holding specifically that a child's interest in continued companionship and society of parents is a cognizable liberty interest; *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987)

The Washington State legislature has determined that the liberty interest of a child is not merely in the continuation of biological relationships, but in their “basic nurture, physical and mental health and safety” and establishes the priority of interests to be protected in dependency proceedings. The paramount interest defined by the legislature is that of the child, “(w)hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail.” RCW §13.34.02.

**2. The Statutory Scheme of RCW 13.34 as a Mechanism for Protection of a Child’s Liberty Interest Is Inherently Flawed.**

The prioritization of a child’s interest as paramount is definitive and sets the framework for the statutory scheme that was intended to carry out the intent of the legislature. However, that scheme is flawed and contains an irresolvable paradox in that the most valued interest is afforded the least protection. This court has interpreted the intent of RCW 13.34.100 as making children in TPRs parties to the action, *Dependency of J.H.*, 117 Wn.2d 460, 815 P.2d 1380, 1991. (“children involved in dependency and termination actions are parties to those actions and entitled to representation.”) This is both a logical

conclusion and consistent with the intent of the legislature to protect the interests of children above those of their parent. However, the process for determination of how to protect the various liberty interests described by the statute is neither logical nor consistent with the framework established in RCW §13.34.02.

RCW§ 13.34.090(1) declares that “any party has a right to be represented by an attorney in all proceedings under this chapter,” but RCW 13.34.090(2) excludes children from the list of indigent persons entitled to appointed counsel, instead placing the provision for protection of the child’s liberty interest under §13.34.100, with an option for something less than legal counsel, an option which is utilized in many cases and for most children.

The liberty interests of every parent in Washington are protected by appointment of counsel at the outset of a dependency matter. But, according to the State, only some children should receive this protection and only in some types of hearings “when the appointment of a [guardian ad litem] will not be enough to protect a child’s rights,” otherwise the discretion of RCW 13.34.100(6) is adequate protection as it “authorizes appointment of counsel.” Resp’t Br. 28. The State’s circular argument that appointment of counsel will prevent injury in

cases where counsel should be appointed is in itself instructive of the flaw.

While the State agrees the underlying matter is such a case in which injury occurred because counsel should have been appointed to the children, it cannot identify how a court would go about exercising an appropriate application of the statutorily permitted discretion in order to prevent similar error. As joint counsel for the Children note in their reply brief, that is because the statute does not “provide any guidelines to courts regarding appointment of counsel.” Children’s Jt Reply Br 5.

As long as the equivocation of RCW 13.34.100 remains in effect and is allowed to detract from the inclusion of children in the rights of parties to appointed counsel in TPRs, as defined in RCW 13.34.090, the potential for repeat errors remains high.

**3. Only An Absolute Right to Counsel Can Adequately Protect the Liberty Interest of Children in TPRs.**

The State has come halfway to the threshold of due process in making the statement that “due process requires the trial court to determine in each case whether counsel...should be appointed” for children in termination proceedings (TPRs). Resp’t Br. 23. This Court must bring the State across that threshold by holding that due process requires

appointment of counsel without an intervening step. Without a clear statement that protection of the child's constitutional interest requires appointment in every case, uneven results will continue and individual children's liberty interests will be at risk.

**(a) A case-by-case determination will not work.**

In truth, a liberty interest cannot be sufficiently protected through a mere potential for appointment of counsel. A case by case determination of the right to appointed counsel is likely to result in lopsided, subjective and random decision-making. This is a conclusion drawn by courts in consideration of the workability of this notion.

When there is an intervening determination as to whether or not the situation warrants protection, the interest has already been undermined.

In *King v. King*, this Court rejected the case-by-case method of determining which litigants have a right to appointed counsel as "unwieldy, time-consuming, and costly." *King v. King*, 162 Wn.2d 378, 390 n. 11, 174 P.3d 659 (2007). In *King*, this Court also noted that a case-by-case approach "might itself require appointment of counsel" to determine whether counsel was required.

Providing guaranteed access to counsel only to those parties named in RCW §13.34.090 leaves the liberty interest most in jeopardy without a

fully trained legal advocate. In the underlying cause, the Guardian Ad Litem for D.R. elected not to speak to the child's interest, specifically because she was untrained, inadequate and unassisted. In its Motion to Reverse and Remand below, the State conceded that both D.R. and A.R. had significant legal interests at stake in the TPR, interests they were unable to protect without counsel. Mot. to Reverse and Remand 2, 3. The State explicitly asserts that neither the CASA nor any other party was capable of providing adequate representation.

**(b) It is imperative that a child's advocate be present to represent only the interest of the child.**

The reality of the child's situation is frequently overlooked or overwhelmed by the interests of other parties to TPRs and disregarded by the people who would be called upon to participate in the initial determination of appointment. Certainly, the facts of the underlying matter demonstrate the truth of this. The CASA appointed to speak on behalf of the interest of D.R. took a position directly adverse to D.R., who opposed termination. RP 418-19, 489-90. The CASA testified that D.R. had consistently told her foster parents that she wanted to resume visitation with her mother and that she wanted a relationship with her mother. RP 426, 490. But CASA argued for termination (RP 474-75)

The entire course of a child's life is irreparably altered by the decisions made in a dependency hearing. If protection of the child's interest is not elevated to the level afforded to the biological parents, then the most ferociously and zealously protected interests will be those of biological imperative, not the right of the child to "basic nurture, physical and mental health, and safety" as identified by the legislature. If it is the child's interest which is primary, then it makes no sense to treat that child's interest as secondary to that of the parent or the state, or to muffle that child's voice by filtering it through representatives of clients with interests divergent from that of the child.

The State has pecuniary, institutional, and programmatic needs that may conflict with the specific needs of a child. See *Kenny A. ex rel v. Perdue*, 356 F. Supp. 2d 1353, 1359 n. 6 (N.D. GA 2005). Likewise, parents' interests diverge from their children's when a dependency order is entered. *Id.* at 1358; see also *Roe v. Conn*, 417 F. Supp. 769, 780 n. 14 (D.C. Ala. 1976) (rejecting contention that state or parents adequately represent children in deprivation proceedings).

See also, *Matter of T.M.H.*, 613 P.2d 468, 470-71 (Okla. 1980) (state, as initiator of petition, has inherent conflict with child); In re *Matter of Jamie T.T.*, 191 A.D.2d 132 (Ct. of App. NY 1993) (child has right to

counsel in abuse and neglect proceedings due to adversarial nature of proceedings); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982) at 761 (parents' interests diverge from their children's when a dependency order is entered).

When considering the reality of the liberty interest from the perspective of the child, it becomes clear that a statutory scheme that filter's the child's voice through parties with other interests is fatally flawed.

**(c) Only a child's attorney is charged with the duty of articulating the liberty interest of the child in the parent-child relationship.**

For a child who has spent any length of time in care, the nurturing child-parent bond imperiled by the outcome may be with somebody who is not a party to the action. This court has held that while foster children are parties to TPRs, their foster parents are not, *Dependency of J.H.*, 117 Wn.2d 460, P.2d 1380,(1991). However, it is a "developed parent-child relationship" and not the "mere existence of a biological link" that merits constitutional protection, see *Lehr v. Robertson*, 463 U.S. 248, 249, 261 (1983). Unless the protection provided to our smallest citizens includes a guarantee of counsel, the basis of judicial decision on TPRs may not even address the liberty interests of a child in charting the course of their own life and the desire to return home or

remain in a home where a parent-child relationship has been established through fostering or kinship care.

A federal district court in California *in Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985) at 664-65, in discussing the interest of a foster parent, also noted the reality that a parent-child bond may be formed with a non-parent during out-of-home placement because the bond is formed on the side of the child just as much as it is formed on the side of the parent and “ however much a foster parent's appreciation of the nature of the relationship can be tutored by the circumstances of its creation, it is obvious that a very young foster child is incapable of knowing that the foster parent—foster child relationship is different from a biological parent-child relationship. No one can caution an infant against loving the individual who provides for all of his needs, physical and emotional; no one can instruct the infant foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feeling toward his foster parent and cause them to be distinguished from the feeling of an infant child to his natural parents.”

The discussion in *Brown* is instructive because the only party to the TPRs action with that relationship is the child. Consequently it becomes more imperative to protect that lone voice with legal representation.

And whether or not the children who are the subject of the proceedings have managed to forge a healthy bond with a parental substitute through kinship or foster care, only appointed counsel is charged with protecting the personal interest of the child to the exclusion of all other interests.

### **C. SUMMARY**

The entire course of a child's life is irreparably altered by the decisions made in a dependency hearing. Because of the fundamental family and physical liberty interests at stake in TPRs, appointment of counsel to all children is constitutionally required. The Children in this case, A.R. and D.R., were denied attorneys under RCW 13.34.100. The State conceded that A.R. and D.R. needed attorneys to protect their legal interests. If protection of the child's interest is not elevated to the level afforded to the biological parents, then the most ferociously and zealously protected interests will be those of biological imperative, not the right of the child to "basic nurture, physical and mental health, and safety" as identified by the legislature. If it is the child's interest which is primary, then it makes no sense to treat that child's interest as secondary to that of the parent or the state, or to muffle that child's voice by filtering it through representatives of clients with interests divergent from that of the child.

The Foster Parents Association of Washington State offer this Amicus brief in support of the Children and ask this Court to hold that all children in TPRs have the constitutional right to the protection of an attorney.

Respectfully submitted this 28th day of December, 2010,

/s/

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MELODY CURTISS, WSBA #35010

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Attached please find **Amicus Curiae Brief of Foster Parent Association of Washington State In Re the Termination of D.R. and A.R.**, Supreme Court No.84132-2 C/A Nos. 27394-6-III consolidated with 27395-4-III

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