

NO. 85729-6

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

In Re Dependency of M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B.
10/10/00)

D.S.H.S., STATE OF WASHINGTON

Respondent,

v.

NYAKAT LUAK,

Appellant.

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SUPPLEMENTAL BRIEF OF APPELLANT LUAK

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

ORIGINAL

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A. INTRODUCTION

This state's statutory scheme and case law place children as the paramount concern in determining whether parental rights should be terminated. The child-centered focus is consistent with children's recognized fundamental liberty interests in the affection and care of their parents, the maintenance and establishment of familial bonds, and their well-being, health and safety.

Yet children are the only stakeholders who remain unrepresented throughout termination proceedings. Though their entire future is at stake—whether they have parents, who or what entity will have control over their care, the extent of contact with siblings—they are deprived of one of the most important procedural protections of our justice system.

The state and federal constitutions compel more. Due process requires children be appointed counsel to safeguard the numerous critical interests at stake in termination of parental rights proceedings.

B. ISSUES PRESENTED FOR REVIEW

1. Whether procedural due process under the state or federal constitution requires the appointment of counsel to children in termination of parental rights proceedings?

2. Where the State failed to provide necessary anger management services and adequately explain cognitive behavioral therapy treatment, did the juvenile court err in terminating Nyakat Luak's parental rights because the State did not satisfy RCW 13.34.180(1)(d)?

3. Where the State failed to clearly provide cognitive behavioral therapy services capable of remedying Nyakat Luak's alleged deficiency and evidence showed she would have improved if such services had been provided, did the juvenile court err in applying the presumption under RCW 13.34.180(1)(e)?

C. STATEMENT OF THE CASE

1. Ms. Luak's Family Background.

Nyakat Luak is the mother of twin boys M.S.R. and T.S.R., who turned nine years old during the termination trial. CP 422 (Finding of Fact (FF) 1.2). She agreed to a dependency after her sons were found during a fire in her apartment. While at work, Ms. Luak had left them with a caretaker. CP 422 (FF 1.3); 1RP 22.¹

2. Procedural History.

The Washington State Department of Social and Health Services ("State") filed a termination petition in September 2008.

¹ This brief follows the designations for verbatim reports of proceedings set forth in Appellant's Opening Brief in the Court of Appeals.

CP 1. M.S.R. and T.S.R. were assigned the same volunteer court-appointed special advocate (CASA), who had no legal training and no duty to advocate for the children's legal rights, wishes or expressed opinions. See 3A-RP 342-44. The CASA, who was represented by counsel, offered at the end of trial to stipulate that M.S.R. and T.S.R. "don't want to lose their mom," though they had not expressed that to her. 3A-RP 379; 7A-RP 988. Despite what she thought the children wanted, throughout trial the CASA advocated for her view of the children's best interests, including that Ms. Luak's rights should be terminated. 3A-RP 342, 380. The children's prior CASA would not have recommended termination. 7A-RP 996, 1045-47.

Ms. Luak advocated for her children's right to participate. CP 330, 374-80; 1RP 1-7; 7A-RP 987-88. The juvenile court denied the children the opportunity to testify and provided no alternate participation. 7A-RP 990-91. The CASA had authority to move for, and the juvenile court had authority to appoint, counsel for the children under RCW 13.34.100, though neither did so. The juvenile court terminated Ms. Luak's parental rights. CP 421.

Ms. Luak appealed the order to the Court of Appeals, which transferred the appeal to this Court. Order of Certification (Div. I,

March 10, 2011); Ruling Accepting Certification (March 17, 2011).²

D. SUPPLEMENTAL ARGUMENT

Because of the fundamental liberty interests at stake, the federal and state due process clauses require children in termination proceedings to have independent counsel to represent and advocate for their interests.³ Constitutional issues such as this are questions of law reviewed de novo. Bellevue Sch. Dist. v. E.S., No. 83024-0, Slip. Op. at 6, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 2278158 (June 9, 2011).

1. THE FOURTEENTH AMENDMENT REQUIRES THAT CHILDREN HAVE COUNSEL TO PROTECT THEIR FUNDAMENTAL LIBERTY INTERESTS DURING TERMINATION OF PARENTAL RIGHTS PROCEEDINGS.

The Fourteenth Amendment requires that fundamental interests be protected from government interference through procedural safeguards commensurate with the nature of the case.

² The Statement of the Case in Appellant's Opening Brief provides additional facts relevant to the issues raised under RCW 13.34.180.

³ Contrary to their position in this case, the State has already taken the position that "All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues." Children's Representation Workgroup, Meaningful Representation for Children and Youth in Washington's Child Welfare System, Standards of Practice, Voluntary Training and Caseload Limits in Response to HB 2735, at 5, as adopted by Commission on Children in Foster Care (including the Assistant Secretary of the Department of Social and Health Services and a representative from the Attorney General's Office), December 20, 2010 (hereinafter Meaningful Representation) (excerpts attached as Appendix A).

U.S. Const. amend. XIV; Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In determining whether a procedural safeguard is constitutionally required, this Court weighs three factors: (1) the nature of the private interest at stake in the governmental action, (2) the risk of error created by the procedure currently used and the probable value of the additional or substitute procedural safeguards, and (3) the governmental and public interest supporting the use of the challenged procedure. Mathews, 424 U.S. at 335; E.S., Slip. Op. at 6-7. These factors are analyzed according to the context-specific nature of due process. Mathews, 424 U.S. at 335, 349 ("procedures [must] be tailored . . . to the 'capacities and circumstances of those who are to be heard,' . . . to insure that they are given a meaningful opportunity to present their case" (citation and footnote omitted)).

a. Children's fundamental liberty interests are at stake in termination of parental rights proceedings.

As recognized by this Court on several occasions, as well as by courts across the country, children have fundamental liberty interests, which are at stake in parental termination proceedings. First, children have a constitutionally protected liberty interest in the affection and care of their parents. Moore v. Burdman, 84 Wn.2d

408, 411, 526 P.2d 893 (1974) ("A corollary interest [to that of the parents' right to custody and control] which has perhaps not received as much attention is that of the child in having the affection and care of his parents."); Santosky v. Kramer, 455 U.S. 745, 760, 765 & n.15, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (in termination proceedings "the interests of the child and his natural parents coincide to favor use of error-reducing procedures"; reciting serious stakes for child in termination proceedings); Doe v. Heck, 327 F.3d 492, 518 (7th Cir. 2003) ("child [has fundamental right] to be raised and nurtured by his parents"); Subboh v. D.A.'s Office, 298 F.3d 81, 91 (1st Cir. 2002) (children have fundamental liberty interest in being in care and custody of parents); In re H.R.C., 286 Mich. App. 444, 455, 458, 781 N.W.2d 105 (2009) (children have fundamental liberty interest in their own proper care and custody).

Additionally, children have a fundamental interest in maintaining and establishing familial bonds, including relationships with siblings. State v. Santos, 104 Wn.2d 142, 147, 702 P.2d 1179 (1985); Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983) (recognizing fundamental liberty interest in "freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship"); Duschene v. Sugarman, 566 F.2d 817, 825 (2d Cir.

1977) (children have "right to the preservation of family integrity" and interest in "not being dislocated from emotional attachments derived from intimacy of daily association with parent" (quotation omitted)); Roe v. Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976) (three-judge court) (children have fundamental right in family integrity); accord In re Welfare of Lusier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (constitutional protection required of familial relationships); Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) (children have fundamental liberty interest in living with parents).

Children also have a fundamental interest in their "safety, health, and well-being." Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (examining Georgia constitutional provision, which is virtually identical to Art. 1, § 3). This right vests at least in foster children, who have a right to be free from unreasonable risk of harm and a right to reasonable safety. Braam v. State, 150 Wn.2d 689, 700, 81 P.3d 851 (2003).⁴

Finally, a child's physical liberty interests are also fundamental. E.g., Kenny A., 356 F. Supp. 2d at 1360-61. In parental termination proceedings the State may gain permanent

⁴ Like most children involved in termination proceedings, M.S.R. and T.S.R. were in foster care during the proceedings. E.g., 4RP 509.

control of the child, authorizing it to move him or her among placements (including placement in foster care with total strangers, placement in a group home, or placement in a state institution).⁵

These interests are all at stake when the State petitions to terminate the rights of children's natural parents and place them in the care of the State, a new family, a group foster home, or an institutional setting. A termination order also dictates children's contact with siblings. RCW 13.34.200(3).⁶ The court's decision could permanently uproot children from the schools and places of worship they attend and destroy their other community ties and friendships. The State is fighting for the right to take full control over the child—including authority to move the child among varying residential and institutional placements.

These stakes for children at least equal those of their parents, and extend beyond their parents with regard to physical liberty interests. See In re Welfare of Myricks, 85 Wn.2d 252, 533

⁵ See Erik Pitchal, Children's Constitutional Right to Counsel in Dependency Cases, 15 Temp. Pol. & Civ. Rts L. Rev. 663 (2005-2006) (hereinafter Pitchal, Children's Constitutional Right) (children may be moved "at the whim of state officials" and based on fiscal, systemic and administrative interests that compete with what is best for each particular child).

⁶ At the time of trial, M.S.R. and T.S.R. had two other siblings and expected a third. CP 435-36 (FF 1.73); 3RP 295.

P.2d 841 (1975); Luscier, 84 Wn.2d at 138-39.⁷ Due to the serious and fundamental nature of these interests at stake, children have an exceedingly strong interest in the accuracy of termination proceedings. Santosky, 455 U.S. at 758 ("loss threatened by [this] particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder").

- b. The large risk of error inherent in a full evidentiary trial, where two adversarial parties are represented by counsel but the children remain without legal representation and with little right to participate, would be substantially mitigated by appointment of counsel for children.

Not only are the stakes high for children, but the current procedures create an elevated risk of error. Termination proceedings carry all the hallmarks of a trial: filing of petition, discovery, motions practice, opening and closing arguments, presentation of evidence and testimony, cross-examination, and access to appellate channels. The trial is held in a courtroom, presided over by a juvenile court judge. The full resources of the State protect its interests; and the CASA is often also represented.⁸

⁷ Children's interests here, moreover, are far greater than in E.S., where the Court found no private interest affected by an initial truancy hearing. Slip. Op. at 9-13.

⁸ Because here the CASA's view of the children's "best interests" supported termination, the State had an additional represented party advocating its position. See also 1A-RP 31 (counsel for State cross-examined witness on

Children in this State, however, are entitled to legal counsel in only limited cases and on a subjective, indeterminate basis. Only children 12 and older must be notified of the right to request counsel and asked whether "he or she wishes to have counsel." RCW 13.34.100(6).⁹ For these children, the statute merely requires that, in an off-the-record conversation with no parameters, the child be informed of his or her right to request counsel and asked whether he or she would like counsel. No notice is provided to or inquiry made of children under the age of 12, like M.S.R. and T.S.R. Id.¹⁰ This provides virtually no access to counsel for

behalf of CASA); cf. Univ. of Wash. School of Social Work & Wash. State Center for Court Research, Wash. State Court Appointed Special Advocate Program Eval. Report 48-49 (Jan. 2010) (in five evaluated counties, CASA agrees with social worker's permanency plan in 89 percent of cases) (excerpts attached as Appendix B). A CASA is "deemed to be guardian ad litem" in termination proceedings; this brief maintains the term CASA throughout. RCW 13.34.030(9).

⁹ These current provisions became effective after Ms. Luak's trial and provide a greater right to notice for children over 12 than the prior version. The text of both versions of RCW 13.34.100(6) is included at Appendix C.

¹⁰ The court has discretion to appoint counsel to children age 12 or older but the statute sets forth no procedures or substantive considerations. See RCW 13.34.100(6). For children under twelve years of age, the statute does not provide a right to counsel. The court alone has discretion to appoint counsel for these younger children only if it or the CASA "determines [through unspecified criteria that need not be recorded] that the child needs to be independently represented." RCW 13.34.100(6)(f); see also Juvenile Court Rule 9.2(c)(1) (court can sua sponte or on request by party appoint counsel for child if child has no guardian ad litem and cannot afford attorney). For these children, no mechanism ensures that the court or CASA consider whether counsel should be appointed. Also, no provision ensures that parents are notified of the right to request counsel for the child or given an opportunity to do so.

children under 12 years old. The vast majority of children are left unrepresented while their fundamental rights are litigated.¹¹

This insufficiency persists even though children subject to termination proceedings, as a generalized group, are even more vulnerable than their parents, who have a constitutional and statutory right to counsel. In determining *parents* have a right to counsel in dependency proceedings, this Court reasoned *their* vulnerabilities in part compelled the result:

[t]he full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.

Myricks, 85 Wn.2d at 254; accord Santosky, 455 U.S. at 763.

Children are equally, if not more, vulnerable.

Absent counsel for children, the risk of erroneous determination of parental rights is multitudinous. First, the standards are amorphous. The termination statute requires the

¹¹ See LaShanda Taylor, A Lawyer for Every Child: Client-Directed Representation in Dependency Cases, 47 Fam. Ct. Rev. 605, 613 (2009) (hereinafter Taylor, 47 Fam. Ct. Rev.) (median age of children entering foster care is 7.5 years old).

juvenile court to determine whether termination is in the child's "best interests," a subjective determination, and to apply other standards which "allow wide room for judicial discretion and thus for subjective determinations." Kenny A., 356 F. Supp. 2d at 1361; RCW 13.34.180(1)(d)-(f); RCW 13.34.190(1)(a), (b). Moreover, the consequences of an erroneous determination under these amorphous criteria are grave: children are either returned to an abusive or neglectful parent or severed permanently from a familial relationship that bears none of those characteristics.¹² Third, children without legal representation are less likely to achieve permanency than children who are represented.¹³ "Given the weight of the private interests at stake, the societal cost of even occasional error is sizable." Santosky, 455 U.S. at 764.

The universal provision of legal representation for children would substantially mitigate these risks of error. See Laws of 2010, ch. 180, § 1 (legislative findings recognizing critical representation provided by attorneys for children in termination proceedings). Legal counsel would advocate for the child's interests through

¹² Taylor, 47 Fam. Ct. Rev. at 608-09.

¹³ See, e.g., Andrew E. Zinn & Jack Slowriver, Expediting Permanency: Legal Representation for Foster Children in Palm Beach County 14-15 (2008) (examining dependencies and terminations), available at www.chapinhall.org/research/report/expediting-permanency.

procedural mechanisms and substantive arguments. On the substantive side, counsel would ensure a child's expressed interest in reunification or termination is advocated for in opening and closing argument, by developing a theory and strategy of the case tailored to the child's stated interests, by presenting evidence and witnesses, through cross-examination, and by helping to consider advice, information and opinions from others. See Pitchal, Children's Constitutional Right at 665.¹⁴

For example, with access to the children and confidentiality protections, M.S.R. and T.S.R.'s counsel could have gained insight into assumptions made about them by their foster mother and visitation supervisor.¹⁵ Using the arsenal of information unlocked only through confidentiality protections, counsel for M.S.R. and T.S.R. could have examined witnesses regarding their mother's alleged anger management deficiency and presented evidence and testimony showing the alleged deficiency did not affect her ability to safely and appropriately parent her children. Counsel also could

¹⁴ The Rules of Professional Conduct provide direction to attorneys representing preverbal children and ensure such representation remains effective. See, e.g., RPC 1.2 & comment 4; RPC 1.14 & comment 1.

¹⁵ E.g., 4RP 528 (foster mother's assumption that children "attempt to say what they think [their mother] would like to hear" when they tell her "they do love her very, very much"); 4RP 556 (foster mother's assumption that children feel "we make do where we're at. But, we like this place [foster home] best."); 2A-RP 277-78 (visit supervisor's assumption T.S.R. wanted visit to end and why).

have zealously cross-examined the CASA regarding the conflict between her best interests opinion and the children's stated interests.

In terms of procedural mechanisms, children's counsel could bring pretrial motions (such as to exclude evidence or witnesses), object to or argue for the admission of evidence at trial, elicit helpful evidence through discovery, contest the legal basis for the termination petition, determine whether the child should be present at trial and ensure his or her presence and testimony if subpoenaed by another party, explain to the child his or her rights and the legal proceedings, negotiate alternatives to court-ordered termination and advise the child of such alternatives, appeal the trial court's decision (or participate in an appeal by the State or a parent), and move to close proceedings as necessary to protect privacy¹⁶.

With counsel for children the risk of procedural irregularity would be low and the substantive result reached—that is, whether parental rights are terminated and, if so, what support obligations persist, the status of the child's sibling relationships, and the extent to which the State controls the child's travel, medical care, and

¹⁶ See RCW 13.34.115(2).

placement for adoption—would be based on a full presentation of the issues and interests involved.

Significantly, other procedural safeguards do not mitigate these risks. CASAs are not legally trained and work for the court. They are charged to investigate and collect information and report it to the court, but not to advocate for the child's wishes or monitor the regularity of the proceeding. RCW 13.34.105(1); see Veazey v. Veazey, 560 P.2d 382, 391 (Alaska 1977). Moreover, only legal counsel can provide attorney-client confidentiality and therefore gain the absolute trust of the child. Finally, because children's interests diverge and are unique from the State and their parents, their interests cannot be adequately represented by either. E.g., In re T.M.H., 613 P.2d 468, 470, 1980 OK 92 (Okla. 1980) ("We are convinced that in *all* termination proceedings there are potential conflicts between the interests of the children and those of both the state and the parents" (emphasis added)); Taylor, 47 Fam. Ct. Rev. at 613-14.¹⁷

¹⁷ Cf. Pitchal, Children's Constitutional Right at 689 (describing State's competing interests); Santos, 104 Wn.2d at 148-49 (because State may have incentive to seek quick but not necessarily accurate paternity determination, it cannot satisfy children's participation and protection of their liberty interests).

- c. The governmental and public interest also weighs in favor of legal representation for children, and any financial and administrative burden fails to outweigh it.

The government and public interest overall do not support use of the current procedure under the third Mathews factor. See Mathews, 424 U.S. at 335, 347. The overriding governmental interest here is as *parens patriae*, to ensure the child's safety and well-being is protected. E.g., Santosky, 455 U.S. at 766-67 & n.17 (also recognizing *parens patriae* interest not fully vested prior to termination); Kenny A., 356 F. Supp. 2d at 1361. The paramount public interest is in the accuracy of the court's fact-finding and conclusions of law. See Senear v. Daily Journal Am., 27 Wn. App. 454, 463, 618 P.2d 536 (1980); Taylor, 47 Fam. Ct. Rev. at 608; see also Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27-28, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); Pitchal, Children's Constitutional Right at 689. As the analysis above demonstrates, providing legal counsel furthers these goals of child safety and well-being as well as accurate decision making, which are at risk under the current procedures.

The government and public arguably also have an interest in avoiding the added administrative and financial costs associated with providing a universal right to counsel, assuming there is a net

cost. But the State cannot rely on financial cost alone. Mathews, 424 U.S. at 348; Lassiter, 452 U.S. at 28; Braam, 150 Wn.2d at 710 (“Lack of funds does not excuse a violation of the constitution.”).

Studies indicate, moreover, that the provision of counsel for children hastens permanency and thus reduces the long-term financial burden on the State.¹⁸ That at least seventeen other states provide children a universal right to an attorney that represents their interests in termination proceedings, and several other states are more protective than Washington, demonstrates any financial and administrative burden is not too great to bear.¹⁹

Under the Mathews balancing test, the enormity of the children’s interests at stake in termination proceedings and the high risk of an erroneous determination far outweigh any slight burden to

¹⁸ E.g., Zinn & Slowriver, Expediting Permanency at 22-23; Ching-Tung Wang & John Holton, Ph.D., Total Estimated Cost of Child Abuse and Neglect in the U.S. (2007), available at http://member.preventchildabuse.org/site/DocServer/cost_analysis.pdf?docID=144.

¹⁹ Conn. Gen. Stat. Ann. § 46b-129a(2); Ga. Code Ann. §§ 15-11-6(b), 15-11-98(a); Iowa Code Ann. § 232.89(2); Ky. Rev. Stat. Ann. § 620.100(1)(a); La. Children’s Code art. 607; Md. Code Ann., Cts. & Jud. Proc. § 3-813(d)(1); Mass. Gen. Laws Ann. ch. 119, § 29; N.J. Stat. Ann. §§ 9:6-8.21(d), 9:6-8.23; N.Y. Fam. Ct. Act § 249; Ohio Rev. Code Ann. § 2151.352; Okla. Stat. tit. 10A, § 1-4-306(A)(5); 42 Pa. Cons. Stat. Ann. § 6311, 23 Pa. Cons. Stat. Ann. § 2313(a); Tenn. Code Ann. § 37-1-149, Tenn. Rules of Juv. Proc., Rule 2; Tex. Fam. Code Ann. §§ 107.001, 107.012; 33 Vt. Stat. Ann. § 5112; W. Va. Code Ann. § 49-6-2(a); Representing Children Worldwide, U.S. Summary Chart, www.law.yale.edu/rcw/rcw/summary.htm (last visited July 5, 2011) (most jurisdictions more protective than Washington); First Star & Children’s Advocacy Inst., A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children (2d. ed. 2009) (same), available at www.firststar.org/documents/Final_RTC_2nd_Edition.pdf.

the State. Children therefore must be provided legal counsel. This result comports with similar holdings under the federal and other state constitutions. After conducting analysis under Mathews, a New York appeals court held the federal and state constitutions mandate that children be provided effective legal representation in proceedings to determine their custody and control. In re Jamie TT 191 A.D.2d 132, 599 N.Y.S.2d 892 (App. Div. 1993). Courts reviewing practices in Georgia and Oklahoma have similarly held legal counsel must be provided for children in termination proceedings. Kenny A., 356 F. Supp. 2d 1353 (under Georgia Constitution); In re Guardianship of S.A.W., 856 P.2d 286, 289, 1993 OK 95 (1993) (constitutional right to counsel in all termination proceedings building on prior decision without clearly delineating whether federal or state). A three-judge federal court finding the fundamental right to family integrity adheres to children held the Fourteenth Amendment requires counsel for children in termination of parental rights proceedings. Roe, 417 F. Supp. at 780.²⁰

²⁰ The provision of legal counsel for children in termination proceedings also comports with international standards and those set by the Children's Representation Workgroup. United Nations Convention on the Rights of the Child, art. 9 & 12, Nov. 20, 1989, 1577 U.N.T.S. 3; Organisation of African Unity, African Charter on Rights and Welfare of the Child, art. 4 & 19, adopted 1990, OAU Doc. CAB/LEG/24.9/49; Meaningful Representation at 5.

2. ARTICLE I, SECTION 3 IS EVEN MORE PROTECTIVE OF CHILDREN'S RIGHT TO COUNSEL THAN THE FOURTEENTH AMENDMENT.

- a. This Court can reach the issue under both the federal and state constitutions.

No federal precedent examining children's fundamental liberty interests has denied that procedural due process requires the appointment of legal representation for children in termination of parental rights proceedings. Consequently, this Court should decide the issue under both the federal and state constitutions.

Though the State may argue Lassiter v. Dep't of Social Servs. controls, that case is not on point. In Lassiter, the U.S. Supreme Court held that failure to appoint counsel for a parent prior to terminating her parental rights did not per se violate federal due process because a parent's physical liberty is not at stake and the "complexity of the proceeding and the incapacity of the uncounseled" parent is not always great enough to make the risk of erroneous termination "insupportably high." 452 U.S. at 26, 31-32.

Unlike the parents considered in Lassiter, children *always* bear the hallmarks of vulnerability that most need protection, including lack of education, experience with complex legal settings, resources, and an appreciation or understanding for the process

and consequences.²¹ Further supporting the distinction, children have physical liberty interests at stake that their parents do not. See Section D.1.a, supra. And to the extent Lassiter concerned other fundamental liberty interests, it was in relation to a *parent's* right. Children's rights differ from, and are arguably greater than, their parents'. For example, the entity or individual with custody and control over children—for their entire age of minority—is at stake.²²

Where no federal decision is on point, this Court looks to the state constitution to determine if it provides for the requested relief. City of Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988) (citing State v. Coe, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)). The reasons are twofold. First, this Court has an

²¹ Compare DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 146, 960 P.2d 919 (1998) (minors "not similarly situated to adults because . . . they generally lack the experience, judgment, knowledge and resources to effectively assert their rights"); Pitchal, *Children's Constitutional Right* at 676-77, 683-84 (all children are ill-equipped to appear pro se and burdened by vulnerabilities parents only sometimes bear) with Lassiter, 452 U.S. at 30-31 (reasoning *parental* vulnerabilities are not always present to require per se right to counsel).

²² The Lassiter court had no occasion to consider the issue raised here because the children had been appointed counsel. 452 U.S. at 28. Further proving that independent state analysis is not foreclosed by Lassiter, this Court has not been constrained by the parameters of federal procedural due process rights set forth in Lassiter. In re Welfare of Hall, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983); In re Dependency of Grove, 127 Wn.2d 221, 237, 897 P.2d 1262 (1995) (extending right broader than Lassiter, constitutional right to legal representation limited to cases where physical liberty or "a fundamental liberty interest, similar to the parent-child relationship," is threatened (emphasis added)).

obligation to interpret and apply the state constitution. Alderwood Assocs. v. Wash. Env't Council, 96 Wn.2d 230, 237, 635 P.2d 108 (1981). Second, absent an on point federal decision, conflict, federalism, and lack of uniformity or cooperation is not at issue. Coe, 101 Wn.2d at 374; Jennifer Friesen, 1 State Constitutional Law: Litigating Individual Rights, Claims and Defenses § 1.04[2] (4th ed. 2006).

Thus, the analysis set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), need not be undertaken because no conflicting federal decision applies the constitutional provision raised (Article I, Section 3) to the identical individual right at issue (children's right to counsel in termination proceedings).^{23 24}

b. Gunwall compels an independent state constitutional analysis.

Even if a Gunwall analysis is necessary, an evaluation of neutral criteria compels an independent state constitutional analysis

²³ See City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009); cf. State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) (federal decision must conflict on the identical contested right, thus declining to follow earlier interpretation of state due process clause with respect to different contested rights). But see Andersen v. King County, 158 Wn.2d 1, 43 n.18; 138 P.3d 963 (2006).

²⁴ Because of the context-specific nature of constitutional rights, criminal cases holding Article 1, Section 3 coextensive with the Fourteenth Amendment are inapposite to the issue of children's due process right to counsel in termination proceedings. See Mathews, 424 U.S. at 335, 349; Hall, 99 Wn.2d at 846-47 (distinguishing child deprivation hearings from criminal matters).

here and proves Article I, Section 3 more protective than its federal counterpart. Cf. Gunwall, 106 Wn.2d at 59 n.3 (identifying parent's due process right to counsel during dependency proceedings, Myricks, 85 Wn.2d 252, as a circumstance where the state constitution provides greater protection than its federal counterpart). Gunwall sets forth six nonexclusive factors to guide the Court in determining whether a state constitutional protection affords greater rights than a similar federal provision: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) preexisting state law, (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern. 106 Wn.2d at 61-62.

With regard to factors one and two, the textual language of the federal due process clause and Article 1, Section 3 are not significantly different.²⁵ This does not end the inquiry, however. Even where state and federal constitutional provisions are identical, the intent of the framers of each constitution may have been

²⁵ Article 1, Section 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3. The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The fifth Gunwall factor accounts for the minor difference.

different or another intent may be found in a different provision of the state constitution. Gunwall, 109 Wn.2d at 61; Justice Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (interpret identically worded provisions independently absent a strong "historical justification for assuming the framers intended an identical meaning").²⁶ For example, in State v. Bartholomew, this Court held that despite textual similarity Article I, Section 3 is broader than the Fourteenth Amendment. 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (interpretation of Fourteenth Amendment does not control interpretation of Art. I, § 3). Thus the provisions of the capital punishment statute at issue in Bartholomew violated due process under the state constitution even if the same result is not compelled under the Fourteenth Amendment. Id.

The third Gunwall factor, state constitutional history, counsels for an independent state constitutional analysis revealing broader protections. Article I, Section 3 requires independent interpretation unless historical evidence shows otherwise. Id. at 514-16. The framers of the Washington constitution modeled

²⁶ Accord Ortiz, 119 Wn.2d at 319 (Johnson, J. dissenting).

Article I, Section 3 after the Oregon and Indiana constitutions rather than the federal constitution. Justice Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 3 (2002) (hereinafter Utter & Spitzer). Like their Indiana and Oregon counterparts, the framers “originally intended [the provisions of the Declaration of Rights] as the primary devices to protect individual rights.” Id. Thus the federal Bill of Rights, including the Fifth Amendment, “was intended as a secondary layer of protection” that applies only against the federal government. Utter, 7 U. Puget Sound L. Rev. at 636.²⁷

Preexisting state law, the fourth Gunwall factor, also points toward an independent state constitutional analysis and broader protection of children’s fundamental liberty interests. In Grove, this Court reached more broadly than the U.S. Supreme Court in holding a constitutional right to legal representation is presumed where physical liberty is threatened or “a fundamental liberty interest, similar to the parent-child relationship, is at risk.” Grove,

²⁷ Cf. Utter & Spitzer at 2-3 (“It would be illogical to assume that a state constitution written before the U.S. Constitution, or a declaration of rights copied from such a state constitution when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts’ interpretations of the federal Constitution.”). Moreover, unlike the federal constitution, Washington’s constitution reflects the political ideals of the Progressive Era and their influence on western state politics of the period. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 67-68 (2001/2002).

127 Wn.2d at 237. This Court has also held that “the right to counsel in child deprivation proceedings [except to the limited extent it is guaranteed by Lassiter] . . . finds its basis solely in state law.” Hall, 99 Wn.2d at 846; see Luscier, 84 Wn.2d at 139.

Washington also places children as the paramount concern in termination decisions. E.g., RCW 13.34.020; In re Welfare of A.B., 168 Wn.2d 908, 911, 232 P.3d 1104 (2010) (termination cannot result if not in “best interests” of child).²⁸

The fifth Gunwall factor, differences in structure between the state and federal constitutions, supports an independent analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power. E.S., Slip. Op. at 19; State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); Gunwall, 106 Wn.2d at 66.²⁹

Finally, the sixth factor weighs heavily in favor of independent interpretation because family relations and minors are inherently matters of state or local concern. State v. Smith, 117

²⁸ The framers of the Washington constitution further recognized the state must be responsible for the care of children. Const. art. IX, § 1 (“paramount duty of the state to make ample provision for the education of all children residing within its borders”); Const. art. XIII, § 1 (institutions for “youth who are blind or deaf or otherwise disabled . . . and such other institutions as the public good may require, shall be fostered and supported by the state”).

²⁹ See also Const. art. I, § 1 (government powers “are established to protect and maintain individual rights”); Hugh Spitzer, New Life for the “Criteria Tests.” 37 Rutgers L.J. 1169, 1192 (2006).

Wn.2d 263, 286-87, 814 P.2d 652 (1991) (Utter, J. concurring); Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).³⁰

In sum, the Gunwall criteria compel an independent state constitutional analysis and dictate that Article I, Section 3 is more protective than the Fourteenth Amendment. For these reasons, and those set forth in Section D.1, state due process requires all children in termination of parental rights proceedings have counsel.

3. THE ISSUE IS PROPERLY BEFORE THE COURT FOR REVIEW ON THE MERITS.

This constitutional issue is properly before this Court.

a. The juvenile court's failure to appoint counsel is a manifest constitutional error.

Ms. Luak can raise the error for the first time on appeal under RAP 2.5(a)(3) because it is (1) truly of constitutional dimension and (2) manifest. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).³¹

The error before this Court is clearly of constitutional dimension. The issue is the children's constitutional right to

³⁰ The U.S. Supreme Court has also instructed that states may create independent and broader procedures to protect due process rights where family matters are concerned. Lassiter, 452 U.S. at 33; Santosky, 455 U.S. at 769-70.

³¹ This Court can also review issues affecting fundamental constitutional rights "as justice may require." RAP 12.2; Santos, 104 Wn.2d at 145-46.

counsel, the denial of which (if the Court finds correct) is a violation of their procedural due process rights under Article I, Section 3 and the Fourteenth Amendment.

The error was manifest because the consequences were foreseeable. Id. at 99-100. The children were deprived any opportunity to voice their expressed interests. Other than the CASA's single statement that the children did not want to lose their mother, the CASA—through her own attorney—advocated for her opinion of the children's best interests. See 7A-RP 988. The trial court knew the CASA's best interests' opinion opposed the children's wishes. Compare 3A-RP 380 with 7A-RP 988. The lack of counsel had further identifiable effects enumerated above. Section D.1.b, supra (setting forth procedural mechanisms and substantive arguments through which legal counsel can advance client's interest). Accordingly, denial of representation for the children had practical and identifiable consequences of which the trial court was aware.

Because this error is structural, it is not subject to harmless error review. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Structural error "resists harmless error review completely because it taints the entire proceeding."

State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Where counsel is constitutionally required but not provided, the entire framework of the trial is tainted by the denial of counsel and reversal is required. State v. Heddrick, 166 Wn.2d 898, 910-11, 215 P.3d 201 (2009); United States v. Cronin, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); Neder, 527 U.S. at 8 (denial of counsel is structural error because "myriad aspects of representation" bear directly on framework).³²

b. Ms. Luak preserved the issue by raising it below.

Alternatively, Ms. Luak preserved the issue by advocating below for her children to be heard and relying on authority invoking the children's right to counsel. Ms. Luak specified she was not necessarily asking for the children to testify but that they be allowed to "participate in . . . [the] pretty momentous decision-making process involving their lives." 1RP 6; see 7A-RP 991 ("it would be pretty hard on the boys going forward and looking back . . . if they felt like they didn't have a voice").

³² Even if subject to harmless error review, this manifest error was not harmless. The court terminated parental rights without considering the basis for the children's desire to be reunited with their mother and without protecting those interests in the termination order. Given an attorney's arsenal of tools and training as well as the known conflict between the CASA's best interests opinion and the children's wishes, counsel's presence would have been palpable.

Ms. Luak argued the children were competent to participate in the proceedings and children younger than her sons have the capacity to direct counsel and offer opinions in legal proceedings. CP 374-77. She asserted that her "children's stated interests should be affirmatively *represented to* and heard by courts." CP 376 (emphasis added); see CP 378-79 (arguing children would be damaged if not given a voice in and perception of control over proceedings). Ms. Luak gave the court the opportunity to resolve the issue by appointing counsel for the children. See RCW 13.34.100(6); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (preservation of error rule affords trial court opportunity to resolve).

4. ALTERNATIVELY, THE TERMINATION ORDER SHOULD BE REVERSED BECAUSE THE STATE FAILED TO SATISFY ITS BURDEN ON TWO ELEMENTS

In briefing before the Court of Appeals, Ms. Luak argued the termination order should be reversed on the independent grounds that (1) the State failed to provide all reasonably available, necessary services by unjustifiably delaying, insufficiently explaining, and inadequately offering a referral to cognitive behavioral therapy and (2) because the State failed to provide all

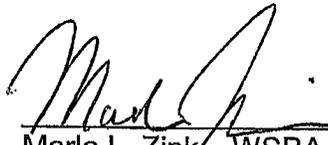
reasonably available, necessary services it could not rely on the presumption under RCW 13.34.180(1)(e). Ms. Luak rests on her briefing before the Court of Appeals on these issues.

E. CONCLUSION

The state and federal constitutions compel all children be appointed legal counsel in termination of parental rights proceedings. Because M.S.R. and T.S.R. were not represented by counsel, the order terminating Nyakat Luak's parental rights must be reversed and remanded for a new trial. Alternatively, the termination order should be reversed on the additional grounds set forth in Ms. Luak's Opening Brief in the Court of Appeals.

DATED this 7th day of July, 2011.

Respectfully submitted,



Marla L. Zink - WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDICES

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APPENDIX A



WASHINGTON
COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System

*Standards of Practice, Voluntary Training, and Caseload Limits in
Response to HB 2735*

Statewide Children's Representation Workgroup

Appointed by the Washington Supreme Court Commission on Children in Foster Care

Statewide Children's Representation Workgroup

Members:

Prof. Lisa Kelly, University of Washington School of Law (UWLS), Chair

Zematra Bacon, Youth Representative
James Bamberger, Office of Civil Legal Services (OCLA)
Patrick Dowd, Office of the Family and Children's Ombudsman
Michael Griesedieck, Assistant Attorney General (AAG)*
Steven Hassett, Assistant Attorney General (AAG)
Christie Hedman, Washington Defender Association (WDA)
Jana Heyd, Society for Counsel Representing Accused Person (SCRAP)
Lori Irwin, Court Appointed Special Advocates (CASA)*
Timothy Jaasko-Fisher, Court Improvement Training Academy (CITA)
Jacqueline Jeske, King County Superior Court Commissioner
Anne Lee, TeamChild
Linda Lillevik, Carey & Lillevik
Jill Malat, formerly with Washington Defender Association (WDA)*
Joanne Moore, Statewide Office of Public Defense (OPD)
Heidi Nagel, Court Appointed Special Advocates (CASA)
Erin Shea McCann, Columbia Legal Services (CLS)*
Sharon Paradis, Benton-Franklin County Juvenile Court Administrator
Hon. Michael Trickey, King County Superior Court
Casey Trupin, Columbia Legal Services (CLS)

Ex-Officio

Janet Skreen, Administrative Office of the Courts

Support Staff:

Carrie Gaasland, UWLS
Ruvyn Munden, CLS
Joseph Timmons, Center for Children & Youth Justice (CCYJ)

*Each agency had one appointed member and was allowed to name a person to serve as an alternate in the event that its appointed representative was unavailable to attend. Michael Griesedieck served as alternate for Steven Hassett in representing the Attorney General's Office. Lori Irwin served as alternate for Heidi Nagel of the King County Dependency CASA. Jill Malat served as alternate for Christie Hedman of WDA. Erin Shea McCann served as alternate for Casey Trupin of Columbia Legal Services.

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Child Representation Practice Standards

PREFACE

All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues. These Child Representation Standards are meant to apply when a lawyer is appointed for a child in any legal action based on RCW 13.34 and 13.36 (guardianship).

These standards are not meant to supplant the professional judgment of an attorney or the requirements set forth in the Rules of Professional Conduct.

Commentary

RCW 13.36 was recently added in the 2010 session to replace Washington State's former dependency guardianship system and allow for a dependency action to be dismissed after the successful appointment of a guardian through a 13.36 petition. The Workgroup wanted to be clear that these standards should pertain to an attorney's activities representing a child in the guardianship proceedings that resulted from a dependency proceeding as well as within those actions covered by RCW 13.34.

1. General Duties

1.1 Role of Child's Attorney

The child's trust and confidence in the decision making process is often a function of the responsiveness of that process. The child's attorney may be the first contact the child has with the process; therefore the attorney has a critical role in developing and guarding the child's trust, confidence and participation in the process including basing decision making within the attorney-client relationship on respect for the child's capacity to make informed decisions. A lawyer who provides legal services for a child owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client:

- (1) The child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, developmental level, level of education, cultural context, disability if any, and degree of language acquisition.
- (2) The child's attorney should determine whether the child's capacity to make adequately considered decisions in connection with a representation is diminished pursuant to the Rules of Professional Conduct (RPC 1.14), with respect to each issue in which the child is called upon to direct the representation. For the purposes of child representation in dependency and termination of parental rights proceedings, a determination of "diminished capacity" should never be based solely on the child's chronological age.
- (3) The child's attorney should elicit the child's preferences, provide counsel and advise the child, in a developmentally appropriate manner.
- (4) As counselor and advisor, the attorney should provide the child with an informed understanding of the child's legal rights and obligations and explain their practical implications. The attorney should explain all aspects of the case and provide comprehensive counsel and advice on the advantages and disadvantages of different case options to assist the child in identifying case goals and making informed decisions. During these discussions, the attorney should address the child's legal rights and interests as well as issues regarding the child's safety, health and welfare. At the same time, the attorney should be

APPENDIX B

Washington State Court Appointed Special Advocate Program Evaluation Report

January 2010

Kathy Brennan
Dee Wilson
Tom George
Oma McLaughlin

University of Washington School of Social Work and
Washington State Center for Court Research

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Executive Summary

A Court Appointed Special Advocate (CASA) is a volunteer appointed by the court to advocate for the best interests of children, most often abused and neglected children in juvenile court dependency cases. CASAs investigate case information, recommend a course of action to the court, facilitate the resolution of problems and monitor progress towards establishing permanency for the child. CASAs provide juvenile court judges and commissioners with a source of information other than the parties involved in the dependency action and with an independent perspective regarding the best interests of abused and neglected children with open dependencies in the juvenile court.

CASA Assignment

CASA programs in Washington began in 1977 and now serve children in 35 out of 39 counties. CASAs typically are assigned no more than three children or sibling groups at a time. However, because of resource limitations not every child involved in a dependency action is assigned a CASA. There are various models of child representation throughout the state. Some CASA programs employ staff to provide supervision to CASA volunteers while other CASA programs also use paid staff to carry a caseload of legally dependent children. The youngest and most vulnerable children entering care are commonly assigned a CASA. Teens in larger counties are often represented by an attorney, not by a CASA. Some counties contract with Guardians ad Litem who work independently and may carry caseloads of up to 100 children.

Evaluating the Impact of CASA

The Administrative Offices of the Courts, Center for Court Research, in partnership with evaluators at the University of Washington School of Social Work, conducted an evaluation of CASA case processes and outcomes. The purpose of the outcome study was to assess children's permanency outcomes and placement stability associated with different types of representation for children involved in dependency proceedings. The process evaluation examined a variety of CASA investigative and monitoring activities documented in CASA reports to juvenile courts in Washington State.

The outcome study examined case outcomes for a cohort of 3,013 dependent children aged 0-12 at time of the dependency filing in 2004. Case outcomes were followed through August 31, 2008. Children in the sample were categorized according to the type of child representation they received: CASA, CASA staff, Contract GAL, Mixed Representation (when a case transferred from CASA to CASA staff or vice versa), or No CASA/GAL. Children assigned attorneys were categorized as having No CASA/GAL. Teens were not included in the analysis because of the disproportionate number of teens with no CASA or GAL representation.

Additionally, 215 cases were selected from the 2004 sample cohort and reviewed for CASA representation activities throughout the dependency process. The case record review included cases from the five largest county programs in Washington and captured information from CASA reports such as recommendations regarding services to children/parents, parental visitation and permanent placement for the child.

Quantitative Study Findings Regarding Child Representation

Sample Characteristics

Of the sample of 3,013 children ages 0-12 entering the dependency system in 2004, CASAs represented 47.4% of the children, including 444 infants (0-12 months), 487 children ages 1-5, and 497 children ages 6-12. Staff GALs represented 18% of children, and Contract GALs, Mixed Representation and No Representation each comprised about 11% of the cases. The No Representation group was relatively small for infants and other pre-school children. Only about 15% of infants and other pre-school children lacked CASA or GAL representation; however, approximately one-third of school age children had no CASA or GAL representation.

Case Outcomes

The study period was from the date the child's dependency petition was filed to either case resolution or August 31, 2008 if the case was still open. After a period of up to 44-56 months in care (depending upon the petition date in 2004), 43% of children had been reunified, 33% had been adopted, 6% had entered into guardianships, and 18% were still in care. Children in these

cases had typically experienced between two and three out-of-home placements, except for those still in care in August 2008; these children had experienced an average of 5.2 placements. The median length of stay to reunification was 302 days or 10 months and was 819 days or 27 months to adoption.

Case outcomes vary by the age of the child: The table below illustrates permanency outcomes by age of the child at entry into care. Infants were far less likely to experience reunification with birth parents and more likely to be adopted as compared to older age groups of children. Guardianships were established for only 2% of infants. Older children were more likely to be reunified, but if 6 to 12-year-olds were not reunified, this age group was more likely to remain in care as compared to younger children. Guardianship was employed as a permanency option for children ages 6 to 12 almost as often as adoption.

Of concern from a practice and policy standpoint is the number of children remaining in open dependency cases in August 2008. Among 6 to 12-year-olds, 28% were still in care, and these children had experienced out-of-home stays of 44 to 56 months.

Table 1: Permanency outcome trends by age at entry into care

	Among infants		Among 6 to 12-year-olds
Rate of reunification	32%	increases to	50%
Rate of adoption	56%	decreases to	12%
Rate of guardianship	2%	increases to	10%
Rate of still-open	11%	increases to	28%

Case outcomes vary by race and ethnicity: African American and Native American children were less often reunified and more often placed in guardianships as compared to Caucasian and Latino children. Native American and Latino children were less often adopted than African American or Caucasian children. Native American children were in still-open cases at nearly twice the rate of Caucasian children. African American children and Latino children also had elevated rates of still-open cases as compared to Caucasian children.

Local Influences on Case Outcomes: CASA programs have developed and operate within local child welfare and judicial frameworks across the state. Juvenile courts are responsible for permanency decisions in dependency cases, and their caseloads, judicial rotations and court practices vary considerably at the county level. Practice variations across Children's Administration's six regions almost certainly also influence child outcomes. Finally, regional differences, such as rates of poverty and urban density may influence the caseload mix and case outcomes of children in dependency cases. Because these intervening variables could not be accounted for in this analysis, regional and county level findings from this study are perhaps most instructive to CASA programs and other stakeholders. These data provide a baseline for examining outcomes at the local level. See Appendices B-E.

Case Outcomes by Age and Type of Representation

The value of CASA or contract GAL representation was more evident for infants and children ages 1-5 than for school age children. School-age children represented by a CASA or GAL were as likely or more likely to be in the still-open group of unresolved dependencies as school-age children with no representation. Infants and 1 to 5-year-old children with either CASA or contract GAL representation were significantly less likely than children with no representation to be in open cases.

Infants with CASA representation had a modestly elevated adoption rate compared to infants represented by CASA staff or contract GALs; but 1 to 5-year-olds represented by CASAs had slightly lower rates of adoption than children of the same age represented by CASA staff or contract GALs.

Adopted children represented by CASAs had much shorter lengths of stay (LOS) in out-of-home care (by 150 days) than contract GALs, a large difference suggesting that CASAs actively seek to reduce the time required to complete adoptions.

CASA staff had higher rates of reunification and lower rates of open cases for all three age groups. These permanency outcomes suggest the possibility that CASA staff have a more balanced approach to permanent planning and give greater priority to the needs of school-age children for permanent families than either CASAs or contract GALs.

The effects of type of representation on permanency outcomes were highly varied from region to region, an indication of the differences among CASA programs and of the influence of varying decision-making cultures in judicial systems and child welfare offices around the state.

Children without representation had shorter LOS (by 70 days or more) to reunification than children with CASA staff, CASA or contract GAL representation. It is possible that children assessed as likely to quickly return home were less likely to have representation assigned.

Type of representation had no effect on placement stability or instability, though longer lengths of stay were associated with more placement moves. Children in open cases had been in an average of 5.2 placements, about double the average for adopted or reunified children.

Case Record Review Findings

A random sample of CASA-assigned cases, stratified by three child age groupings, was drawn from dependency cases filed in 2004 in Clark, King, Pierce, Snohomish and Spokane Counties. The cases reviewed represented over one-fifth of the CASA-assigned cases in these counties in 2004 and about one-eighth of all 2004 dependencies filed in these counties for children ages birth to 12 years. This review found much higher rates of CASA stability on cases as compared to assigned Children's Administration (CA) social workers. Two out of three cases had just one CASA over the life of the dependency, whereas in King, Pierce and Snohomish Counties, two-thirds of cases had three or more social workers. CASA investigation and monitoring activities on behalf of children were evident in the range and number of persons contacted by CASAs to prepare their reports. These included contact with the CA social worker, the child, her/his parents, foster parents, siblings and relatives as well as service providers involved in the case.

The focus of the CASA reports tended to reflect local jurisdictional and CA permanency practices. Furthermore, the format and content of the CASA reports varied considerably across the five programs. The lack of consistency regarding CASA recommendations to the courts limited the scope of this analysis.

Conclusion

Together, the large cohort analysis and the case record review indicate that CASAs, along with the courts and Children's Administration, have prioritized timely permanency for the youngest children in care. Yet, in this sample, the children at greatest risk for remaining in care for four or more years had a dependency petition filed on their behalf as 6-12 year olds. This age group of children was more likely to be reunified, yet far less likely to be adopted as compared to the younger children in the sample. A sizable portion of these children were in the care of relatives. Decision-making around permanency options which allow these children to become legally stabilized in the homes of relatives is critical.

It is estimated that up to half of school-age children in foster care display significant behavioral and emotional problems which may or may not have been identified as they entered care (Landsverk et al., 2007). Over time, these children often experience multiple moves in care, group care placements, and a lack of continuity in nearly every familial and adult relationship in their life. CASA programs should consider making an increased commitment to stable case assignment of CASAs and timely permanency for school-age dependent children, especially children of color who are at elevated risk for lengthy stays in out-of-home care because of their race/ethnicity as well as their age.

A challenge to the dependency system in our state and to CASA programs is to reduce the rate of unresolved dependency at three or more years. Findings from this study may serve as baseline comparisons for current and future program improvement efforts.

I. Introduction

CASA Programs in Washington

In Washington State, there are roughly 7,000 new and ongoing dependency cases each year. CASA programs have developed locally throughout the state over the last three decades based on community needs, court leadership and available resources. Currently, there are CASA programs in 35 counties in the state. Some CASA programs operate as non-profits, while most are managed by the Juvenile Court Administrator at the county level.

The following are the key CASA volunteer activities on behalf of children:

- Case advocacy, including contacts with the child and family, and contacts on behalf of the child (e.g. talking to social worker, foster parent, making referrals).
- Monitoring child safety.
- Writing court reports and testifying in court, making recommendations for placement and permanency plans in the child's best interest.

CASA volunteers typically carry between one and three cases at a time. Each case can include one child or a sibling group. What distinguishes CASA case representation from other types of representation is the CASA's ability to spend time visiting the child in foster placement and communicating with the social worker and others involved in the dependency action. CASAs monitor consistency between court orders and the actual experiences of the child and the birth parents. In this way, they increase the accountability of both parents and social workers involved in a dependency case.

Washington State law requires that every dependent child be assigned an advocate, but the requirement can be waived by a local court if there is "good cause" (RCW 13.34.100). Local jurisdictions interpret and apply the legal mandate quite differently based on local resources

Paternity was established at the outset of the case in 44% of cases. Parent child visitation with the father or presumed/alleged father was recommended by the social worker at the beginning of the case in 53% of cases, not recommended in 22% of cases and the recommendation was unknown in 25% of cases. The CASA disagreed with the initial visitation plan for fathers, advocating either for or against visits, in 2% of cases.

Over the life of case, CASAs disagreed with the social worker's parental visitation recommendations in only 6% of cases.

The majority of children (80%) in the cases reviewed had siblings. In the three counties (Pierce, Snohomish and Spokane) where issues of siblings and placement were examined more closely, almost half of those children with siblings (n=89) were placed with their sibling(s) at some point during the life of the case (45%). When siblings didn't all live together, CASAs explicitly advocated in 24% of the cases for sibling visits at some point in the life of the case.

In at least one-third of cases reviewed, children lived with relatives at some point in the case. Thirteen percent of cases included a report where the CASA explicitly recommended visits with relative/relatives.

Social Worker and CASA Agreement on Case Plans

As an indicator of the CASAs advocacy regarding placement and permanency planning, CASA reports and social workers' ISSPs were reviewed for agreement and disagreement between the CASA and the social worker regarding the child's current placement and recommended permanent plan.

CASAs mainly agreed with social workers regarding placement and permanency. There was evidence in the case record that CASAs disagreed with social workers regarding the child's current placement in 7% of cases. These cases were in Clark, King, and Pierce counties only.

There was evidence in the case record that CASAs disagreed with social workers regarding the child's permanency plan in 11% of cases and these cases happened across all five counties. Combined, there was evidence of CASA disagreement with social workers in 17% of cases either regarding the child's current placement or permanent plan.

Court Decisions and CASA Recommendations on Permanent Plans

In the large majority of cases this review found that CASA recommendations were aligned with the court's decisions regarding permanency planning. There was evidence in the file that the CASA recommendation did not concur with the judicial decision regarding the permanent plan in 8% of cases.

Services Recommended by CASAs

As a key indicator of monitoring and advocacy for the child's best interests, CASA reports were reviewed for their recommendations regarding services and supports to promote the child's well being while in care. In general the CASAs' services recommendations mirrored the social worker service recommendations, though these were not evaluated alongside the social workers' ISSPs.

Services for the Child

Services were recommended for the child in 87% of cases. The average number of services recommended for each child in all cases was 2.6. The range was 1 to 11 services per case. As Table 17 shows, children's services recommendations were not consistently documented in Snohomish or Spokane County.

Table 17: Services recommended by CASAs for children

County	n	% of cases with child service recommendations
Clark	46	98%
King	46	91%
Pierce	45	98%
Snohomish	37	65%
Spokane	41	81%

APPENDIX C

RCW 13.34.100(6)

Effective June 8, 2000 through June 9, 2010

Version in effect at time of termination trial¹

(6) If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position.

RCW 13.34.100(6)

Effective June 10, 2010 through present

(6)(a) Pursuant to this subsection, the department or supervising agency and the child's guardian ad litem shall each notify a child of his or her right to request counsel and shall ask the child whether he or she wishes to have counsel. The department or supervising agency and the child's guardian ad litem shall notify the child and make this inquiry immediately after:

(i) The date of the child's twelfth birthday;

(ii) Assignment of a case involving a child age twelve or older; or

(iii) July 1, 2010, for a child who turned twelve years old before July 1, 2010.

(b) The department or supervising agency and the child's guardian ad litem shall repeat the notification and inquiry at least annually

¹ M.S.R. and T.S.R. were born October 10, 2000 and thus have been under the age of 12 during the duration of these termination proceedings.

and upon the filing of any motion or petition affecting the child's placement, services, or familial relationships.

(c) The notification and inquiry is not required if the child has already been appointed counsel.

(d) The department or supervising agency shall note in the child's individual service and safety plan, and the guardian ad litem shall note in his or her report to the court, that the child was notified of the right to request counsel and indicate the child's position regarding appointment of counsel.

(e) At the first regularly scheduled hearing after:

(i) The date of the child's twelfth birthday;

(ii) The date that a dependency petition is filed pursuant to this chapter on a child age twelve or older; or

(iii) July 1, 2010, for a child who turned twelve years old before July 1, 2010;

the court shall inquire whether the child has received notice of his or her right to request legal counsel from the department or supervising agency and the child's guardian ad litem. The court shall make an additional inquiry at the first regularly scheduled hearing after the child's fifteenth birthday. No inquiry is necessary if the child has already been appointed counsel.

(f) If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position.

OFFICE RECEPTIONIST, CLERK

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Subject: 857296-LUAK-SUPPBRF

IN RE M.S.R. AND T.S.R.

No. 85729-6

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF APPELLANT

Marla L. Zink - WSBA 39042
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: marla@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
www.washapp.org