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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and M.H.P., a minor,**

Petitioners,

v.

PAUL PARVIN and LESLIE BRAMLETT,

Respondents.

**SUPPLEMENTAL BRIEF OF PETITIONER DIANA FARROW,
COURT-APPOINTED SPECIAL ADVOCATE**

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 ORIGINAL

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INTRODUCTION

The court below approved a procedure allowing indigent parents in dependency and termination cases to move ex parte for funds for experts without notifying other parties—including the Court-Appointed Special Advocate (CASA), a party designated by statute to advocate for the best interests of the children. *See* RCW 13.34.105. The procedure went even further, allowing routine sealing of both the requests for funds and the orders that perfunctorily followed. The procedure violates some of the most fundamental rules governing open courts, and due process does not require secret funding requests without notice to other parties.

The CASA submits that such a secretive procedure also threatens the interests of the children involved. The motions and orders were made after witness disclosure deadlines, resulting in untimely expert disclosures. The late disclosures forced the CASA to choose between delaying trial (contrary to the child's need for rapid permanence) or proceeding with an expert whose views had never been tested during discovery (decreasing the chances of an accurate decision). The procedure was used in other cases and in some of those cases the orders issued *after* judgment had already been entered; one issued a full year after a parents' rights had been terminated. The waste of public funds aside, those orders threatened to displace settled decisions about the lives of children, risking the anxiety

that permanence is designed to reduce. And some orders went beyond mere funding, ordering expert observations of parents and children.

Weighed against the risks, the interests of the parents are small. The parents argue that their interests are the due process right to care for their children, or the right to effective counsel. But those are not the precise interests at stake. The precise interest is in secrecy for funding requests made to a trial court. That interest is not nearly enough to justify the threat to the interests of children.

The parents claim that if they must provide notice of their request for funding they will be compelled to tell the other parties how their attorney views the case. No party has ever asked for that. The full justification for the request may typically be sealed. But the bare fact of the request itself cannot be sealed. And that bare fact can provide the other parties enough information to intercept the types of orders that might result in harm to children.

The parents also point to the unfairness of having to give notice when wealthier parents can hire an expert without notice. It is not clear whether that argument is based on due process or equal protection, but both doctrines require that indigent people be singled out *because* they are indigent. These parents are not so singled out. They must give notice not because they are poor, but because they are asking a court to provide them

public funds in a contested proceeding. There are procedures in place to protect attorney work product, but there is no reason to exempt expert funding requests from the general rules governing sealing.

Secret and one-sided judicial proceedings are always risky, and they are even riskier when children are involved. The decision below should be reversed so that the interests of children can properly be considered in all decision that might affect them.

ASSIGNMENTS OF ERROR

The majority below erred by authorizing a procedure under which indigent parents in termination cases may move ex parte for expert funds without providing notice to other parties and, as a matter of course, seal both the motion requesting funds and the orders that followed.

STATEMENT OF THE CASE

This case began as a consolidated motion involving five cases. This Court granted review in one case, which centers on six-year-old M.H.P. He first came into the foster care system in 2010 because his parents abused drugs, were violent and mentally unstable, and severely neglected him. CP 2-4, 6-8. Despite a host of services offered by the State, they were never able to reach a point where M.H.P could safely be returned to their care. CP 5-6. After determining that there was little likelihood that their dangerous behavior would change, the State moved to

terminate their parental rights so M.H.P. could move toward a permanent family. CP 6. The CASA supported the motion to terminate parental rights.

The court entered an order establishing a December 5, 2011 deadline for discovery cutoff and for the parties to exchange lists of possible witnesses. CP 13. Following a series of continuances, trial was eventually scheduled for August 27, 2012, but the discovery cutoff and witness disclosure deadlines remained the same. CP 508. Two weeks before trial, the mother served a new witness list identifying Makiko Guji as an expert witness. CP 509-11. The disclosure said she had been treating the mother for a year. *Id.* The disclosure contained no report or treatment records, and with only two weeks before trial there was no time to obtain them. CP 518. Then, the Friday before the Monday trial, the mother disclosed an evaluation by Carmela Washington-Harvey, another witness who had never been disclosed. CP 515-17.

The mother was able to keep the witnesses a secret in large part due to a procedure used in King County. Under the procedure, indigent parents facing termination proceedings were allowed to file *ex parte* motions requesting public funds for experts. CP 296, 304. They were also able to file the motion automatically under seal and give no notice to the other parties even of the request to seal the motion. CP 59-63. None of the

orders granting the motions for funds— issued by judges who were not otherwise involved in the cases—considered whether sealing was justified under the familiar framework of *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982).

The CASA discovered the orders when reviewing the legal file after the parents moved to continue the trial. CP 318. The State investigated and uncovered four other cases where the procedure was apparently used. The State and the CASA moved to unseal the documents in those cases and to require identification of other cases where requests were filed ex parte and under seal. CP 198. The King County Superior Court denied the motion. CP 438-43.

Division I of the Court of Appeals affirmed in a divided opinion. The majority held that “the notice requirements of GR 15(c)(1) [which governs the sealing of court records] do not adequately safeguard the due process guarantees of indigent parents involved in termination proceedings seeking public funding for expert and other services.” *State v. Parvin*, 181 Wn. App. 663, 665 (2014). It held “that motions for such services, including motions to seal the moving papers, are exempt from the notice requirements of the rule.” *Id.*

Judge Becker dissented. In her view, the “secret ex parte motion practice takes a step backward” on the road to ensuring that children

receive permanence in a timely fashion. *Id.* at 684. “It is a formula for unnecessary delay and expense[.]” *Id.* She would have “reverse[d] the order denying the motion to vacate and hold that GR 15(c) and *Ishikawa* apply to requests for public funds for expert witness services in dependency and termination cases.” *Id.* at 689. This Court granted review.

ARGUMENT

The secret procedure at issue violates some of the most basic principles of settled Washington open courts law and is not required by due process. It allows automatic sealing, contrary to the holding of *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211-12 (1993). It does not require trial courts to work through the factors listed in *Ishikawa*, contrary to the holding of *In re Detention of D.F.F.*, 172 Wn.2d 37, 41 (2011). It requires no notice of a motion to seal, contrary to GR 15(c)(1). And it relies on a criminal rule even though dependency and termination proceedings are governed by civil rules. JuCR 1.4(a). The State addresses those and other arguments in detail, and the CASA does not repeat them here.

Instead, the CASA focuses this brief on the balancing test at the heart of decisions about motion to seal, which calls for courts to weigh competing interests to determine if sealing is justified. *See Ishikawa*, 97 Wn.2d at 38. The interests of children are threatened by the secret

procedure and the interests of parents are insufficient to justify the threat. Automatic sealing with no notice to other parties is unwarranted and should not be condoned in these circumstances.

A. There is a strong presumption of openness in Washington courts.

“The Washington Constitution clearly establishes a right of access to court proceedings.” *Ishikawa*, 97 Wn.2d at 36. Article I, Section 10 of the state constitution provides that “[j]ustice in all cases shall be administered openly[.]” There are compelling reasons for open court proceedings. “The open administration of justice is fundamental to the operation and legitimacy of the courts and to the protection of all other rights and liberties.” *In re Detention of D.F.F.*, 172 Wn.2d 37, 45 (2011). It “assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary.” *Id.* at 40. Open court rules “serve[] to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process.” *Indigo Real Estate Serv’s v. Rousey*, 151 Wn. App. 941, 948 (2009).

Proceedings seeking to terminate parental rights are subject to the general open courts requirements. *In re Dependency of J.A.F.*, 168 Wn. App. 653, 661-62 (2012). There is a natural tendency, when fundamental interests like the right to parent are at stake, to err on the side of

dispensing with normal court procedures, but “the fact that fundamental rights are at stake does not mean that principles of procedural fairness are abandoned. On the contrary, the more important the substantive rights, the more important the procedural protections.” *In re Dependency of R.H.*, 129 Wn. App. 83, 88 (2005).

Under *Ishikawa* and the cases that have come after it, those seeking secrecy must show five things. 97 Wn.2d at 37-38. Among them is a showing that the competing interests justify sealing. *Id.*; see also *Dreiling v. Jain*, 151 Wn.2d 900, 904 (2004) (access to “court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified”). Properly considered, the competing interests here do not justify the secret procedure used in King County.

B. A child’s interest in openness far outweighs a parents’ interest in automatic secrecy.

In dependency and termination cases, a child’s interests are paramount. “When 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 13.34.020. The dependency and termination statutes “assure the child’s interests be given

due considerations, and prevail in case of conflict with the parents.” *In re Dependency of J.B.S.*, 123 Wn.2d 1, 8 (1993).

The interests of children in dependency and termination proceedings are generally straightforward. There is a “compelling interest in protecting the physical, mental, and emotional health of the children.” *In re Dependency of V.R.R.*, 134 Wn. App. 573, 581 (2006). Children have “the fundamental rights to health and safety . . . which the court cannot ensure without orderly inquiries.” *In re Dependency of R.H.*, 129 Wn. App. 83, 88 (2005).

Children also have an interest in “a speedy resolution of any proceeding under this chapter.” RCW 13.34.020. “Child development experts widely stress the importance of stability and predictability in parent/child relationship, even where the parent figure is not the natural parent.” *J.B.S.*, 123 Wn.2d at 13 (citation omitted). Statutes contain deadlines to ensure expeditious proceedings. *See* RCW 13.34.070(1); RCW 13.34.138(1); RCW 13.34.145(1)(a). Quick resolution is important because “[a]lthough 1 year may not be a long time for an adult decision maker, for a young child it may seem like forever.” *In re Dependency of A.W.*, 53 Wn. App. 22, 32 (1988).

Secret funding orders threaten those interests in a number of ways. First, because the judges ordering funding are not otherwise involved in

the cases they are generally unaware of discovery deadlines. That can result in untimely expert appointment followed by a surprise witness and a choice between delaying trial or proceeding blind. That risk is compounded by the fact that the CASA generally cannot compel the production of mental health evaluations without a court order. *See* RCW 13.34.370.

In one of the companion cases for example, an expert witness funded by a secret order disclosed his evaluation in the middle of trial. CP 315. The prejudice to the State and the CASA was obvious, but the case had been pending for so long that the CASA did not request a continuance. *Id.* The result was a trial by ambush, which “has little place in our present-day adversarial system[.]” *Lybbert v. Grant County*, 141 Wn.2d 29, 40 (2000). The CASA can move to exclude a late-disclosed expert, but that decision is left to the Superior Court’s discretion. *See* King County Local Civil Rule 26(K)(4). When the Superior Court exercises that discretion to allow experts who were not timely disclosed, the choice is between delay and ambush.

The majority below specifically considered whether “the children’s interest in prompt resolution of the termination proceedings is at risk.” *Parvin*, 181 Wn. App. at 675. It immediately dismissed that risk, observing that “[c]hildren have an interest in both a prompt and fair

resolution of the proceedings, including the right to remain with fit parents when possible.” *Id.* “It follows,” the majority reasoned, “that children involved in termination proceedings have an inherent interest in their parents’ ability to properly make a case for preservation of their familial ties, including a meaningful opportunity to obtain expert services without risk of disclosure to opposing parties.” *Id.*

That argument dismisses out of hand a child’s interest in swift permanence. It also assumes the very question at stake in termination proceedings (whether parents are fit to care for their children) and then uses that assumption to claim that a parents’ interest in secrecy is the same as a child’s. But occasionally the interests of parents and children diverge; in fact the entire dependency system is predicated on the fact that the interests of parents and children are not always identical. *See In re Dependency of M.S.R.*, 174 Wn.2d 1, 9-10 (2014) (a “child’s liberty interest in a dependency proceeding is very different from, but at least as great as, the parent’s”). A child’s interest in prompt proceedings cannot be ignored by equating it with a parents’ interest in receiving funds for experts.

Secret orders also threaten children because the orders can provide for more than simply funding for experts. With respect to M.H.P., for example, the court ordered the expert to observe the parents with the child

in the parents' home. CP 472. In some cases parents are precluded from contacting their children, or visiting them in particular locations, or being in the home with them. Because the secret funding orders were signed by judges who were not otherwise involved in the cases, they would not be aware of any restrictions on visitation unless the parents happened to mention them. A secret order requiring home observation or other visitation runs the risk of conflicting orders, and more importantly, of putting children in dangerous situations.

Secret orders also risk unsettling children who have found permanent homes. Two of the motions for expert funds in the companion cases came after parental rights had already been terminated, and one motion was made a full year after the termination trial. CP 278-86. In one of those cases the children had already been adopted and were in counseling to deal with the turbulence and uncertainty in their lives. CP 327. A belated attempt to wrench them from their homes—complete with the possibility of an expert saying that the termination order should be revisited—was bound to increase their anxiety and delay their permanency.

To be sure, not every secret order funding experts will result in harm to the children involved. But some will, and several of the orders at

issue did. That risk is not worth running, especially because when properly considered, the parents' interest in secrecy is small.

C. The parents' interests.

The parents present three interests in favor of secrecy: a due process right to experts, protection of attorney work product, and similar treatment to wealthy parents. None outweighs the interests of the children in openness.

1. The parents' due process interests are stated too broadly.

First, the parents observe that they have a due process right to counsel, which includes a right to experts. The majority below defined that interest even more broadly, describing it as the "fundamental liberty interest in the custody and care of their children . . ." *Parvin*, 181 Wn. App. at 670.

Those claims state the parents' interest too abstractly, and when sealing is involved, the "interests and rights justifying redaction must be articulated as specifically as possible." *Hundtofte v. Encarnación*, 181 Wn.2d 1, 9 (2014) (quotation omitted). While the right to parent one's children and the right to counsel are always implicated in termination proceedings, the specific interest at stake is the interest in asking a court for expert funds with the right to seal both the request and the order and

without notice. It is the interest in secrecy—not the right to due process or even the right to the custody of one’s children—at stake.

The interest in secrecy is not enough. This court and others have rejected the argument that criminal defendants, even those facing the death penalty, have a constitutional right to an *ex parte* hearing when requesting funds for expert or investigative services. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 389 (1999); *see also State v. Apelt*, 861 P.2d 634, 650 (Ariz. 1993).

The death row inmate in *Gentry* made an argument similar in kind to the argument here when he sought to seal his motions for post-conviction investigation expenses. 137 Wn.2d at 389. He was “concerned the State will use, in a retrial, any unfavorable evidence he might discover[.]” *Id.* at 390. This Court rejected the argument because “the evidence itself would not be revealed simply by unsealing [his] motions.” *Id.* at 390. And he was “seeking discovery in order to obtain facts tending to establish his conviction or sentence should be vacated. Surely he does not believe a court would grant such relief without giving the State an opportunity to test, in an adversarial hearing, whatever evidence his planned investigation produces.” *Id.*

In much the same way here, the requests sought funds for experts who were likely to be called at trial. As discussed below, requiring notice

of the motions to seal need not reveal any evidence detrimental to the parents, but it serves to protect the interests of the children involved. And any admissible evidence that comes from expert funding must be put through the adversarial discovery process anyway. The parents' interest in secrecy is simply not enough to justify the risks to children.

2. The CASA has never requested attorney work product, and procedures are in place to protect work product.

Next, the parents rely on the interest of protecting their attorney's work product. The CASA has never asked for work product. It is entirely possible for parents to give notice that they are moving for expert funding without disclosing anything about their attorney's views of the case. The criminal defendant in *Ishikawa*, for example, initially claimed he should not have to reveal the sealed material "because to do so would have jeopardized the very interests threatened." *Ishikawa*, 97 Wn.2d at 39. When required to justify his claims, however, he was able to list "fair trial rights," "ongoing criminal investigation," and "safety of witnesses" as justifications for sealing. *Id.* at 40.

The parents here can likewise list "funds for expert services" in the notice of their motion to seal without disclosing privileged information or attorney work product. The majority below considered that possibility, but concluded that such information was worthless "since the only objection

the government could make is a general objection.” *Parvin*, 181 Wn. App. at 673 (quoting the Superior Court opinion).

Even if limited, notice is not worthless. There are a number of situations, many of them presented by this case and the companion cases, where simple notice of a request for funding will allow the CASA to sensibly object. When parents request funds for experts after the discovery cutoff the CASA can explain as much and avoid a late-breaking expert disclosure and the attendant choice between delaying trial or proceeding blind. When an order already limits contact between a parent and a child the CASA can bring that to the court’s attention so any order on funding will not run roughshod over those limits. And when a case has already gone to judgment and the time for an appeal has run the CASA can make that fact known. It may be that in the run of cases a request for expert funds will be unobjectionable. But the downside to notice is so low, and the risk to children great enough, that notice should be required.

There is also a procedure to reduce any risk of disclosing attorney work should a motion to seal be denied. Under *State v. McEnroe*, 174 Wn.2d 795, 798 (2012), motions to file documents under seal may be filed at the same time as the documents themselves, and if the motion to seal is denied, the documents can be withdrawn. That procedure provides even more protection against the disclosure of privileged information and

attorney work product. Parents may file a robust motion for expert services under seal, and provide a relatively limited notice of the motion not under seal, and should their motion be denied they can simply withdraw the documents. There is no real risk that work product will be disclosed.

The majority below raised the related concern that “revelation of the names or expertise of potential experts would be prejudicial to parents because, once potential experts are identified, they are available for questioning by the State.” *Parvin*, 118 Wn.2d at 673-74. The CASA does not request the names or expertise of purely consulting experts. She expects timely disclosure of testifying experts, but CR 26(b)(5) will continue to protect the identity of consulting experts. The CASA seeks only notice and the chance to be heard on whether expert funding requests should be sealed. Purely consulting experts’ identities and opinions will remain secret.

The majority below also dismissed the notice requirement by holding that it “is addressed to members of the general public, giving anyone present in the courtroom the opportunity to be heard on the proposed closure or sealing. It does not speak to the State’s particular objection here, that as a party to the litigation they [sic] were not given notice of the motion[.]” *Parvin*, 181 Wn. App. at 679.

There are two problems with that holding. First, it gives parties *fewer* rights than members of the public who happen to be present in a courtroom. No court has held, and this Court should not hold, that the notice requirement excludes parties or is limited just to those who happen to be in the courtroom when a motion to seal is made.

Second, there was no one in the courtroom when the motions were made because the motions were filed *ex parte* with a court clerk. No one is present when that happens. Under the reasoning of the majority, there is no need to alert anyone when filing a motion to seal so long as the motion is based on a paper filing and is not made in a courtroom where a member of the public who happens to be in attendance can object. This Court should not condone a procedure that renders the notice requirement obsolete for motions made in paper filings.

3. The interest in equalizing indigent and wealthy parents is insufficient.

Finally, the parents argue that they have an interest in being able, like wealthier parents, to hire experts without notice to any party. “Neither due process nor equal protection requires that the state equalize the resources of the indigent and the wealthy defendant. Rather, they guarantee the indigent an opportunity to present his or her claims adequately and fairly.” *Apelt*, 861 P.2d at 650. There is no obligation

under the due process or equal protection provisions to duplicate “the legal arsenal that may be privately retained” by other litigants, “but only to assure the indigent defendant an adequate opportunity to present his claims fairly” *Ross v. Moffitt*, 417 U.S. 600, 616 (1974); *cf. King v. King*, 162 Wn.2d 378, 388-98 (2007) (the Washington Constitution’s due process and equal protection provisions do not require appointment of state-funded attorneys in divorce proceedings, even when the custody of children is at stake). “Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.” *Ross*, 417 U.S. at 611.

The parents argue that they *are* being singled out, insofar as they must provide notice to other parties while wealthier parents may simply hire an expert. That gets causation wrong. They are not required to provide notice *because* they are indigent, but because they are requesting public funds by filing a motion in a contested court proceeding. The other parties deserve notice of the request. So does the public, if only because the natural check of spending one’s own money does not apply when spending the government’s money. Even a wealthy parent is unlikely to pay for an expert a year after judgment has been entered, but in one of the companion cases a parent sought and received just that. CP 278-86. It is

the act of filing a motion for public funds, not the fact of poverty, that requires notice.

In any event, the interest in being in the same position as wealthier parents does not outweigh a child's interests that are threatened by secret ex parte funding orders. Notifying other parties of a motion to seal does not limit a parent's ability to defend, and following the general rules governing sealing does not hamper the ability to present one's claims. Pure equality between indigent and wealthy parents is not required by due process or equal protection. And it certainly does not justify placing the interests of children at risk.

CONCLUSION

The majority below gave short shrift to the interests of children when it authorized parents to request expert funds ex parte and without notice and to seal both the motion and the order following. The decision should be reversed with a clear statement that such a procedure inadequately protects the interests of children involved in termination proceedings.

DATED: March 25, 2015

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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF:

M.H.P.,

Minor Child,

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Petitioner,

P. PARVIN AND L. BRAMLETT

Respondents

DECLARATION OF
SERVICE

I, Gennifer Holland, declares as follows:

I am a Legal Assistant employed by Perkins Coie LLP. On March 25, 2014, I sent a copy of: Supplemental Brief of Petitioner Diana Farrow, Court Appointed Special Advocate and Declaration of Service.

Said copies were sent by U.S. Mail and Electronic Mail, on the 25th day of March, 2015 to **Supreme Court**, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929, e-mail address

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

DATED: March 25, 2015



Jennifer Holland
Legal Assistant

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Subject: 90468-5 - Supplemental Brief of Petitioner Diana Farrow, Court Appointed Special Advocate

Dear Clerk,

Now Attached for filing in Cause No. 90468-5, In re Dependency of M.H.P., please find a Supplemental Brief of Petitioner Diana Farrow, Court Appointed Special Advocate.

Best Regards,
Gennifer Holland

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