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IN THE WASHINGTON STATE SUPREME COURT

In Re the Dependency of

M.H.P.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENTS

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ORIGINAL

TABLE OF CONTENTS

I. REPLY STATEMENT OF THE ISSUE PRESENTED1

II. REPLY STATEMENT OF FACTS3

III. ARGUMENT5

 A. INTRODUCTION5

 B. DSHS AGREES THAT INDIGENT PARENTS HAVE A
 RIGHT TO THE APPOINTMENT OF COUNSEL AT PUBLIC
 EXPENSE6

 C. IT IS NOT CLEAR THAT DSHS AGREES THAT THE RIGHT
 TO COUNSEL IS MEANINGLESS IF COUNSEL IS UNABLE
 TO OBTAIN THE SERVICES OF AN INDEPENDENT
 EXPERT AT PUBLIC EXPENSE8

 D. DSHS IS ONLY SEEKING TO INTRUDE ON THE
 PRETRIAL PREPARATIONS MADE BY INDIGENT
 PARENTS9

 E. BASED UPON A CAREFUL CONSIDERATION OF ALL OF
 THE INTERESTS INVOLVED, THE COURT OF APPEALS
 CORRECTLY CONCLUDED THAT RELIANCE ON GR
 15(C)(1) WOULD NOT ADEQUATELY PROTECT THE
 RIGHTS OF INDIGENT PARENTS AND WOULD TREAT
 THEM DIFFERENTLY THAN PARENTS WITH FINANCIAL
 RESOURCES.....11

IV. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) 8

In re Dependency of Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995) 6

In re Pers. Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999).. 11

In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005) 8

In re Welfare of Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974) 7

In re Welfare of Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975)..... 7

Nast v. Michels, 107 Wn.2d 300, 730 P.2d 54 (1986)..... 3

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) 12

State v. McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012) 2

State v. Mendez, 157 Wn. App. 565, 238 P.3d 517 (2010)..... 11

State v. Punsalan, 156 Wn.2d 875, 133 P.3d 934 (2006) 8

State, Dep't of Soc. & Health Servs. v. Parvin, 181 Wn. App. 663,
326 P.3d 832, review granted sub nom. by *In re Dependency of*
M.H.P., 337 P.3d 326 (Wash. 2014)..... 1

Yakima v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768
(2011)..... 3

Statutes

RCW 10.101.005 8

RCW 13.34.090 6, 7

RCW 2.70.005 3

RCW 42.56.904 11

Rules

CrR 3.1 1
GR 15 1, 11
GR 31.1 3
LGR 15..... 2

Constitutional Provisions

Const. art. I, § 3 (Due Process) 6
U.S. Const., amend. XIV (Due Process)..... 7

I.
REPLY STATEMENT OF THE ISSUE PRESENTED

In the Court of Appeals, the issue was whether Presiding Judge Kessler properly concluded that GR 15(c)(1) and CrR 3.1(f) set forth the proper procedure by which indigent parents may obtain ex parte orders for the appointment of experts in parental rights cases. In the opinion below, the Court of Appeals summarized the facts as follows:

King County has adopted the ex parte motion practice outlined at CrR 3.1(f) as a means for attorneys of indigent parents to obtain expert services and orders to seal the moving papers in dependency and termination cases. The State asserts that this practice is improper because it: (1) unfairly denies the other parties notice and opportunity to be heard under GR 15, (2) violates the public's right to open proceedings, and (3) improperly applies criminal rules to civil cases. The parents do not dispute that the ex parte motion practice at issue in this case does not comply with GR 15. They argue however, that application of the rule to the motions at issue impinges on their due process rights to effective assistance of counsel and a fair trial. They contend that providing notice to the State of experts with whom they intend to consult, in advance of a determination to call the expert as a witness, compromises their ability to prepare for trial and causes them to be treated differently than parents with the means to obtain those services without public assistance.

State, Dep't of Soc. & Health Servs. v. Parvin, 181 Wn. App. 663, 669-70, 326 P.3d 832, 836, review granted sub nom. by *In re Dependency of M.H.P.*, 337 P.3d 326 (Wash. 2014). After granting review, this Court has framed the issue as:

Whether a King County Superior Court procedure allowing indigent parents in parental termination cases to move ex parte for public funding of expert witnesses and to seal records of the motions is justified to protect the parents' due process rights, and whether the procedure violates the public's right under Washington Constitution, article I, section 10, to open court proceedings.

It appears that the King County system is no longer at issue. As argued in Respondent's Motion to Dismiss as Moot, in recent years the Washington State Office of Public Defense (OPD) has taken over the administration and funding the representation of parents in parental rights.¹ Their administration of these programs has been quite successful. Perhaps as a result, during the last session, the Legislature reallocated funds to OPD to expand their administration into six new counties, including King. According to the OPD administration, they administer the parental representation funds in 31 of 39 counties.

In short, in its Petition for Review, the Department of Social and Health Services (DSHS) criticizes the Court of Appeals majority opinion for failing to consider alternative ways of providing experts to indigent parents, including "an administrative process" . . . "that does not involve the courts." It appears that has happened in the 2014 Legislative session

¹ Even before the State Office of Public Defense took over the funding of these requests, King County had amended its local rules in response to this Court's decision in *State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861 (2012). The new rule, LGR 15(c)(2)(C), referenced specific protocols regarding parental rights.

when the authority for considering King County funding requests for experts in parental rights cases involving indigent parents was transferred to OPD,²

Thus, it is not clear to Respondents what remedy DSHS now seeks.³

II. REPLY STATEMENT OF FACTS

In the Court of Appeals, Respondents accepted DSHS's statement of the case with the following clarifications. It appears from the record in this case that many of the delays were occasioned by changes in counsel

² Any challenge to OPD's practices would present unique issues that have not been fully fleshed out. OPD was created by the Legislature to implement the constitutional and statutory guarantees of counsel and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington. It is an independent agency of the judicial branch. RCW 2.70.005. Judicial actions and files are not generally subject to public disclosure. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768, 775 (2011); *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54, 58 (1986). The question of whether OPD must consider these requests in an "open courtroom" in an adversarial proceeding is simply not before this Court nor can it be decided on this record.

³ Moreover, the issue will become irrelevant when this Court implements GR 31.1(1)(6). That rule would exempt from disclosure:

Documents related to an attorney's request for a trial or appellate court defense expert, investigator, or other services, any report or findings submitted to the attorney or court or judicial agency by the expert, investigator, or other service provider, and the invoicing of the expert, investigator or other service provider during the pendency of the case in any court. Payment records are not exempt, provided that they do not include medical records, attorney work product, information protected by attorney-client privilege, information sealed by a court, or otherwise exempt information.

and at least one delay was due to DSHS's failure to provide the parents' counsel with discovery. 9/13/12 RP 16-17. It appears that counsel for the mother was not even assigned the case until July 9, 2012. 9/13/12 RP 16.

In addition to Judge Kessler's written ruling in this case, Judge Doerty said the following:

In any case, situation [sic] where an indigent person is entitled to the right to representation of counsel at public expense, whether it's a constitutional provision that's derived of statute like it is in this proceeding or whether it's directly under the Sixth Amendment or whether it's a hybrid of the two, an example of which is the sexual predator commitment statute, the defense ought to have the same opportunity that a party, a defendant or respondent with money has, which is to go out and consult with forensic experts to see if a defense can be put together or if an opinion can be generated that would be useful to the defense.

And they ought to be able to do that in the same way as paying parties, which is with confidentiality between the defense lawyer or the respondent's lawyer and the consulted expert.

That's why the Superior Court generally, Judge Kessler in particular, and the Executive Committee, as a matter of policy believes that those OPD authorizations for expert services ought to be sealed. There's just no question at all if the respondent had money and they went out to talk to somebody about their case that the other side wouldn't get to know about that until the respondent was going to use the witness at trial. And, in that circumstance, the rules of discovery clearly apply.

9/13/12 RP 27-28.

Judge Doerty went on to note that although the defense had the right to seek expert funding ex parte, the defense still had the obligation to timely disclose the expert when it became clear the expert would be called to testify at trial. 9/13/12 RP 29. He said: “Once the defense goes out and gets the resources to hire the witness, it’s up to the defense to crack the whip on the witness and get their work product done in time to conform to the rules.” *Id.* at 30.

In this particular case, Judge Doerty found there was a “last minute disclosure of somebody who has certainly been in the mix for a really long period of time.” As a result, he excluded the defense experts because they had not been timely disclosed. 9/13/12 RP 31.

III. ARGUMENT

A. INTRODUCTION

This case would have progressed differently if the parents, Parvin and Bramlett, were not poor. Had the parents had access to money, even though the case had been set for trial, they could have hired experts on January 11, 2012, February 2, 2012, March 10, 2012, and May, 2012. DSHS would not have been entitled to notice that the parents had privately retained these experts. DSHS would not have had the right to come to court and argue that the parents were squandering their money and should

be prohibited from doing so. DSHS would not have been entitled to argue that because the parents spent their own money, they were placing the safety of their children in jeopardy. DSHS would not have been entitled to argue that it was entitled to notice of strategic decisions made by the parents after consultation with counsel.

But because the parents are poor and are required to file a motion to ask the court for funds to hire experts, DSHS believes that it is entitled to notice of the parents' trial preparations and strategic decisions and an opportunity to object to those decisions, in particular, the decision to seek expert opinions.

In short, despite the DSHS's argument to the contrary, the procedure at issue in this case is not about undermining the best interests of the children, delay or non-compliance discovery deadlines. It is about applying different rules to poor people and their children simply because they are poor.

B. DSHS AGREES THAT INDIGENT PARENTS HAVE A RIGHT TO THE APPOINTMENT OF COUNSEL AT PUBLIC EXPENSE

It is well settled in Washington that the right to counsel attaches to indigent parents in termination proceedings by way of RCW 13.34.090(2). *In re Dependency of Grove*, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995). This right derives from the due process guaranties of article I, § 3 of the

Washington Constitution as well as the Fourteenth Amendment. *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). The right to the custody, control, and companionship of one's children is a fundamental right that the State may not abridge without the complete protection of due process. *Id.* at 136-37. "There can be no doubt that the full panoply of due process safeguards applies to deprivation hearings." *Id.* at 137; *In re Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975).

There is also a statutory right to the appointment of counsel:

At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

RCW 13.34.090(2).

By statute also—not just in criminal proceedings, but in every case in which the right to counsel attaches—legal representation means effective representation, by definition.

The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection,

and due process in all cases where the right to counsel attaches.

RCW 10.101.005. See *In re Welfare of J.M.*, 130 Wn. App. 912, 922, 125 P.3d 245, 250 (2005).

C. IT IS NOT CLEAR THAT DSHS AGREES THAT THE RIGHT TO COUNSEL IS MEANINGLESS IF COUNSEL IS UNABLE TO OBTAIN THE SERVICES OF AN INDEPENDENT EXPERT AT PUBLIC EXPENSE

Our Supreme Court has also recognized, in the context of criminal cases, that “[t]he Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense.” *State v. Punsalan*, 156 Wn.2d 875, 878, 133 P.3d 934 (2006), citing *Ake v. Oklahoma*, 470 U.S. 68, 76, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (due process guarantees the defendant access to competent experts “who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense”).

DSHS does not explicitly quarrel with the above cases. However, DSHS clearly believes that it has the right to notice that indigent parents are seeking the appointment of experts. And DSHS clearly believes that it has the right to object to the appointment of experts for indigent parents. DSHS notes that “parents typically have already received professional services” in the dependency process. Thus, DSHS believes that it should be able to block further appointment by informing the funding judge

“about the nature and adequacy of the services already provided.” Petition for Review at 15-16.

DSHS, however, provides no authority for the novel proposition that it has the right to object to the parent’s request for independent experts. DSHS apparently believes it can provide “objective information” before the authorization of “more public funds” to indigent parents. But, in the context of litigation, DSHS is not “objective” and the indigent parents are not required to be dependent only upon the professional services provided by the opposing party.

D. DSHS IS ONLY SEEKING TO INTRUDE ON THE PRETRIAL PREPARATIONS MADE BY INDIGENT PARENTS

DSHS does not appear to dispute that parents with financial resources do not have to notify DSHS, the CASA or the court when consulting with experts in preparation for trial. In fact, while DSHS argues that the procedure for indigent parents ignores the rights of children in this type of litigation, it does not ask for the same notice and “right to be heard” on the part of children whose parents are using their own money to consult with experts. Thus, the DSHS’s arguments regarding the “risks”, if any, that King County’s old procedure presents to the child’s interests applies only to children who have poor parents.

For example, in the Petition for Review page 13 at fn. 9, DSHS complains that the King County system would

even allow a parent to request an evaluation of a child or an observation of a parent and child together, without the CASA or Department being informed or able to provide the court any input as to how that might negatively affect the child.

But the real question is why DSHS is entitled to notice of such activities for indigent parents when they are clearly not entitled to notice when parents with money could engage such unfettered pretrial preparation.

Throughout the Petition, DSHS argues that parental termination cases differ from criminal cases because the children are party to the litigation.⁴ But the children are a party whether the parents have financial resources or are poor. Currently, parents who have money can hire experts without telling the DSHS or the CASA. DSHS is not arguing that they are entitled to notice and have standing to object on behalf of the children every time parents with financial resources hire or consult with an expert when their family is the subject of a dependency or termination

⁴ Moreover, while not a party in criminal cases, there is frequently a victim. While the victim has a keen interest in how the case is proceeding, he or she does not have a right to notice of and the opportunity to object to the defendant's requests for the appointment of an expert.

litigation. But they are asking for such notice when the parents are indigent.

E. BASED UPON A CAREFUL CONSIDERATION OF ALL OF THE INTERESTS INVOLVED, THE COURT OF APPEALS CORRECTLY CONCLUDED THAT RELIANCE ON GR 15(C)(1) WOULD NOT ADEQUATELY PROTECT THE RIGHTS OF INDIGENT PARENTS AND WOULD TREAT THEM DIFFERENTLY THAN PARENTS WITH FINANCIAL RESOURCES

A majority of the Court of Appeals carefully pointed out the reasons why application of GR 15(c)(1) would be inappropriate in parental rights cases.

The majority correctly recognized that DSHS is asking for information about the parents' preparation of their case and the payment to experts *before* trial. *M.H.P.* at 671-72, Thus, *State v. Mendez*, 157 Wn. App. 565, 238 P.3d 517 (2010), *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999), and RCW 42.56.904 are distinguishable and therefore unpersuasive in this case. Similarly, the majority properly concluded that DSHS offered no explanation why completely redacted documents would supply any meaningful notice to the parties under GR 15(c)(1). And the majority properly noted that disclosure of any such information would provide a considerable tactical advantage to DSHS. *Id.* at 673-74.

Contrary to DSHS's arguments, the majority did credit the children's interests and said:

It follows that children involved in termination proceedings have an interest in their parents' ability to properly make a case for preservation of their familial ties, including a meaningful opportunity to obtain expert services without risk of disclosure to opposing parties.

Id. at 676.

Finally, it appears from DSHS's petition that its primary concern is that under the abandoned King County procedures DSHS was not given notice that the parents were seeking funds for experts. Thus, in the Petition, DSHS does not appear to quarrel the majority opinion that the orders sealing in the records *before trial* in this case satisfied all five *Ishikawa*⁵ factors. And post-trial DSHS does not appear to have moved to unseal any of these records.

IV. CONCLUSION

This Court should affirm the Court of Appeals majority opinion because it correctly decided that indigent parents — like parents with financial resources — have the right to hire and consult with their own experts without informing the opposing party.

⁵ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

DATED this 25th day of March, 2015.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634

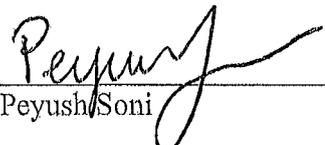
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I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Dear Sir/Madame:

Enclosed for filing with the Washington State Supreme Court in In Re the Dependency of M.H.P, Supreme Court No. 90468-5, is the Supplemental Brief of Respondents.

Feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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