

No. 98596-1

NO. 78985-6-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

In Re the Dependency of E.M., Minor,

STATE OF WASHINGTON,
Department of Children, Youth and Families

Respondent,

v.

Julia Morgan

Appellant.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

E.M. is a four-year-old boy, and during the past four years, he has been the subject of a highly contentious dependency proceeding that has generated voluminous discovery and an extensive court record. When E.M. was three years of age, after reviewing approximately one thousand pages of pleadings, the dependency court moved E.M. from his grandmother's home to licensed foster care. Then, E.M.'s grandmother hired an attorney to represent E.M. in the dependency proceeding. Without court approval and without access to E.M. or the extensive discovery and case records, the retained attorney filed a motion to reconsider E.M.'s removal from the grandmother's home. The Department objected to the attorney's notice of appearance, arguing the attorney did not appear to be independent counsel for the child. E.M.'s father, E.M.'s guardian ad litem (GAL), and the Department all cited to the Rules of Professional Conduct in their responses to the motion filed by retained counsel. The dependency court considered the Rules of Professional Conduct, RCW 13.34.100, and Washington case law before deciding to strike the notice of appearance and the motion for reconsideration.

The issue of retained counsel for E.M. should not be addressed because this issue is now moot, as the attorney retained is no longer available to represent E.M. In addition, the issue regarding the court's

authority to provide oversight into the role of retained counsel was not raised at the superior court level, and should not be raised for the first time on appeal. RAP 2.5(a).

In any event, the trial court did not err because the court in a dependency proceeding possesses the ability to oversee the question of whether an attorney will represent a child who is incapable of providing informed consent. Here, the dependency court's consideration of the Rules of Professional Conduct, Washington case law, and RCW 13.34.100 provided a tenable basis for striking the notice of appearance, and the decision does not constitute an abuse of discretion. If the merits of the matter are considered, the dependency court's order should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Was the issue regarding the dependency court's authority to provide oversight into the role of retained counsel raised at the superior court level, and is review inappropriate under RAP 2.5(a)?

2. Is the issue as to whether the dependency court abused its discretion in striking the notice of appearance moot, as there is no effective relief available?

3. Does the dependency court have discretion to decide whether to permit counsel retained on behalf of a dependent child incapable of providing express consent to representation?

4. Assuming the dependency court has discretion to decide whether to permit retained counsel, did the court abuse its discretion in deciding to strike the notice of appearance filed for E.M.?

III. COUNTERSTATEMENT OF FACTS

The petitioner, Julia Morgan, is the mother of three children. CP 81. Her two older children are M.M. and S.M. CP 3. In January 2010, the Department determined that Ms. Morgan neglected infant S.M. when she left him alone in a parked car for 55 minutes at night when it was 27 degrees outside. CP 390-91. Ms. Morgan has a history of mental health issues. CP 3-4. She has been diagnosed (in separate evaluations) with obsessive-compulsive disorder and delusional disorder, persecutory type. CP 3, 1565.

In November 2011, Ms. Morgan's second-eldest child, S.M., disappeared while he was in her care and custody. CP 81. Ms. Morgan claims she left then two-year-old S.M. alone in her car after the car ran out of gas, and that he was gone from the car when she returned. CP 391. Law enforcement, however, determined that the car had not run out of gas. CP 391. Law enforcement was unable to locate S.M. despite an extensive search. CP 4. Ms. Morgan has provided false information in the past regarding her identity and her living situation. CP 402. S.M. remains missing, his disappearance remains unsolved, and Ms. Morgan is the subject of an open and ongoing law enforcement investigation. CP 86. Ms. Morgan

has not cooperated with the police in regards to their search for S.M. CP 391. S.M.'s father is not a suspect in S.M.'s disappearance. CP 391.

Ms. Morgan's youngest child, E.M., was born on July 10, 2015. CP 1. At the time of his birth, the hospital contacted Child Protective Services, expressing concern about Ms. Morgan's mental health. CP 406. Alan Morgan, E.M.'s father, has criminal history for domestic violence, and he was incarcerated at that time. CP 291. The Department filed a dependency petition as to E.M. a few days after he was born. CP 1. Ms. Morgan agreed to dependency, and the dependency court placed E.M. in the care of his maternal grandmother. CP 290, 296. Ms. Morgan's dispositional order required her to participate in a psychological evaluation with a parenting component. CP 296. In October 2016, an evaluation was completed, and Ms. Morgan was diagnosed with delusional disorder, persecutory type, unspecified personality disorder, and unspecified moderate intellectual disability. CP 1565. During the evaluation process, Ms. Morgan gave the evaluator the following prepared response when asked about her past parenting experience:

I am sorry, my attorneys have instructed me not to answer any questions about [S.M.] and [M.M.]. On my attorneys' instructions, I can only share the following information: I have two older children, [S.M.] and [M.M.]. My daughter, [M.M.] lives with her father. My son [S.M.] has been missing since 2011. My attorneys have instructed me not to discuss anything related to [S.M., M.M.] or the

circumstances of [S.M.]’s disappearance.

CP 1561.

Initially, Ms. Morgan was allowed to live in the home with the grandmother and E.M. under conditions imposed by the Court. CP 63. Then, in April 2017, the grandmother made a series of phone calls to a Department, expressing her concerns about Ms. Morgan’s behaviors. CP 391, 97. The Department was informed that Ms. Morgan, while unsupervised, kept E.M. out after 8 p.m. on multiple occasions. CP 391. At the time of this initial report, the grandmother expressed concern about the wellbeing of her grandson, and she stated that she was fearful that she would “lose another grandchild.” CP 391. The grandmother reported that Ms. Morgan sometimes bathed E.M. during the middle of the night, seemingly obsessed over his cleanliness. CP 391. The grandmother also reported that Ms. Morgan would try to keep E.M. up late at night, so he would sleep late with her in the morning. CP 391. Ms. Morgan also reportedly told the grandmother that the grandmother would never see E.M. again if the grandmother cooperated with the Department. CP 391.

The Department filed a motion to place E.M. in foster care. CP 301. In response, in May 2017, King County Superior Court Judge Patrick Oishi ordered Ms. Morgan to move out of the grandmother’s home. CP 301-02. Ms. Morgan sought discretionary review of this order, and review was

denied by this Court. *In re Dependency of E.M.*, No. 76959-6-I (Nov. 2, 2017) at 4.

At meetings held with Ms. Morgan in 2017, the Department sought a new psychological evaluation to address what happened prior to S.M.'s disappearance and Ms. Morgan's trauma associated with no longer having S.M. and M.M. in her life. CP 392. Ms. Morgan refused to complete a new psychological evaluation with these conditions. CP 392. In April 2018, the dependency court heard a motion filed by Ms. Morgan to have the grandmother approved as a monitor for Ms. Morgan's visits with E.M. CP 304. The court denied this motion, based upon a "history of conflict between the mother and grandmother." CP 304.

In May 2018, Ms. Morgan filed a motion asking to remove E.M. from the grandmother's home and seeking placement in the home of James Kelly (where Ms. Morgan also resided). CP 7-32. Ms. Morgan explained that she would "never have unsupervised access to [E.M.] until this Court deems it appropriate." CP 43. In addition to her own declaration, she filed declarations from her friend, James Kelly, a declaration from the maternal grandmother, a 363 page private home study, a 78 page foster care assessment program (FCAP) report, and a 746 page "proof of services binder." CP 13-18, 20-25, 41-45, 49-56, 59-77, 498-1243, 1529-1891.

E.M.'s father filed a competing 80 page motion asking to place E.M.

in foster care. CP 305-384. The Department's 28-page response to the two competing motions opposed Ms. Morgan's motion and deferred to the court on the placement change suggested by E.M.'s father. CP 385-412. The Department social worker felt that if Ms. Morgan had unsupervised access to E.M., this would not be a safe situation for E.M. CP 388. The Department noted that the lengthy private home study obtained by Ms. Morgan did not include the information known to the Department such as child protective services history and administrative findings of neglect. CP 386-87. Ms. Morgan filed two separate responses to Mr. Morgan's motion. CP 413-421, 456-497. She stated she is "in agreement that her mother Nadia Biryukova should be allowed to act simply as a grandmother and return to work, thus necessitating a change of placement from maternal grandmother Nadia Biryukova to James Kelly." CP 414.

E.M.'s father filed a response opposing Ms. Morgan's motion to change placement, arguing that her motion was "nothing more than an attempt to have [E.M.] placed with her." CP 425. E.M.'s father's declaration stated that Ms. Morgan had warned him repeatedly that if he interfered with her reunification efforts with E.M., "NOBODY would see [E.M.] again." CP 425-26 (Emphasis in original). E.M.'s father also filed a reply to Ms. Morgan's response. CP 428-455. His reply notes, "[u]nfortunately, there is no longer a CASA on this case, due largely in part to the barrage of constant

emails and personal attacks on the parties from Ms. Biryukova and Ms. Morgan, which is a detriment to the child.” CP 430. He also filed a response to the FCAP report, contesting what he viewed as “false allegations” from Ms. Morgan and E.M.’s grandmother repeated in the FCAP report. CP 1247.

Initially, a pro tem Commissioner of the superior court granted Ms. Morgan’s motion and E.M. was placed in the care of James Kelly with specific conditions. CP 159-161.

Then, E.M.’s father filed a 630 page motion for revision, which included pleadings previously filed by Ms. Morgan and the Department. CP 1262-1891. Ms. Morgan filed a response opposing the father’s motion to revise the court commissioner. CP 1892-1895. On July 11, 2018, Judge Oishi, being familiar with E.M.’s case from earlier proceedings, and having reviewed the voluminous materials, revised the Commissioner’s order. CP 81-84. Judge Oishi found that the “[s]afety, security, and welfare concerns for E.M. must be considered through the lens of Ms. Morgan’s past conduct, particularly the disappearance of S.M.” CP 81. Judge Oishi also noted that “[t]he disappearance of S.M. remains unsolved, the mother remains the subject of an open and ongoing criminal investigation, and Ms. Morgan is not cooperating with law enforcement’s investigation of S.M.’s disappearance.” CP 81. Judge Oishi also did not find Mr. Kelly’s

declaration in support of the mother's motion for change of placement to be credible, as it contained "completely incongruent" statements. CP 83. Because Mr. Kelly works outside the home from 9 a.m. to 5 p.m., he was not available to monitor Ms. Morgan's time spent with E.M. CP 83. In addition, Judge Oishi did not find that safety concerns for E.M. had been alleviated since Ms. Morgan was required to remove herself from the home of the grandmother in May 2017. CP 83. Judge Oishi ordered placement of E.M. in licensed foster care. CP 84.

After the July 11, 2019 order to place E.M. in foster care, Ms. Morgan filed an emergency motion to stay the court's order. CP 1896. In Mr. Morgan's response in opposition to the motion to stay, he noted that Ms. Morgan did not seek appointment of counsel for E.M. prior to filing a motion to change E.M.'s placement. CP 1900.

Then, on July 18, 2018, a lawyer named Aimée Sutton filed a notice of appearance to represent E.M. CP 1914. Ms. Sutton's notice of appearance was not filed in conjunction with any discovery request. CP 1930. The Department, E.M.'s father, and E.M.'s GAL did not know who had hired Ms. Sutton. CP 86, 1930, 1949. When asked, Ms. Sutton refused to explain who had hired her. CP 86.

On July 19, 2019, an attorney from the CASA program filed a notice of appearance from a trained dependency GAL named Emma Bergin.

CP 1915-17.

Ms. Sutton attempted to contact E.M., but the Department refused to provide his location in foster care, as this information is confidential. RP 7, 13. Five days after filing her notice of appearance, Ms. Sutton filed a motion to reconsider E.M.'s placement into foster care, seeking to return the child to the grandmother's home. CP 1918-1925. Ms. Sutton requested a "full evidentiary hearing" on the proposed change of placement, arguing the court violated state law by not deferring to the wishes of Ms. Morgan in regards to E.M.'s placement. CP 1918, 1921. Judge Oishi issued a preliminary order denying Ms. Sutton's request for a full evidentiary hearing on the motion for reconsideration. CP 1926. Judge Oishi required all parties to file a written response to "address the child's request for alternate placement with the maternal grandmother." CP 1926. Judge Oishi scheduled oral argument to address Ms. Sutton's motion. CP 1927.

On July 30, 2018, along with its response to the motion for reconsideration, the Department filed an objection to the notice of appearance filed by Ms. Sutton. CP 85. In addition, the Department social worker provided a declaration explaining her "serious concerns" about proposal to place E.M. back in the care of his maternal grandmother. CP 97.

E.M.'s father also filed a response to the motion for consideration, seeking to strike Ms. Sutton's notice of appearance. CP 1928. E.M.'s father

noted that it appeared as though Ms. Sutton had not spoken to any of the parties except Ms. Morgan prior to filing her motion for reconsideration. CP 1930. He argued that Ms. Sutton's lack of "any collateral information" was "extremely concerning." CP 1930. He expressed his belief that Ms. Sutton had not acted in accordance with the RPCs and "instead appears to be relying solely on information from the mother and acting based on the mother's directives..." CP 1935. Mr. Morgan also noted the confidential nature of information in dependency cases. CP 1930. He argued in favor of a requirement for child's counsel to be "court-appointed." CP 1929. Instead of retained counsel for E.M., Mr. Morgan supported the current GAL appointment, noting that due to the age of the child, the GAL appointment was "sufficient to protect and advocate for his best interests in this case." CP 1931. He noted that E.M. has "four entities who are interested in and can speak to the child's safety and welfare: the father, the mother, the State, and the child's appointed GAL." CP 1930.

Ms. Morgan filed a response to the motion for reconsideration, supporting the motion for reconsideration filed by Ms. Sutton, and (contrary to her own earlier motion) seeking E.M.'s placement in the care of the maternal grandmother. CP 1953.

E.M.'s GAL filed a response to Ms. Sutton's motion, and she took "no position on the placement motion due to her recent appointment."

CP 1947. The attorney for the CASA program argued that the notice of appearance filed by Ms. Sutton was “contrary to the procedure required by RCW 13.34.100,” as Ms. Sutton was attempting to appear “without an order for appointment of counsel for the child.” CP 1947. The CASA program attorney argued that from reviewing the pleadings filed by Ms. Sutton, “it appears that the attorney has only reviewed the most recent legal documents, has not reviewed discovery and may not have met the child at the time of the filing of the Motion.” CP 1947. The CASA attorney noted there was “no motion before the court asking for appointment of an attorney for this toddler.” CP 1949.

The GAL’s response, citing RCW 13.34.100(1), stated, “[c]hildren involved in dependency proceedings have a statutory right to a guardian ad litem (GAL) ‘unless a court for good cause finds the appointment unnecessary.’” CP 1947. A CASA supervisor explained that the CASA program had assigned “four CASAs to advocate for [E.M.] and his siblings since the filing of the dependency petitions on their behalf.” CP 1950. The first CASA assigned had been with the CASA program for a decade and had advocated for E.M.’s older siblings in a prior dependency. CP 1950. This CASA removed herself from the case after she experienced an investigation prompted by a defense attorney that she believed was “intended to harass.” CP 1950. The next person assigned to E.M.’s case was

an attorney guardian ad litem. CP 1951. This attorney guardian ad litem left the case in April 5, 2016 (after dependency was established). CP 1951. Then, a third CASA was assigned in July 2017, and this CASA asked to be removed in October 2017 after Ms. Morgan's attorney made a complaint that was investigated according to RCW 13.34.107 and the GAL rules. CP 1951. The CASA program manager deemed the complaint "meritless." CP 1951. The CASA program then assigned Emma Bergin, a trained staff guardian ad litem who appeared on the case on July 19, 2019. CP 1915-17. The CASA program supervisor explained that "none of these advocates were removed for any wrong doing," and that this statement was being made to correct prior misrepresentations. CP 1951.

At the August 2, 2018 hearing, Judge Oishi considered the Rules of Professional Conduct, the Admission to Practice Rule 5(g), RCW 13.34.100, and *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012) before deciding to strike Ms. Sutton's notice of appearance and the motion for reconsideration. CP 263. Ms. Morgan sought review of this decision, and Washington State Court of Appeals Commissioner Mary Neel denied review on March 14, 2019. Subsequently, on May 16, 2019, Ms. Morgan's motion to modify was granted and discretionary review was granted.

IV. ARGUMENT

A. **The Issue of the Dependency Court's Oversight of Retained Counsel Was Not Raised Below**

The record establishes that any argument that the dependency court lacks authority to strike the notice of appearance filed by privately retained counsel was not raised at the superior court level. Each of the participants in the hearing held in King County Superior Court recognized the dependency court's oversight authority in whether to accept retained counsel for a dependent child who is too young to provide informed consent and direct counsel. The Department maintained that a privately retained attorney had to be "properly appointed to represent [E.M.] in this case." RP 7. The GAL's attorney agreed, stating, "the Court should make an independent inquiry as to whether or not this child should have appointed counsel and if that appointed counsel should be the person retained by the grandmother in this matter..." RP 9. E.M.'s father expressed his "serious ethical concerns" and sought a "full inquiry regarding the appropriateness of Ms. Sutton's representation of the child in this case." RP 9-10. Ms. Morgan's attorney conceded there could be a hearing on the issue if a party objected to the child's retained attorney. RP 11. Ms. Morgan's written response to the motion for reconsideration supported the motion filed by Ms. Sutton, and it contained no claim that the juvenile court lacked authority

to reject Ms. Sutton's notice of appearance. CP 1952-2022. Ms. Sutton's pleadings provide "that ultimately this court will have the power to decide whether she has authority to represent [E.M.]" CP 259. Ms. Sutton asked the dependency court to "confirm counsel's appearance" on behalf of E.M. CP 259.

Ms. Sutton also argued that, based upon a Washington State Bar Association opinion, E.M.'s GAL had to provide consent to confirm her representation of E.M. CP 259. The Washington State Bar Association advisory opinion 1014¹ provides that when a guardian ad litem is in effect for a dependent child, RPC 1.8(f) requires that the GAL's consent be given prior to any direct contact between the lawyer and the dependent child and any representation of that child. Here, E.M.'s GAL did not provide consent to the attorney's representation of E.M. RP 8. The Washington State Bar Association opinion was based upon a version of RCW 13.34.100 in effect in 1987. While both the Rules of Professional Conduct and RCW 13.34.100 have been substantially modified a number of times since 1987, the concession by Ms. Sutton that some level of oversight (either from the existing guardian ad litem or from the court), was sound.

In summary, all of the parties either requested the dependency court

¹ The opinion from the WSBA is available at <http://mcle.mywsba.org/IO/searchresult.aspx?year=&num=1014&arch=False&rpc=&key words=> (last accessed on September 23, 2019).

to oversee the issue of appointment or recognized the gatekeeping role of the dependency court in confirming such appointments. The record shows the dependency court's role in performing general oversight in the life of a dependent child, including the ability to decide whether retained counsel is suitable, was not a contested issue. The issue of whether the juvenile court possesses authority to reject the notice of appearance filed by privately retained counsel is being raised for the first time on appeal. This is not appropriate under RAP 2.5(a).

B. The Issue of Whether the Dependency Court Abused Its Discretion in Striking the Notice of Appearance is Moot and the Exceptions for Review of a Moot Issue Do Not Apply Here

Aimée Sutton is now a King County Superior Court judge, and, as such, she is no longer available to represent E.M. *See* King County Superior Court, Judge Directory, Judge Aimée Sutton, <https://kingcounty.gov/courts/superior-court/directory/judges/sutton.aspx> (last accessed on September 18, 2019). Consequently, in this case, there is no effective relief to provide. As a general rule, the appellate court will not hear moot cases. *Hart v. Social and Health Services*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). The inability of the appellate court to provide effective relief is an indicator of mootness. *In Re LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986).

The appellate court may decide a case despite it being moot if it

involves a matter of continuing and substantial public interest. The criteria to be considered in deciding to accept a case that is moot include the public nature of the question presented, the desirability of a determination for the future guidance of public officers and the likelihood of future recurrence of the question. *City of Seattle v. Johnson*, 58 Wn. App. 64, 67, 791 P.2d 266 (1990). These criteria have not been established here.

Exceptions to the general rule of not reviewing moot questions should only be made in situations where the benefit to the public interest in reviewing the case outweighs the harm from an essentially advisory opinion. *Hart*, 111 Wn.2d at 450. Appellate review of this matter does not present a situation in which the public interest will outweigh the harm from an essentially advisory opinion. As noted by Commissioner Mary Neel, the issues here are “unusual.” *In re E.J.M.*, No. 78985-6-I, Commissioner’s ruling at 5. Given the uncommon nature of the issue, the desirability of a determination for the future guidance of public officers is of lesser significance.

If Ms. Morgan desires an attorney for E.M., she may file a motion to have counsel appointed. RCW 13.34.100(7)(b)(i)(A). To date, Ms. Morgan has not sought appointment of counsel for E.M. at public expense. E.M. now has an experienced dependency GAL from the King County CASA program representing his best interests in court. CP 2024-27. This

individual, Megan Notter, has substantial and relevant work history, and she has received extensive training in the area of child abuse and neglect. CP 2025-27. Ms. Notter has been E.M.'s GAL now for almost one year. CP 2024. The GAL is also represented by a CASA program attorney, who can bring legal issues to the dependency court's attention in order to advance E.M.'s best interests. CP 2024. The issue of whether the dependency court abused its discretion in August 2018 regarding the notice of appearance filed by Ms. Sutton is now moot, and as such, this Court should decline to reach this issue.

Ms. Morgan cites to *In re Dependency of M.S.R.*, 174 Wn.2d 1, 5, 271 P.3d 234 (2012) (holding case-by-case decision making procedure to determine whether to appoint counsel for a child in a termination proceeding satisfies federal due process) and *In re Dependency of E.H.*, 191 Wn.2d 872, 893, P.3d 587 (2018) (holding discretionary right to counsel granted to children in dependency proceedings is adequate under the state constitutional due process guaranty). Br. Appellant at 12, 23. The question touched upon by Ms. Morgan, whether E.M. has a constitutional due process right to an attorney given his individual circumstances, is a question not raised here. This issue may be raised at any time by the parties at the superior court level, pursuant to RCW 13.34.100(7)(a).

C. Standard of Review

In the alternative, if this Court decides to consider the merits of Ms. Morgan's argument, that the trial court lacked authority under RCW 13.34.100 to strike the notice of appearance, matters of statutory interpretation are reviewed by the appellate court on a de novo basis. *In the Matter of K.J.B.*, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017) (citing *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 696, ¶8, 335 P.3d 416 (2014)).

If this Court determines the dependency court has an oversight role to play in regards to retained private counsel for dependent children too young to provide informed consent, review of the trial court's decision then moves to an abuse of discretion standard. *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) (finding trial court did not abuse its discretion when it refused to disqualify insured public utility districts' counsel due to potential prejudice to insureds).

In dependency proceedings, a juvenile court's orders regarding placement and visitation are reviewed for abuse of discretion. *See, e.g., Dependency of R.W.*, 143 Wn. App. 219, 223, 177 P.3d 186 (2008) (placement decisions in a dependency is discretionary and will be reviewed under the abuse of discretion standard); *In re Dependency of T.L.G.*, 139 Wn. App. 1, 15, 156 P.3d 222 (2007) (visitation decisions made by juvenile court regarding dependent child is reviewed for abuse of discretion

standard). In this case, the order striking the notice of appearance was a fact-specific decision. The abuse of discretion standard is also appropriate here.

A dependency court abuses its discretion if its ruling is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *T.L.G.*, 139 Wn. App. at 15; *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standards. *T.L.G.*, 139 Wn. App. at 15; *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

D. The Dependency Court Has the Authority to Decide Whether an Attorney Will Represent a Child in a Dependency Proceeding

The dependency court has authority to decide whether an attorney will represent a child in a dependency proceeding. This authority is inherent in the court's authority to oversee the administration of justice in its court, and recognized by the Legislature in RCW 13.34.100 and RCW 13.50.100, and RCW 2.44.030 and RCW 2.44.060. The gatekeeping function of the dependency court as to retained counsel is further supported by existing Washington case and federal law. In addition, American Bar Association's *Standards of Practice for Lawyers Who Represent Children in Abuse and*

*Neglect Cases and Rules of Professional Conduct*² provide that the dependency court should play a scrutinizing role in deciding whether to approve the role of retained counsel for a dependent child.

1. When viewed in its entirety, RCW 13.34.100 authorizes the dependency court to decide whether an attorney will represent a child in a dependency proceeding

The dependency court was correct in concluding that RCW 13.34.100(7) authorizes it to decide whether an attorney will represent a child in a dependency proceeding. RP 18. RCW 13.34.100(7) contains two references to retained counsel:

(a) The court may appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.

(b)(i) If the court has not already appointed an attorney for a child, or the child is not represented by a *privately retained attorney*:

(A) The child's caregiver, or any individual, may refer the child to an attorney for the purposes of filing a motion to request appointment of an attorney at public expense; or

(B) The child or any individual may *retain an attorney* for the child for the purposes of filing a motion to request appointment of an attorney at public expense.

(ii) Nothing in this subsection (7)(b) shall be construed to change or alter the confidentiality provisions of RCW 13.50.100.

RCW 13.34.100(7) (emphasis added)

² The standards may be accessed at https://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf (last viewed September 23, 2019)

The second reference at RCW 13.34.100(7)(b)(i)(B) does not advance Ms. Morgan's argument because it applies to a limited circumstance not present here. RCW 13.34.100(7)(b)(i)(B) establishes that "any individual" can retain an attorney for the purpose of filing a motion to "request appointment of an attorney at public expense."

The first reference to a "privately retained attorney" is set forth at RCW 13.34.100(7)(b)(i) ("or the child is not represented by a privately retained attorney"), and this reference suggests the Legislature envisioned a privately retained attorney for a child in at least some circumstances. But RCW 13.34.100(7)(b) should not be read in isolation from the remainder of the statute. Words "must be read in the context of the statute in which they appear" and not in isolation. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Specifically, here, RCW 13.34.070(b)(i) should be read in conjunction with RCW 13.34.100(7)(a). RCW 13.34.100(7)(a) generally authorizes the dependency court to decide whether to appoint an attorney for a child. "The court may appoint an attorney to represent the child's position..." RCW 13.34.100(7)(a). When drafting RCW 13.34.100, the Legislature clearly envisioned a gatekeeping role being performed by the dependency court. RCW 13.34.100 contains the terms "appoint" or "appointment" thirty-five times, repeatedly referring to the court's authority to decide whether children in dependency proceedings will have guardian

ad litem and/or attorneys. This Court discerns the plain meaning “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell v. Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

RCW 13.34.100 is plain on its face in authorizing the dependency court to decide whether an attorney will represent a child in a dependency proceeding. The legislative intent is clear from the statute itself that the dependency court serves a gatekeeping function. When a term is not defined by statute, the reviewing court may look to the dictionary to give it meaning. *Nissen v. Pierce County*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). *Black’s Law Dictionary* defines “appointment” as “[t]he designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.” *Black’s Law Dictionary* 474 (5th ed. 1979) citing *In re Nicholson’s Estate*, 104 Colo. 561, 93 P.2d 880, 884. Read as a whole, RCW 13.34.100 contemplates that the juvenile court maintains general oversight into attorney and GAL appointments for dependent children.

In addition, the gatekeeping function of the juvenile court is also consistent with the Legislative finding from 2010, accompanying RCW 13.34.100, stating, “when children are provided attorneys in their dependency and termination proceedings, it is imperative to provide them with well-trained advocates so that their legal rights around health, safety,

and well-being are protected.” Laws of 2010, ch. 180, §1. Judicial oversight is required to ensure that only well-trained advocates serve the role of representation of dependent children. Or, as the dependency court in this case more plainly stated, “It’s not a situation where we just wholesale, have parties coming in, hiring private lawyers and having them file notices of appearance on behalf of children. It just doesn’t happen in dependency.” RP 19.

Children involved in dependency proceedings are especially vulnerable, and the Legislature has noted that attorneys representing these children should be trained “in meaningful and effective child advocacy, the child welfare system and services available to a child client, child and adolescent brain development, child and adolescent mental health, and the distinct legal rights of dependent youth, among other things.” Laws of 2010, ch. 180, §1. The dependency court here correctly interpreted its authority under RCW 13.34.100, based on the plain meaning of the statute and legislative intent, to allow it to decide whether a child in a dependency case may be appointed a specific attorney.

2. RCW 13.34.100 must be read in conjunction with RCW 13.50.100

The dependency court’s gatekeeping authority over whether to permit retained counsel for a child is consistent with the confidentiality of

juvenile court records, as set forth in RCW 13.50.100. Significantly, when the Legislature drafted RCW 13.34.100, it referred to the confidentiality provisions in RCW 13.50.100. “Nothing in this subsection (7)(b) shall be construed to change or alter the confidentiality provisions of RCW 13.50.100.” RCW 13.34.100(7)(b)(ii). Plain meaning considers the statutory scheme as a whole and related statutes. *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

RCW 13.50.100 provides that records of dependency court hearings “shall be confidential” and proscribes limited instances in which they may be released. RCW 13.50.100(2). Here, when Ms. Sutton asked the Department for release of the location of E.M. in foster care, which was a request for confidential information, the Department properly desired court approval prior to releasing this information. RP 7. Counsel for the Department noted that Ms. Sutton’s motion had been filed without Ms. Sutton having access to the court records or the Department’s records. RP 7. The Department’s attorney stated, “as far as I was concerned, Ms. Sutton has not been properly appointed to represent [E.M.] on this case. So I was not going to provide any information to her, unless or until that happened, nor was the Department.” RP 7.

Given the confidential nature of the Department’s records, including the confidential location of a child in foster care, the mere filing of a notice

of appearance should not be construed to trigger full access to otherwise confidential records. Due to the confidential nature of dependency records and a child's inability to contract with an attorney, court appointment or approval of counsel is needed before the Department and the parties are free to provide information a child's attorney needs to properly assess the child's legal interests.

3. RCW 2.44.030 and RCW 2.44.060 also provide authority for the court's oversight as to attorney representation

The dependency court's gatekeeping authority derives not only from RCW 13.34.100, but also from provisions in chapter 2.44 RCW. RCW 2.44.030 provides:

The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

Here, when Ms. Sutton initially was questioned by the Department's attorney, Ms. Sutton refused to disclose who retained her. CP 86. The Department filed an objection to Ms. Sutton's notice of appearance. CP 85. Under RCW 2.44.030, the juvenile court was justified in requiring Ms. Sutton to prove the authority under which she appeared after the Department objected to the notice of appearance.

The juvenile court's gatekeeping authority also derives from RCW 2.44.060, which states:

When an attorney dies, or is removed, or suspended, or ceases to act as such, a party to an action for whom he or she was acting as attorney, must, at least twenty days before any further proceedings against him or her, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person.

The reference here to an attorney being "removed" applies to involuntary removal, not voluntary withdrawal by an attorney. *Skaare v. Skaare*, 52 Wn.2d 273, 277, 324 P.2d 815(1958) (noting RCW 2.44.060 "does not apply to a voluntary withdrawal by an attorney such as occurred in the case at bar.") Consequently, RCW 2.44.060 contemplates the ability of the court to remove an attorney from representing a particular individual in a case. For example, if a child's attorney fails to meet with a child, neglects to prepare reports for the court, and then repeatedly fails to appear in court at the child's hearings, the juvenile court would have the power to discharge that attorney. *Cf. American States Insurance Co. ex rel. Kommavongsa v. Namath*, 153 Wn. App. 461, 470, n. 7, 220 P.3d 1283 (2009) (noting the power of the court to discharge ineffective counsel in a criminal case). The power to discharge untrained or incompetent attorneys is part of the general oversight authority possessed by the court, consistent with RCW 2.44.060.

4. Washington case law regarding the court's broad discretion demonstrates the dependency court's judicial oversight function

Existing Washington case law also demonstrates the dependency court's role in providing oversight for a dependent child in the State's care. The dependency court has "broad discretion" to receive and evaluate relevant evidence in order to reach a decision regarding the welfare of a child. *In re Dependency of Z.F.S.*, 113 Wn. App. 632, 639, 51 P.3d 170 (2002); *In re Welfare of Becker*, 87 Wn.2d 470, 478, 553 P.2d 1339 (1976). The Washington State Supreme Court has determined, "[b]oth our current statutory law and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are the subjects of dependency or termination proceedings." *M.S.R.*, 174 Wn.2d at 22. In addition, recently, this Court implicitly recognized the dependency court's ability to choose which particular attorney serves as a child's representative. In *In re Dependency of A.E.T.H.*, ___ Wn. App. ___, 446 P.3d 667, 680 (2019), this Court noted that a particular attorney guardian ad litem "would be a suitable choice, if she is able to serve" to represent the child.

RCW 13.34.100(7) does not allow any member of the public to hire a lawyer for a child involved in a dependency proceeding without oversight by the dependency court. The Washington Supreme Court has long recognized the "express legislative concern for the physical and emotional

well-being of children that underlies the juvenile dependency statute, RCW 13.34.020.” *King v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). The dependency court here was acting on this concern by ensuring that this young child, without a parent to adequately care for him, was not represented by an attorney demonstrating conflicted interests. RP 20.

5. The American Bar Association’s standards support the gatekeeping role of the dependency court

The American Bar Association also envisions an important role for the court as a gatekeeper when a private attorney is retained for a dependent child. American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, Approved February 5, 1996 at 19. The ABA standards pertain primarily to the situation where a child makes an independent choice to be represented by retained counsel:

H-5. Permitting Child to Retain a Lawyer. The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child’s independent choice, and such counsel should be substituted for the appointed lawyer.

Id. at 19.

The standards also provide that the court’s approval is appropriate to review the suitability of retained counsel:

A person with a legitimate interest in the child’s welfare may retain private counsel for the child and/or pay for such

representation, and that person should be permitted to serve as the child's attorney, *subject to approval of the court*. Such approval should not be given if the child opposes the lawyer's representation or if the court determines that there will be a conflict of interest. The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.

Id. (Emphasis added).

The commentary accompanying the standards also addresses the "rare circumstances" where someone seeks to have retained counsel recognized as sole legal representative of the child:

Although such representation is rare, there are situations where a child, or someone acting on a child's behalf, seeks out legal representation and wishes that this lawyer, rather than one appointed by the court under the normal appointment process, be recognized as the sole legal representative of the child. Sometimes, judges have refused to accept the formal appearances filed by such retained lawyers. These Standards propose to permit, under carefully scrutinized conditions, the substitution of a court-appointed lawyer with the retained counsel for a child.

Id. at 19.

Although this comment appears to apply when substituting counsel, it nevertheless shows that the court plays a prominent role in supervising the appearance of counsel for a child. Thus, both the ABA standards and the commentary underscore the importance of the juvenile court's role, to carefully scrutinize whether to accept the appearance of a retained lawyer, and to safeguard privileged information about the child's case.

6. The Rules of Professional Conduct also support the gatekeeping role of the juvenile court

Additionally, RCW 13.34.100 must be read in a manner consistent with the Rules of Professional Conduct (RPC), which prohibit a lawyer from accepting compensation for representing a client from one other than the client unless the client provides informed consent. RPC 1.8(f). In deciding to strike the notice of appearance, the dependency court relied in part on RPC 1.2, 1.4, and 1.8. CP 263. The dependency court properly considered the RPCs when determining whether to permit the representation of retained counsel for E.M. “A court has not only the right, but also the duty to safeguard ethical practice as part of its inherent power to supervise its own affairs.” *In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 904, 332 P.3d 1063 (2014), citing *In re Mt. Vernon Plaza Cmty. Urban Redevelopment Corp.* I, 85 B.R. 762, 765 (Bankr.S.D.Ohio 1988).

In summary, the gatekeeping role employed by the dependency court is supported by RCW 13.34.070, RCW 2.44.030, RCW 2.44.060, RCW 13.50.100, existing Washington case law, federal case law, the American Bar Association, and the Rules of Professional Conduct. These authorities constitute a tenable basis supporting Judge Oishi’s decision to strike the notice of appearance filed by retained counsel for E.M.

E. The Juvenile Court Did Not Abuse Its Discretion in Striking the Notice of Appearance and the Motion for Reconsideration

Judge Oishi properly exercised his discretion by considering the various provisions of the RPCs to determine whether counsel was independent and appropriate for E.M.'s well-being. RPC 1.8(f) provides that a lawyer "shall not accept compensation for representing a client from one other than the client" unless the client gives "informed consent." Ms. Sutton admitted it "will likely not be possible to get informed consent directly." CP 256. E.M. had never met or spoken to the attorney retained to represent him. RP 13. E.M. had not provided informed consent to the retained attorney, and he had not waived any potential conflict created by the fact that the attorney was retained by his former caregiver. RP 13; CP 91. The dependency court correctly concluded that three-year-old E.M. did not provide informed consent for representation by Ms. Sutton. RP 16.

In addition to the RPCs, Judge Oishi also considered the Admission and Practice Rules (APR), specifically APR 5(g). CP 263. APR 5(g) references the Oath of Attorney, which states in pertinent part: "I will ... accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court." APR 5(g)(6).

Judge Oishi did not specifically find that the retained attorney

violated the RPCs or APR 5(g). RP 15. Instead, the court commended Ms. Sutton for placing the funds received from the grandmother in a trust account. RP 15. Although the juvenile court did not find a specific violation of the RPCs had yet taken place, the court properly referred to the RPCs to evaluate whether to accept the attorney's notice of appearance. The trial court also concluded there was at least a potential conflict. Judge Oishi determined the question "boiled down just into one nutshell" which was "the problem of potential conflict, and obviously that's why I talked about the RPC. That's why I talked about the APR rule." RP 20. By filing a motion to return E.M. to his grandmother's home without first meeting with E.M. and without first obtaining access and reviewing the confidential records about E.M.'s circumstances, the attorney retained by the grandmother engaged in behavior justifying her discharge from the case.

The comments to the preamble to the RPC provide that a violation of a professional rule does "not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." RPC Preamble (20). But that preamble does not suggest, as Ms. Morgan appears to claim, that disqualification of a lawyer in pending litigation is never an appropriate response. "A court has the authority and duty to inquire on its own initiative into whether counsel should not serve because of a conflict with another client." *Wixom*, 182 Wn. App. at 904,

citing *United States v. Coleman*, 997 F.2d 1101, 1104 (5th Cir.1993); *Estate of Andrews by Andrews v. United States*, 804 F. Supp. 820, 824 (E.D.Va.1992); *In re Chou-Chen Chems., Inc.*, 31 B.R. 842, 852 (Bankr.W.D.Ky.1983). The juvenile court properly considered the various provisions of the RPCs to determine whether counsel was independent and appropriate for E.M.'s well-being.

The plenary authority to discipline attorneys resides in the Washington State Supreme Court, but lower courts may exercise authority consistently with the manner demonstrated by the Supreme Court. *Chism v. Tri State Construction*, 183 Wn. App. 818, 841-42, 374 P.3d 193, review denied, 186 W.2d 1013 (2016). For example, courts may deny or disgorge attorney fees in response to a RPC violation. *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2ds 1207 (1992). Courts may also determine that a violation of the RPCs in the formation of a contract renders that contract unenforceable as violative of public policy. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014). "In cases where counsel is in violation of professional ethics, the court may act on motion of an aggrieved party or may act sua sponte to disqualify." *O'Connor v. Jones*, 946 F.2d 1395 (8th Cir. 1991).

In addition, Judge Oishi's decision was supported by facts in the record. Judge Oishi had earlier revised the Pro Tem Commissioner's ruling

regarding E.M.'s placement. CP 81-82. In doing so, Judge Oishi read voluminous materials. And, earlier, Judge Oishi had called for responses on the question of placing E.M. back in his grandmother's care. CP 1926. All of the parties, with the exception of the CASA (being too unfamiliar with the history of the case), responded by taking a position on whether E.M. should be placed again with his maternal grandmother. The Department social worker felt the grandmother could not be trusted to protect E.M. from his mother. CP 97-98. E.M.'s father felt the maternal grandmother was "not an appropriate placement" for E.M. and he believed foster care would be the "safer, more suitable placement..." CP 1933. The dependency court, in an earlier hearing, had determined that the grandmother and the mother had a "history of conflict." CP 304. Ms. Morgan had previously described E.M.'s maternal grandmother as "abusive." CP 392. Yet, Ms. Morgan sought return of E.M. to the care of his grandmother, claiming her wishes as a parent, instead of the father's wishes, formed the legal basis for placement of E.M. with the maternal grandmother. CP 1957. Judge Oishi considered all of these responses, and was familiar with extensive facts, before deciding to strike both the notice of appearance and the motion for reconsideration. CP 263.

Ms. Sutton was not familiar with discovery, previous filings, or with E.M. himself. Ms. Sutton obtained information only from the grandmother

and the mother, and perhaps Mr. Kelly, Ms. Morgan's "life coach." RP 7. Ms. Sutton purported to represent E.M.'s legal right to "family integrity" (CP 266) without fully understanding E.M.'s legal rights to health, safety, and well-being. Having never met E.M. and without being familiar with the discovery, retained counsel was not in a position to make a well-balanced decision as to E.M.'s legal rights. Judge Oishi's own long-standing knowledge and familiarity with the case stands in contrast to the scant information available to Ms. Sutton. Judge Oishi's decision-making process was based upon tenable grounds. The dependency court did not abuse its discretion in deciding to strike both the notice of appearance and the motion for reconsideration.

Lastly, Ms. Morgan's claim that the Department acted in bad faith by thwarting Ms. Sutton's attempts to meet with E.M. is unfounded and demonstrates a lack of appreciation for the confidential nature of the records at issue in dependency proceedings. If Ms. Sutton had first sought court approval and access to the Department's records, this procedure would have been agreeable to the Department. The mechanism set forth in RCW 13.34.100(7)(b)(i)(A), of filing a motion to seek approval to represent a dependent child, is equally applicable for retained counsel appearing under the general appointment of counsel provision set forth at RCW 13.34.100(7)(a). Instead, Ms. Sutton insisted on relying solely on the

notice of appearance to give her access to E.M. CP 254. Her first action was then to file a motion that was entirely in line with the grandmother's interests, the interests of the person who retained her. The situation here highlights the importance of an attorney being properly appointed by the court and having access to the child's information in order to pursue legal remedies that advance the child's legal interests.

V. CONCLUSION

For all of the foregoing reasons, the trial court did not err, and the order striking the notice of appearance and motion for reconsideration should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Court of Appeals, Division One, under Case No. 78985-6-I, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Jan Trasen, Washington Appellate Project, wapofficemail@washapp.org; and jan@washapp.org; and
2. Kathleen Martin, Dependency CASA Program, casa.group@kingcounty.gov; and kathleen.martin@kingcounty.gov.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of October, 2019, at Seattle, WA.



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Office Identification #91016

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

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