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Washington State Supreme Court

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NO. 90468-5

SUPREME COURT OF THE STATE OF WASHINGTON

In re: the Dependency of M.H.P.,
STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Petitioner,

v.

P. PARVIN AND L. BRAMLETT,
Respondents.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON and
WASHINGTON COALITION FOR OPEN GOVERNMENT

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 ORIGINAL

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I. INTRODUCTION

In the words of Judge Mary Kay Becker, “In government, where secrecy sets in, scandal follows.” *State Dept. of Social and Health Services v. Parvin*, 181 Wn.App. 663, 685, 326 P.3d 832 (Div. 1, 2014) (Becker, J. dissenting). As explained in her dissenting opinion below, allowing parties to obtain public funding in complete secrecy is “a formula for unnecessary delay and expense,” resulting in wasted tax money in this case. *Id.* at 684-685. Private court proceedings threaten to squander not only money, but public trust.

Public oversight of parental termination cases is needed to ensure that state laws are serving their intended purpose to nurture healthy families and protect children. Also, in these times of overloaded courts and scarce resources, public monitoring of purse-strings is important to support proper funding of the justice system. In order to safeguard public trust in the system, this Court should hold that motions for public funding in parental termination cases are subject to the same strict sealing test that applies to other civil motions. In addition, this Court should clarify that rules governing public access to state courts may not be changed outside of the GR 9 process. This Court must control the rulemaking process to ensure a thorough public review that balances competing interests.

II. INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a non-profit trade association representing 25 daily newspapers throughout the state, including the respondent Seattle Times. The Washington Coalition for Open Government (WCOG) is a non-profit statewide organization dedicated to promoting and defending the public's right to know about the conduct of public business. These nonpartisan organizations regularly advocate for public access to court records as part of government accountability, including participating as amicus parties and commenting on proposed court rules.

Amici have a strong interest in protecting public oversight of courts, particularly where the rights of vulnerable children and disadvantaged indigent parents are concerned. Newspapers frequently report on the state's handling of child abuse and neglect because of its major public importance. This case will affect amici's ability to inform the public about the costs, benefits and workings of the parental termination system. If defense requests for public funding are totally hidden, as in this case where even the sealing motion was secret, it will be harder to evaluate the fairness and effectiveness of the system. Also,

amici want to protect their ability to comment on rules through the GR 9 rulemaking process.

III. DISCUSSION

A. Article 1, Section 10 Applies To Funding Motions in Parental Termination Cases.

Amici Allied Daily Newspapers of Washington and the Washington Coalition for Open Government agree with the state's arguments that parental termination cases are subject to the presumption of openness rooted in Article 1, Section 10 of the Washington Constitution. Supp. Brief of the State of Wash., pp. 6-13. Those arguments are not repeated here. This brief will focus on the general public's interest in motions for public funding in parental termination cases, which is separate from the interests of children emphasized in the parties' supplemental briefing. Because of the strong public interest in overseeing parental termination cases, this Court should require application of the constitutional sealing test when asked to seal the funding motions at issue.

1. The Public Is Interested in the Fair and Efficient Administration of Parental Termination Laws.

In this case, the parents secretly obtained public funding to hire – again – the same expert already paid by the state to evaluate the child multiple times. Supp. Brief of the State of Wash., p. 11, citing CP 59-71,

180-194. Without any public scrutiny or notice to other parties, the parents were able to obtain the expert funding even though it was too late to use the experts' opinions in the termination trial. As Judge Becker said in dissent:

A judge rubber-stamped orders authorizing payment of expert witnesses and sealed the applications and the orders. Because the State was not made aware of the request, the judge was unaware that the discovery deadlines for witness disclosure had long passed, trial was imminent, and allowing the witnesses to testify would require a lengthy continuance....

Public funds were wasted in this case. The money was spent to hire new witnesses well after the deadline for disclosure and discovery. Because of the prejudice caused by the late disclosure, the trial judge excluded the witnesses and their work was for naught. This would not have happened if there had been notice to adverse parties as required by GR 15.

Parvin, 181 Wn.App. at 684-685.

The kind of waste that occurred here underscores why funding motions matter to the general public. According to the 2015 State of the Judiciary Report,¹ “our courts continue to struggle with high caseloads, reduced staff, old information systems, growing needs for interpreters, and inadequate structures.” The report highlighted a 20 percent reduction in the number of state-funded Northwest Justice Project attorneys, “resulting

¹ See <http://www.courts.wa.gov/newsinfo/content/stateOfJudiciary/january2015.pdf>, pp. 2, 13-14.

in a drop of nearly 5,000 civil legal aid cases handled from 2009 to 2014.” Against this backdrop of inadequate court funding, described in the report as “the most severe obstacle impeding fair, accessible and timely justice for the people of Washington,” any waste of the scarce money allocated to public defense is of grave and broad importance. It diverts funds vitally needed to protect the public interest in fair and timely resolution of cases. Also, wasted expenditures undermine public trust, jeopardizing the funding needed for the justice system as a whole to function properly.

As Justice Louis Brandeis famously said, sunshine is the best disinfectant. When the public is not watching, judges and litigants are more likely to make mistakes. Public scrutiny promotes fair and just decisions. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735 (1986) (“one of the important means of assuring a fair trial is that the process be open to neutral observers”). When records are sealed without any opportunity for objection, as happened here, there is nothing to prevent courts from improperly elevating private interests over more important public interests in open and accountable courts.

In sum, if a blanket of secrecy indiscriminately covers all motions for public funding in parental termination cases, the risk of wasteful or unjust decisions is heightened. As a result, public trust is undermined, and

support for proper funding of the system is jeopardized. These vital public interests should be considered along with the interests of children discussed in the parties' briefing.

2. This Court Should Explicitly Hold That *Dreiling* Applies.

In *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004), this Court stated: "Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny." This Court explained that Article 1, Section 10 "guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases." *Id.* at 908-909. That right of public access "may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified." *Id.* at 904. *Dreiling* adopted a five-part test for sealing records in civil cases: 1) the proponent of closing a courtroom or sealing court records must make some showing of the need, stating the interests or rights which give rise to that need as specifically as possible without endangering those interests; 2) anyone present when the closure or sealing motion is made must be given an opportunity to object, after receiving "sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records"; 3)

the court, proponents and objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened; 4) the court must weigh the competing interests of the parties and the public, and articulate its findings and conclusions as specifically as possible; and 5) the order must be no broader in its application or duration than necessary to serve its purpose. *Id.* at 913-914, citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). Because courts are presumptively open, the burden of justification rests on the parties seeking to infringe the public's right. *Id.* at 914.

In this case, the Court of Appeals held that the trial court's sealing orders met the standard set forth in *Dreiling. Parvin*, 181 Wn.App. at 666. Thus, the Court impliedly held that the constitutional sealing test applies to funding motions in parental termination cases, but did not say so explicitly. This Court should clarify that trial courts must apply the *Dreiling* test when asked to seal motions for public funding in civil cases. Otherwise the public will have no way to learn about wasted funds or improperly denied funds, removing the “check of public scrutiny” and undermining “the public’s understanding and trust in our judicial system” in violation of Article 1, Section 10. *Dreiling*, 151 Wn.2d at 903-04.

B. Changes in Public Access Require A Thorough Public Rulemaking Process.

GR 9 prescribes the process used by this Court to adopt new rules governing civil and criminal proceedings in state courts. GR 9(a) explains the purpose of the rulemaking process as follows:

In promulgating rules of court, the Washington Supreme Court seeks to ensure that:

- (1) The adoption and amendment of rules proceed in an orderly and uniform manner;
- (2) All interested persons and groups receive notice and an opportunity to express views regarding proposed rules;
- (3) There is adequate notice of the adoption and effective date of new and revised rules;
- (4) Proposed rules are necessary statewide;
- (5) Minimal disruption in court practice occurs, by limiting the frequency of rule changes; and
- (6) Rules of court are clear and definite in application.

These important purposes were not served in this case. The King County Superior Court adopted a procedure allowing parental termination defendants to bring secret ex parte motions for funding and to seal those motions without following GR 15, this Court's sealing rule. In adopting the uniform procedure, the Superior Court did not ensure that "[a]ll

interested persons and groups receive notice and an opportunity to express views,” as would happen under GR 9(a)(2).

The Court of Appeals upheld the secret motion practice, stating that the due process rights of indigent parents allow them to seek expert funding privately, so as not to give a tactical advantage to the state or place them in a worse position than wealthy parents. *Parvin*, 181 Wn.App. at 665. The Court held that such public funding requests are “exempt” from the GR 15(c)(1) requirement to notify all parties of a hearing to seal records. However, GR 15 contains no such exception, with good reason. If parties in a case have no idea that a sealing motion has been filed, interested members of the public cannot be alerted and the public’s right to object to sealing is rendered meaningless.

This Court adopted GR 15 after careful consideration of all the public and private interests affected by sealing court records, and with due regard for the presumption of openness rooted in Article 1, Section 10. If a party believes that GR 15 fails to account for an important private interest, the proper course is to propose a rule amendment pursuant to GR 9(d). That rule says, “Any person or group may submit to the Supreme Court a request to adopt, amend, or repeal a court rule.” By skirting the rulemaking process, proponents of King County’s secret funding

procedure foreclosed any consideration of the public interest. This violates the right to open administration of justice under Article 1, Section 10, as well as the democratic principles of informed decision-making embodied by GR 9(a). To ensure that public access to courts does not yield to less important private interests, this Court should hold that a GR 9 rulemaking process is required for any relaxation of the GR 15 restrictions on sealing court records.

IV. CONCLUSION

For the foregoing reasons, this Court should hold that motions for public funding in parental termination cases must be subject to the same sealing restrictions that apply to other civil motions, unless a GR 9 rulemaking process creates an exception.

Dated this 3rd day of April 2015.

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By: s/Katherine A. George
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on April 3, 2015, I served the foregoing Amicus Curiae Memorandum and related motion by email, per agreement, to:

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Good afternoon. Please find attached for filing and service an Amicus Curiae Memorandum and related Motion for Leave to File Amicus Brief by Allied Daily Newspapers of Washington and Washington Coalition for Open Government, with certificate of service, in Case No. 90468-5, State Dept. of Social and Health Services v. Parvin.

This filing is by Katherine George, WSBA 36288, phone 425 802-1052, email kgeorge@hbslegal.com.

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