

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/8/2018 2:42 PM  
BY SUSAN L. CARLSON  
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NO. 94529-2

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HBH; SAH; and TREY HAMRICK  
litigation guardian ad litem on behalf of  
KEH, JBH, and KMH,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner,

and

TOWN OF EATONVILLE,

Defendants

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**BRIEF OF AMICUS CURIAE**  
**KING COUNTY SEXUAL ASSAULT RESOURCE CENTER**

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## I. INTRODUCTION

Children entering the foster care system are particularly vulnerable to maltreatment in out of home placements. They are often in care because of abuse and neglect. They have limited attachment to responsible nurturing, protective adults. They are at high risk for re-victimization. Obviously, the more extensive abuse suffered, the greater difficulty these children will have leading healthy and productive lives.

Children who are sexually abused infrequently immediately report the abuse. This fact has been documented over many years and in many studies. The heightened vulnerability of children in care, combined with the fact abuse often occurs multiple times before it is reported, makes the prevention of abuse through investigation of prospective foster parents and close monitoring of the placement before abuse can occur of paramount importance.

The State inexplicably denies it has a special relationship with the children in their custody. The State insists it has no duty to investigate the suitability and safety of a placement. The State maintains the only claim that a child can bring for abuse in foster care is negligent investigation of a report of abuse. Under this theory, the State can place a child with a known abuser, and escape liability for abuse because they only need to investigate after the abuse has occurred and been reported. As providers

of treatment and advocacy for abused children, Amicus cannot accept that this is the public policy of the State of Washington, and asks the Court to explicitly reject it.

## II. IDENTITY AND INTEREST OF AMICUS

*See* Motion For Leave.

## III. ARGUMENT

### A. **As Legal Custodian Of Vulnerable Dependent Children, The State Has A Duty To Prevent Abuse In Care By Effective Screening and Monitoring of Foster Care Placements.**

KCSARC serves victims of sexual assault and child physical abuse throughout King County. In this capacity, KCSARC annually treats children who have been removed from their homes due to sexual abuse and placed in foster care only to be abused again.

A history of maltreatment: neglect, physical abuse and sexual abuse, are the common backgrounds for children placed out of home. The majority of foster children experienced multiple forms of maltreatment before removal from their homes. A literature review shows rates of maltreatment for children entering care of 18-78% for neglect, 6-48% for physical abuse, and 4-35% for sexual abuse. Oswald, Heil & Goldbeck (2010). "History of Maltreatment and Mental Health Problems in Foster Children: A Review of the Literature." *Journal of Pediatric Psychology* 35(5) pp 462-472.

It is well documented that child sexual abuse is a significant risk factor for revictimization. Recent victimization places a child at the highest risk of being abused again. Child sexual abuse doubles or even triples the risk of further sexual abuse. The likelihood of sexual revictimization increases with each cumulative trauma. Survivors of sexual abuse accompanied by physical abuse are at even higher risk. Classen, Palesh & Aggarwal (April 2005). "Sexual Revictimization: A Review of the Empirical Literature," *Trauma, Violence and Abuse*, Vol. 6, No. 2. Pappia, Luebbers, Ogloff, Catajar, Muller & Mann (2017). "Further Victimization of Child Sexual Abuse Victims: A Latent Class Typology of Re-Victimization Trajectories", *Child Abuse and Neglect*, 66, 112-129.

Delayed disclosure of sexual abuse has long been recognized to be the norm. A significant number of victims never disclose. There are many reasons, but a leading cause is that the perpetrator is usually known to the child, and the victim feels responsible for their own abuse. In one study, 75% of children did not disclose within the first year of the abuse, and 18% had not disclosed after five years. Elliott & Briere (1994). "Forensic Sexual Abuse Evaluations of Older Children: Disclosures and Symptomatology" *Behavioral Sciences and the Law* 12, 261-77. Another study reported an average two year delay. Henry, J. (1997) "System

Intervention Trauma to Child Sexual Abuse Victims Following Disclosure” *Journal of Interpersonal Violence*, 12, 499-512.

Because the risk of harm to children in foster care is so well known, and because the harm that occurs greatly exacerbates pre-existing vulnerability, Washington as well as other states screens foster home placements. Though licensing and approval varies by state, the common purpose of screening is to provide safe, nurturing homes. The standards of safety set by law and regulation are designed to reduce risk of harm to children in care. “Home Study Requirements for Prospective Foster Parents” Child Welfare Information Gateway. <https://www.childwelfare.gov> (date visited). To this end, Washington State regulates who can apply, training requirements, and minimum standards for foster care applicants. Applicants can be excluded if they are of unsuitable character to provide safe and appropriate care. WAC 388-148-1300 Minimum Licensing Requirements for Child Foster Homes.<sup>1</sup>

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<sup>1</sup> WAC 388-148-1365 states:

- (2) You must demonstrate you have:
  - (a) The understanding, ability, physical health, emotional stability and personality suited to meet the physical, mental, emotional, cultural, and social needs of children under your care;
  - (b) The ability to furnish children with a nurturing, respectful, and supportive environment; and
  - (c) Sufficient regular income to maintain your own family, without the foster care reimbursement made for the children in your care.
- (3) You may not use drugs or alcohol, whether legal or illegal, in a manner that affects your ability to provide safe care to children.

**B. The State Has A Common Law Duty To Investigate The Safety And Suitability Of A Home Before Placement Of A Child.**

The State maintains the only recognized claim by an abused child against DSHS is negligent investigation pursuant to RCW 26.44.050. It ignores *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), mischaracterize the holding in *M.W. v. State*, 149 Wn.2d 589, 70 P.3d 954 (2003), and misstate the holdings in *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574, 583 (2006).

*Babcock v. State, supra*, first recognized a cause of action for negligent placement of a child under RCW 13.34. *et seq.* In *Babcock* the plaintiff's theory was that a caseworker inadequately investigated a prospective foster care placement. The children were sexually abused in foster care. The *Babcock* decision describes the plaintiffs' cause of action as negligent placement. "We now conclude that the caseworkers are not absolutely immune from suit for negligent foster care placement and reverse ...." *Babcock*, 116 Wn.2d at 599. Subsequently, in *Tyner v. DSHS*, 141 Wn.2d 68, 79, P.3d 1148 (2000), the court characterized *Babcock* as "a negligent placement suit against the State, alleging that DSHS failed to adequately investigate the backgrounds ..."

*M.W. v. State*, 149 Wn.2d 589, 70 P.3d 954 (2003), did not limit *Babcock*. In fact, there is no mention of *Babcock* in *M.W.* *M.W.* involved a claim that the manner of conducting a medical exam of a child pursuant to a RCW 26.44.050 child abuse investigation was contrary to DSHS policy and caused emotional distress to the child. There was no complaint about the placement of the child and no claim of abuse or neglect in the placement. The Supreme Court narrowed the statutory cause of action for negligent investigation of child abuse under RCW 26.44.050 to negligence that results in a harmful placement, defined as the initial placement, continued placement, or wrongful removal.

The State ignores the clear and unequivocal holding of *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003), that DSHS has a common law duty not to harm children:

Our conclusion not to expand the cause of action of negligent investigation is bolstered by our determination that DSHS **has an existing common law duty of care not to negligently harm children**. An expansion of the action of negligent investigation is therefore unnecessary.

*M.W.*, 149 Wn.2d at 600 (emphasis added). Indeed, the State's attempt to limit its duty to investigate until after abuse has occurred and been reported has been repeatedly rejected for the reason it is inconsistent with the common law duty, public policy, and common sense.

For example, before the explicit rejection by Division I in *C.L.* and Division II in *H.B.H.*, the attempt to narrow abused children’s rights to RCW 26.44.030 was rejected in *Lewis v. Whatcom Co.*, 136 Wn. App. 450, 149 P.3d 686 (2006). The plaintiff, a child sexually abused by her uncle, alleged the sheriff’s office negligently investigated her abuse. The County, relying on *M.W.*, argued that a negligent investigation claim arises only under RCW 26.44.030, and only applied when a parent is an abuser, not an uncle. Division I rejected that argument, emphasizing that nothing in cases limiting the rights of alleged abusers to sue for negligent investigation under RCW 26.44.030 should be read to limit the duty to protect children from abuse.

In *C.L. v. State Dept. of Soc. & Health Servs.*, 200 Wn. App. 189, 196-197, 402 P.3d 346 (2017), the court specifically rejected the argument stating that:

The department’s attempt to confine the plaintiffs to a cause of action for negligent investigation of child abuse is unsupported. The *M.W.* court, while finding no duty was owed in the particular circumstances of that case, **recognized an actionable duty that flows from the department to children and parents who are harmed when the department’s negligence results in placing a child into an abusive home.** *M.W.*, 149 Wn.2d at 597, 70 P.3d 954. In the *Babcok* case, our Supreme Court “implicitly approved” a claim of negligence against the department for failing to adequately investigate the backgrounds of prospective foster parents. *Tyner v. Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 79, 1 P.3d 1148

(2000), discussing *Babcok v. State*, 116 Wn.2d 596, 809, P.2d 143 (1991). A number of statutes and regulations direct the department to protect children by doing a careful evaluation of a foster or adoptive home before recommending placement. *See, e.g.* RCW 26.33.010; RCW 74.15.010; WAC 388-148-1320-1370. (Emphasis added.)

*Sheikh v. Choe*, 156 Wn.2d 441, 457-58, 128 P.3d 574 (2006), incorrectly cited by the State as supporting its position, underscores that the purpose of RCW 74.13.031, and other child welfare statutes is to protect dependent children. *Sheikh* at 452 (“these statutes uniformly follow from child welfare’s stated purpose: to safeguard the health and welfare of dependent children”). *See also Terrell C. v. DSHS*, 120 Wn. App. 20, 26, 84 P.3d 899 (2004) (“the legislative purpose behind these statutes is to protect client children from abuse while preserving family integrity”). Any ongoing relationship between the social worker and dependent child “is to prevent future harm **to that child**, not to protect members of the community from harm.” *Id.* at 28 (bold added).

Accepting the State’s argument results in the State being immune from liability for placing a child with a known sex offender because it was not investigating a reported claim that abuse had occurred. This has not been the law since *Babcock*, nor can it possibly be sound policy.

**C. The State’s Duty To Screen And Monitor Placement Arises From Its Special Relationship To Dependent Children.**

The existence of a special relationship results in a duty to protect children from foreseeable injury from a third person. The duty “arises where one party is entrusted with the wellbeing of another.” *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997). This duty is based on the defendants’ “assumption of responsibility for the safety of another.” *Id.* at 46. *Caulfield v. Kitsap Co.*, 108 Wn. App. 242, 252, 29 P.3d 738 (2001), citing *Niece v. Elmview Group Home*, 131 Wn.2d at 43. That the State has such a relationship to dependent children should be beyond dispute.

**1. Compelling Interest In Protecting Children.**

DSHS’s “special relationship” to dependent children is the logical conclusion because of the State’s undeniable interest in protecting all children. Washington courts have consistently declared that protecting children from abuse is a compelling state interest. *C.J.C. v. Corp. of Catholic Bishops of Yakima*, 138 Wn.2d 699, 726, 985 P.2d 262 (1999) (archdiocese has special relationship with children in the church to prevent foreseeable abuse by priests). *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P.3d 914, 918 (2011) (duty to protect children from abuse by friend of priest when the archdiocese knew of priest’s history of sexual abuse); *N.K. v. Corp. of Presiding Bishop of*

*Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730 (2013) (duty to protect children from the foreseeable risk of sexual abuse by a scout leader).

As the Court of Appeals observed in *State v. LeTourneau*, 100 Wn. App. 424 (2000), “courts have recognized prevention of harm to children to be a compelling state interest.” *Id.* at 439 (*citing, inter alia, In re Dependency of C.B.*, 79 Wn. App. 686, 690 (1995)). “Prevention of child abuse is of ‘the highest priority’”); *State v. Motherwell*, 114 Wn.2d 353, 366, 788 P.2d 1066 (1990) (“the State’s interest in the protection of children is unquestionably of the utmost importance”); *State v. Waleczek*, 90 Wn.2d 746, 752, 585 P.2d 797 (1978) (the husband-wife testimonial privilege is subordinate to “the overriding and paramount legislative intent to protect children from physical and sexual abuse”); *McKinney v. State*, 134 Wn.2d 388, 397, 950 P.2d 461 (1998) (recognizing a special relationship between adoption placement agencies and adopting parents, also allowing children to seek a tort remedy when they are damaged by the department’s negligent failure to uncover pertinent information about their prospective adoptive home).

## **2. *Parens Patriae* Relationship To Dependent Children.**

Children are born dependent upon adults to provide for their needs; needs such as protection, nurturance, food, clothing, shelter, and

education. The State must meet a high burden when intervening to remove a child from their parents' care. The State, standing *in loco parentis*, must demonstrate it will be able to adequately provide for the needs of the child. In the same way that a parent has a special relationship and responsibility to their child, the State has a special "*in parens patriae*" relationship and responsibility to children under its care. Removing a child from one harmful situation only to place them into another harmful placement would make no sense.

Washington has long recognized that entities acting in the stead of parents, such as school districts, have a special relationship with their students. The students 'involuntary relationship" to the district requires the district take reasonable care to protect them from harm perpetrated by teachers, staff, and other students. *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953), citing *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 633, 383 P.3d 1053, 1057 (2016):

The court reasoned that, because a child is compelled to attend school and has an involuntary relationship with the school district, the district has a duty "to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers."

The special relationship arises from the State's *parens patriae* relationship to a child they have removed from their parents.

In *Braam v. State*, 150 Wn.2d 689, 703, 81 P.3d 851 (2003), the court acknowledged the State's complete and sole control over placement:

We find compelling the reasoning of the Wisconsin Supreme Court, which found 'that those entrusted with the task of ensuring that children are placed in a safe and secure foster home owe a constitutional duty that is determined by a professional judgment standard.' Kara B., 205 Wis. 2d at 158 (emphasis added). We agree. Foster children, because of circumstances usually far beyond their control, have been removed from their parents by the State for the child's own best interest. More often these children are victims, not perpetrators. Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety.

The suggestion the State has no duty to investigate the placement is nonsensical.

### **3. Statutes and Regulations.**

A special relationship also arises from the State's statutory duty to place children with caretakers who will ensure the child's well-being. RCW 74.13.031(1) provides as the primary consideration in the placement of dependent children:

(1) To safeguard the health, safety and well-being of children ... receiving care away from their own homes, which is paramount over the right of any person to provide care;

The secretary has the duty, not just the right, to develop policies that assess a prospective foster parent's ability to provide the individual is of suitable character, and competence to care for children ....”

RCW 74.15.030(3). Meeting minimum qualifications is the beginning of the investigation of suitability to receive children, not passing a grade. No one has a right to be licensed to care for children. See WAC 388-148-1300, et. Seeq.

*C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 198, 402 P.3d 346, 350 (2017) citing *H.B.H. v. State*, 197 Wn. App. 77, 92, 387 P.3d 1093 (2016), petition for review filed, No. 94529-2 (Wash. May 22, 2017) explicitly acknowledged that the department's duty to a dependent child arises from a special relationship:

Absent proper monitoring by the State, a foster child is wholly exposed to the will of the foster parents, whether that will is a blessing or a horror. In this setting, the State is the last watchman of the foster child's well-being. A more compelling illustration of the bases of a special relationship ... is hard to imagine.

This declaration of policy from the Court of Appeals should be affirmed by this Supreme Court.

#### IV. CONCLUSION

Our courts have declared that protecting children is a compelling interest. Religious organizations, scouting organizations, schools, and police departments, are all required to protect children from the foreseeable risk of abuse. The State of Washington, with more control

over dependent children than any other entity, certainly has a duty to protect children in its care by screening and monitoring placement of children.

Respectfully submitted this 8<sup>th</sup> day of January, 2018.

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Washington Supreme Court  
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DATED: January 8, 2018, at Seattle, Washington.

  
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January 08, 2018 - 2:42 PM

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**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94529-2  
**Appellate Court Case Title:** HBH; SAH; and Trey Hamrick v. State of Washington, et al.  
**Superior Court Case Number:** 11-2-15110-2

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