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\* CASA Appendix  
IS SEALED

NO. 76000-9-I

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

**In Re the Dependency of E.H.**

**Ramona Rigney,  
Petitioner**

v.

FILED  
Feb 21, 2017  
Court of Appeals  
Division I  
State of Washington

**STATE OF WASHINGTON,  
Department of Social and Health Services,**

**Respondent.**

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**BRIEF OF COURT APPOINTED SPECIAL ADVOCATE**

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## I. INTRODUCTION

E.H. is now nine years, three months old and he has been in the dependency system for three years, three months. His CASA is Laura Clough, who also is the CASA for his five and six year old siblings. E.H. is one of eight siblings, two of whom are adults, three are teen-agers who are also dependent.

His case is now before this court based on his mother's claim that the Superior Court erred when it applied first a *Gunwall* analysis and found there is no right to counsel for all children in dependency; second, applied the *Mathews* factors and found that due process when applied to E.H. in particular did not require appointment of counsel; and third, separately examined whether there is a presumption of appointment of counsel based on E.H.'s liberty interests since he has been removed from his mother's care. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct 893, 47 L.Ed2d 18 (1976)

The Court found that "even assuming that a foster child's liberty interest is the type of interest that creates a presumption for the appointment of counsel, the court is still to weigh and balance the other three factors to determine if the presumption has been overcome." The Court found that "sadly," the particular circumstances of this child and his siblings leave no choice but placement in foster care. Pet. App. A.

## II. ISSUES FOR REVIEW

1. Whether this court should grant discretionary review when the juvenile court did not commit probable error, as the juvenile court is authorized by RCW 13.34.100(7)(b) to its exercise discretion in whether to appoint counsel for dependent children.
2. Whether the juvenile court properly considered the *Mathews* factors and a *Gunwall* analysis when denying the mother's motion for appointment of counsel.

## III. STATEMENT OF THE CASE

E.H.'s mother, Ms. Rigney, is incarcerated in federal prison with a release date of 2019. She had furloughs for some time which allowed her to travel to Washington to visit the children, but, at the time of the mother's motion, that furlough was revoked due to discovery that the grant of furloughs was a mistake on the part of the bureau of prisons.

E.H. has not lived with his mother since 2013, but his placement history is somewhat confusing. CASA App. He has been in his current placement since January 30, 2015.

The mother's motion for appointment of counsel appears to have been prompted in part by the CASA's recommendation that adoption as a primary permanent plan in a February 2016 Report to Court, but the mother's motion failed to note that in her May 2016 Report to Court, Ms. Clough recommended adding guardianship as a permanent plan based on

her conversations with E.H. and his stated wishes regarding his permanence. CASA App.

E.H. has suffered much trauma in his life. As reported by Ms. Clough in her reports to court, he has been diagnosed with Anxiety Disorder and Adjustment Disorder. His therapist reported that he “shut down” when his therapist broached the topic of his mother, and that he is anxious at the idea of separation from his current caregivers and finding himself alone. “He is obsessed with money; wanting to sell toys he is not using, almost as though he is preparing to take care of himself.” E.H. has disclosed living in “bad” homes, physical abuse by his mother’s friends, and being traumatized over his grandmother’s shooting death. CASA App.

The CASA spoke with E.H. three days before submitting her report to court regarding the mother’s motion for appointment of counsel and “through his tears, he told [the CASA] that he wants to be reunited with his mother as soon as possible, and wants to make sure the CASA tells the court that he strongly desires to stay in his current placement until his mother can return to him.” CASA App.

Ms. Clough reported to the court of the sadness E.H. feels if his older siblings fail to go to visits and her own efforts to engage E.H. in telephone or other communications with the older brother, which E.H. declined. CASA App.

At this time, the permanent plans established by the September 1, 2016 Permanency Planning Order for E.H., are primary plans for adoption

or guardianship with an alternate plan of return to the mother, reflecting the CASA's recommendations.

The CASA also adopts further statements of fact presented in the State's pleadings for this motion.

#### IV. ARGUMENT

**A. The juvenile court properly applied a *Gunwall* analysis when examining whether Art. 1, §3 requires appointment of counsel for all children in dependency proceedings.**

The State's briefing in response to the mother's motion provides a thorough discussion of this issue and the CASA adopts the arguments of the State. The trial court examined whether the Washington constitution expands due process rights to include appointment of counsel for all children and properly found that there is no "independent basis for appointing counsel." Pet. App. A. "[T]raditionally, [the Court] has practiced great restraint in expanding state due process beyond federal parameters." *Rozner v. Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991); *State v. Spurgeon*, 63 Wn.App. 503, 820 P.2d 960 (1991); *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 710-714, 257 P.3d 570 (2011). The juvenile court's ruling was in keeping with this principle.

**B. The juvenile court did not err when exercising discretion in making the decision not to appoint counsel for E.H., but finding that it is appropriate, given his particular circumstances, that he has a right to best interest advocacy.**

Appointment of counsel for all children in dependency is not required under the United States Constitution, federal statute, or the

Washington Constitution and is governed by RCW 13.34.100(7)(b)<sup>1</sup> which authorizes the court to exercise discretion on a case by case basis.

Further, the Court in *MSR* upheld the constitutionality of RCW 13.34.100 (6)<sup>2</sup> which permitted, but did not require, the court to consider appointment of counsel for children... “(C)hildren of parents subject to dependency and termination proceedings have due process rights that must be protected and, in some cases, must be protected by appointment of counsel, but that the right to appointment of counsel is not universal. We further hold that RCW 13.34. 100(6) is constitutionally adequate to protect the right of counsel for such children.” *In re Dependency of M.S.R.*, Wn. 2d, 1, 271 P.3d 234 (2012). While *MSR* specifically addressed appointment of counsel for children in a termination proceeding, the decision upholds the underlying principal that a court should have the discretion over appointment of counsel. Neither *MSR* nor the statute stands for the proposition that W.H. *should* be appointed counsel, but both the statute and case law demand that his individual circumstances must be considered when the court decides that issue.

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<sup>1</sup> RCW 13.34.100(7)(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. RCW 13.34.100 was amended effective July 1, 2014 and the relevant sections for appointment of counsel are now 13.34.100(6)(a), which applies to children who have been legally free for six months without achieving permanence, and 13.34.100(7) which applies to all other children in dependency.

<sup>2</sup> RCW 13.34.100 was amended effective July 1, 2014 and Section (6)(a) now applies only to children who have been legally free six months and have not achieved permanence; Section 7(a) applies to children in dependency.

Best interest representation is fundamental to protecting children in dependency proceedings and is codified by the Child Abuse Prevention and Treatment and Reform Act (CAPTA) which requires:

[every state to have] provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings— (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child...42 U.S. Code § 5106a (2)(B)(xiii)

RCW 13.34.105 requires a CASA to focus on the child and the child's needs.<sup>3</sup> The purpose of appointing an advocate for the child is to protect the child's interests. *In re Dependency of R.H.*, 129 Wn. App. 83, 89, 117 P.3d 1179 (2005). Washington State Guardian ad Litem Rules instruct a CASA and requires the CASA to "become informed about case... make reasonable efforts to become informed about the facts of the case and to contact all parties...examine material information and sources

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<sup>3</sup> RCW 13.34.105

(a) To investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child; (b) To meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court; (c) To monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order. . . (e) Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties; (f) To represent and be an advocate for the best interests of the child;

of information, taking into account the positions of the parties.”

GALR(2)(g)

The juvenile court found that “it is unclear what counsel could contribute that a conscientious CASA represented by counsel cannot.” Pet. App. A., 10. This conclusion was borne out through the number of reports to court Ms. Clough provided which have detailed descriptions of each of the three siblings’ particular circumstances. There is no room for the claim that the court was not provided with E.H.’s stated desires both for himself and his mother. That his stated wishes do not coincide with what *can* occur, given his mother’s situation cannot be remedied by appointment of an attorney.

The legislature has recognized that not every child in every dependency or termination proceeding is developmentally capable or even safe if they have to choose between what the parents ask of the court and what they themselves may want. RCW 13.34.105 grants the CASA discretion about whether it is appropriate for a child to be required to make a decision or weigh in on the emotionally charged issues before the court in dependency and termination proceedings. Fortunately for E.H., he trusts Ms. Clough and she has reported his expressed opinions to the court. While Ms. Clough has advocated for E.H.’s permanence by recommending guardianship as a permanent option, she has never failed to let the court know that E.H. himself wants to live with his mother.

**B. The juvenile court properly applied the *Mathews* factors in denying the mother's motion.**

Under *Mathews*, the court must consider, "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews* at 903.

The Court in *M.S.R.* held that each case must be decided on its individual facts and that in *M.S.R.* there was no constitutional violation of the children's rights because there was no evidence to show that appointment of counsel was necessary. *M.S.R.* at 22. The juvenile court addressed each factor in Ms. Rigney's motion, recognizing that E.H. has a significant interest in the proceedings and his interests are those identified in *MSR*: Those are removal from home, placements in foster care, and being placed in the care of parents who cannot safely or adequately parent the child. E.H.'s circumstances are particular in that there is no alternative for his placement in foster care. His liberty and contact with his biological family have been unalterably impaired by his mother's incarceration and the abuse and trauma which predated the dependency action.

The juvenile court also considered whether adding or substituting counsel for the CASA would bring value to protecting E.H.'s interests and prevent erroneous deprivation. Pet. App. 9. Ms. Clough's reports to court in response to the mother's motion, attached hereto as the CASA Appendix (CASA App.,) show that she has provided active advocacy for E.H.'s best

interests throughout her tenure on this case. She took great care when gathering information from him about the mother's motion for counsel and there is no evidence from the mother that an attorney for E. H. will protect his liberty interests more than his CASA has by advocating for his best interests, or how an attorney would prevent erroneous deprivation. As much as he wishes to live with his mother, her incarceration prevents him from living with her; contact between he and his siblings and mother are unalterably affected by their family's dispersal when she entered prison in 2013.

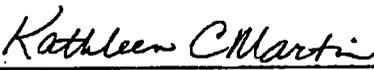
Siblings have the right to contact unless it is detrimental to their health and welfare but having an attorney would not change that E.H. has some siblings who are adults so the court cannot order contact; some of his siblings are either not safe or available to visit at will; and, at the time of the hearing on September 1, 2016, one of the siblings was on the run and his whereabouts were unknown. Pet. App. A, 10, 11. At the time Ms. Clough wrote her response to the mother's motion for counsel, E.H. had chosen not to continue contact with one sibling and Ms. Clough is committed to gently trying to restart the relationship with the sibling. CASA App.

## V. CONCLUSION

While E.H. has found himself in the most unfortunate of circumstances as a child with a traumatic history, family violence, separation, and clearly in need of special services, he also has the

protection afforded by RCW 13.34.100 in that he has a CASA to represent his best interests in court. He is protected by RCW 13.34's requirement that the court regularly hear updates on his situation and RCW 13.34.105's requirement that his CASA report to the court. There is no evidence at this time that having an attorney would have afforded him additional protections in court or kept him from having to be in foster care. His CASA has provided a voice for him in court and the court has recognized this voice.

RESPECTFULLY SUBMITTED this 21st day of February, 2017.

  
Kathleen C. Martin  
Kathleen C. Martin, WSB # 25636  
Attorney for CASA, Laura Clough

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the below date, the original of the documents to which this declaration is affixed/attached, was filed in the Court of Appeals-Division One under Case No. 76000-9-I, and a true copy was mailed with first class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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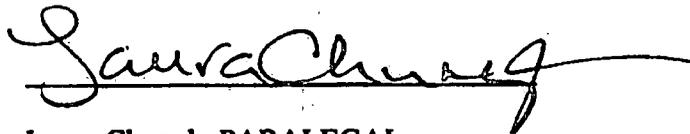
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