

FILED
SUPREME COURT
STATE OF WASHINGTON
3/5/2018 8:00 AM
BY SUSAN L. CARLSON
CLERK

NO. 94798-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of E.H.,

A minor child.

RESPONSE TO AMICI

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INTRODUCTION

Neither the United States' Constitution nor the Washington State Constitution require blanket appointment of counsel for all children in dependencies. RCW 13.34.100 protects the due process rights of children in dependencies by: requiring children have an independent Court Appointed Special Advocate (CASA), a guardian *ad litem*, unless a court affirmatively finds good cause not to appoint a best interests advocate; allowing the CASA or GAL to fully participate in the child's dependency case as any other party; requiring that the child's CASA or GAL, or the department notify twelve year old children of their right to ask for an attorney, and inform the court of the child's position; and, requiring appointment of counsel children who have not achieved permanence within six months after becoming legally free. RCW 13.34.100(1)(5)(6)(7).

In termination cases, if the trial court is asked to appoint counsel for the children, the court is required to consider each request for appointment of counsel on a case by case basis, weighing the liberty interests at stake, and the risks of an erroneous decision to determine whether the particular needs and circumstances of each child require appointment of counsel to protect the child's due process rights. *In re the Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012).

This Court should rule that the same standard should apply to dependency cases and hold that RCW 13.34.100 is constitutional in its current form.

ARGUMENT

As the United States Supreme Court found in *Lassiter*, “[d]ue process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty.” *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed.2d 640 (U.S. 1981), (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)).

The standard of “fundamental fairness” is not met by a blanket requirement for appointment of counsel for all children in dependency regardless of the child’s age, competence, ability to communicate with or assist their counsel, or understand the proceedings. Instead, RCW 13.34.100 creates a model to serve children by providing meaningful representation, not representation that is based solely on whether the representative is a lawyer. RCW 13.34.100, RCW 13.34.105, and the Guardian ad Litem Rules (GALR) work together as a model to protect constitutional protections of children’s due process rights in dependencies. E.H.’s case epitomizes how this model can be implemented to ensure the child has zealous advocacy,

independent of any agenda other than representing his best interests, and to insure the court knows the child's expressed wishes when the child is able to express those to the CASA or GAL. E.H.'s CASA trained according to state and national standards, she is supervised by professional staff, and she is represented by an attorney. This model allows the CASA to fulfill the anticipations of the statutes and GALR that the CASA will fully participate in the legal proceedings and will bring relevant information about the child before the court. This model means the CASA can file motions, respond to motions, examine and cross-examine witnesses in trials, in addition to being an active participant in other aspects of the dependency case.

E.H.'s CASA developed a net of connections between E.H. and sports programs, communicated with his school, gathered information from his services providers, his mother, and worked to facilitate contact with his siblings who are no longer under the court's jurisdiction. Finally, even though his CASA believed that it is in E.H.'s best interests for him to have permanence through adoption, she informed the court that it is his expressed desire to be reunited with his mother. The CASA changed her recommendation regarding a permanent outcome to guardianship rather than termination and adoption based on E.H.'s strong desire to maintain his maternal connection. Joint Appendix 204-243

The statutes allow the model established and implemented by the

King County Dependency CASA Program to be the normative model for the entire state, should funding from the legislature be provided to accomplish that goal.

Multiple amici point to the First Star Report Card to support their claim that this Court should find all children in dependency proceedings require legal representation. The First Star Report uses a matrix to assign grades to states based on whether the state requires appointment of counsel for children, with deductions from the state's score if counsel is appointed to represent the children's best interests and extra credit to states if counsel is for legal interests' representation only. Children's Advocacy Institute and First Star, *A Child's Right to Counsel, a National Report Card on Legal Representation for Abused and Neglected Children* at 4-21 (3rd ed. 2012), available at <https://www.firststar.org/learn-more/research-reports>. (last visited on March 1, 2018). Another criteria used in grading is the amount of training required to be an attorney for a child. *Id.*

In its grant of the A Grade to Louisiana, the First Star Report notes that: "One prominent Louisiana child law expert noted that Louisiana's [sic] use of Court Appointed Special Advocates (CASA) under Louisiana's Children's Code articles 424.1-424.10. Once appointed, these CASAs are to be given notice of every hearing *to ensure the child's voice is heard.*" *Id.* at 65.

Louisiana is one example out of the fifteen states that received an A or A+ rating and received full marks in the legal interests' representation criteria. However, the statute cited in the report is silent as to how fundamental fairness can be achieved for a child when the child cannot instruct their attorney, or possibly even communicate with the attorney. Competent clients are a crucial part of an attorney-client relationship and yet amici offer no explanation of how to overcome the obvious barriers to a child actually understanding the legal process and implications of the court's decisions. *Id.* at 64-65.

Under the Louisiana statute, children are entitled to be present at "the adjudication hearing," but they are not entitled to notice of other hearings, depriving them of the right to be heard. *Id.* at 64-65. By contrast, under RCW 13.34.100 and RCW 13.34.105 (1), the CASA or GAL receives notice of all hearings, is required to report to the court not only updates on the compliance and progress of the parents, the department, and the case, and has the obligation of bringing concerns about the child to the court's attention. The CASA or GAL must also report the child's opinions or wishes to the court on the issues, whenever the child's age and development make that possible.

First Star awarded ten out of ten points to Louisiana for the training

required for an attorney representing children in dependencies – they must take eight hours of training within two years of appointment and six hours of training per year thereafter in child welfare related subject matter. *First Star* at 64-65. By contrast, the volunteer CASA for E.H. was required to take thirty (30) hours of training from a curriculum developed by National CASA, before being sworn in as a CASA, and the King County Dependency CASA Program requires twelve hours of ongoing training per year. King County Superior Court Dependency CASA Program/Volunteer/Training: <http://www.kingcounty.org/menus/training.html>, <http://www.kingcounty.org/faqs.html>. (last visited March 1, 2018. While Ms. Clough is not an attorney, her actions show that fundamental fairness and due process is not achieved through having advocacy based on a particular education, but from having a statute that provides for due process whether or not the advocate is a lawyer.

RESPECTFULLY SUBMITTED this 2nd day of March, 2018.



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KING COUNTY SUPERIOR COURT

March 02, 2018 - 5:05 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94798-8
Appellate Court Case Title: In re the Dependency of: E.H.
Superior Court Case Number: 14-7-01413-7

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