

No.98596-1

NO. 78985-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DEPENDENCY OF:

E.M.,

Minor Child.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

Julia M. has not been permitted by the State to raise her four-year-old son, E.M., due to the tragic disappearance of her oldest child, S.M., eight years ago. Because of S.M.'s disappearance, E.M., born from Julia's second marriage, has been a dependent child since his birth in 2015.

Last summer, after living his entire life with his grandmother, E.M. was suddenly placed in foster care at age three. Shortly after this placement, E.M.'s grandmother retained attorney Aimee Sutton¹ to represent E.M. The Department and the father objected, and the juvenile court found Ms. Sutton's representation was inconsistent with several Rules of Professional Conduct. The court struck Ms. Sutton's appearance and pleadings.

The mother moved for discretionary review, arguing the juvenile court committed probable error and acted outside the usual course of judicial proceedings when it interfered with the attorney-client relationship. This Court granted review.

¹As of January 30, 2019, Aimee Sutton was appointed to the King County Superior Court bench. For purposes of this briefing, she is referred to without the honorific, as in the original proceeding. No disrespect to Judge

II. ASSIGNMENT OF ERROR

The trial court erred when it refused to permit the child's retained attorney to appear.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Under RCW 13.34.100(7)(b)(i), as the Department has acknowledged, an attorney may be retained for a dependent child.

Where an attorney is retained, a motion for counsel need not be filed pursuant to RCW 13.34.100(7). Here, where the juvenile court refused to permit retained counsel Aimee Sutton to appear, did the court wrongly interfere in the attorney-client relationship?

2. The Rules of Professional Conduct (RPC) govern the ethical practice of attorneys. The RPC's state clearly that supervision of attorney conduct is delegated to the Bar Association, rather than to individual courtroom judges, lest parties use the RPC's as a "litigation tactic." Where the juvenile court sought the opposing parties' opinions on the ethical conduct of the lawyer for the child, and where the court ultimately excluded Ms. Sutton from the case, did the court err when it refused to permit retained counsel to appear?

Sutton is intended. <https://www.governor.wa.gov/news-media/inslee-appoints-aimee-sutton-king-county-superior-court>.

3. Did the court erroneously apply the analysis used in appointed counsel cases pursuant to RCW 13.34.100(7), rather than permit counsel's appearance as in other privately retained cases?

IV. STATEMENT OF THE CASE

1. Family Background

E.M. was born to Julia M. on July 10, 2015. CP 1. The relationship between Julia and E.M.'s father, Alan M., was marred by the father's domestic violence, substance abuse, and untreated mental illness. CP 1-3; 59-61. The father was incarcerated when E.M. was born, and his unavailability due to incarceration and periods of homelessness, as well as his alcohol and methamphetamine abuse, contributed to Julia's decision to file for divorce. Id.

From the time of E.M.'s birth, Julia and her son lived with the maternal grandmother, Nadia B. CP 13-18; 59-77. Living with Nadia provided a stable and nurturing environment for E.M.; this also suited the needs of the Department of Children, Youth, and Families (Department), which had filed a dependency petition when E.M. was born. CP 1-6.

The Department's concerns regarding E.M. largely stemmed from the disappearance of Julia's older son in 2011, which has remained unsolved. Id.² Due to the prior case, the Department has required restrictions on Julia's contact with E.M., even though no charges have been brought against Julia or anyone else since S.M. disappeared. Id.

E.M. resided with his maternal grandmother from the time of his birth until the summer of 2018, and Julia lived with them for much of that time, as the court gradually liberalized the terms of her contact with her son. Dependency of E.M., No. 76959-6-I (Nov. 2, 2017), at 2.

Following violations of the court's curfew restrictions, Julia began residing with her mentor and friend, James Kelly, while E.M. stayed with his grandmother; Mr. Kelly actively participated in E.M.'s life as a visitation monitor. CP 20-24. While Mr. Kelly works at his Redmond I.T. office, ten minutes from home, E.M. attended full-time daycare. CP 78-80. Mr. Kelly is supportive of Julia and has grown

² Julia cooperated with the investigation of the disappearance of her son, S.M., including a full search of her home, car, phone, computer, and a 24 hour interrogation by the Bellevue Police Department without counsel. CP 69. Julia told the police everything she knew until her counsel requested that police cease the interrogation. Id. S.M. has not been found and Julia has never been charged, although a "founded" neglect allegation remains, related to the disappearance of S. M. CP 5-6.

close to E.M., having supervised and monitored over 50 visits between Julia and E.M. CP 20-25 (detailing over 200 hours of visitation).

In May 2018, Julia moved for a change of placement from the grandmother to “another suitable person,” naming Mr. Kelly as the proposed placement. CP 7-32 (motion for placement).³ Nadia supported placement with Mr. Kelly, as E.M. has enjoyed a strong bond with Mr. Kelly, who was willing and able to monitor contact with Julia. Id. Nadia stated she remained available as a respite resource or even as the placement, should the court deny the mother’s motion. CP 13-18.

The father filed a competing motion to change placement, but did not request that E.M. be placed with him. The father argued that E.M. should be placed in licensed foster care because it was a more “neutral” environment. RP 18. The father, realizing his marriage to Julia was over, abruptly decided he no longer supported placement with Mr. Kelly, and advocated for licensed foster care as an environment that would support his son’s reunification with him. CP 61; RP 18.

On June 1, 2018, argument was held before Superior Court Commissioner Susan Llorens. Following argument, the Commissioner

³ Julia’s mother, Nadia, stated she had an opportunity to return to work, and supported E.M. spending more time with his mother.

issued an order granting the mother's motion for change of placement to Mr. Kelly's home, with certain conditions.⁴ CP 78-80; RP 53-58. The Commissioner denied the father's motion for placement in foster care, concluding foster care was not in E.M.'s best interest. Id.

The father filed a motion to revise, and the Superior Court granted revision, on the basis that the court's concerns for E.M.'s safety were not alleviated, and that placement in foster care was in E.M.'s best interest. CP 81-84. E.M. was removed from Mr. Kelly's home and placed in foster care, where he has remained for the past year. Id.

2. Attorney for Child Retained

Five days after E.M. was placed in foster care, Aimee Sutton filed a notice of appearance as counsel for E.M. CP 254. Ms. Sutton was retained by E.M.'s grandmother, Nadia, who paid a deposit into a trust account on E.M.'s behalf. Id.; CP __, sub. no. 392 (declaration of Aimee Sutton). Ms. Sutton has been a licensed attorney for over 15 years and has represented thousands of juveniles and adults on retained and appointed cases throughout Washington. Id.

After Ms. Sutton filed a notice of appearance on July 18, 2018, she contacted counsel for the Department to obtain contact information for E.M., in order to speak with her new client, E.M. Id.

After Ms. Sutton's second attempt to reach E.M., she was informed by the Department that it would "not be providing [E.M.'s] contact information." CP __, sub. no. 392. Ms. Sutton made a third request to meet E.M. during a scheduled supervised visitation at the Department offices. Id. This request, too, was declined by the Department. Id. Although Ms. Sutton had not withdrawn any of the funds on deposit in the trust account paid for her representation, she filed a motion to reconsider E.M.'s placement in foster care, based upon E.M.'s legal interest in his family integrity. Id.

On August 2, 2018, the parties appeared before the juvenile court on the motion to reconsider placement. RP 4-22. The court refused to hear argument from Ms. Sutton on her motion to reconsider E.M.'s placement in foster care, stating it was not properly before the court. RP 5; CP 263-64. The court exclusively heard argument on Ms. Sutton's

⁴ The conditions imposed by the Commissioner for placement with Mr. Kelly included: enrollment in daycare for E.M. with transport provided by Kelly; mental health counseling for Julia; no passport for E.M.; and a safety plan to be entered by the parties. RP 53-58; CP 78-80.

notice of appearance on behalf of E.M. RP 5. The Department and the father requested that Ms. Sutton's notice of appearance be stricken, along with the motion to reconsider E.M.'s placement. RP 7-10. The court agreed and issued an order striking Ms. Sutton's appearance and motion to reconsider. CP 263-64; RP 14-21 (stating the court relied on RPC 1.2, 1.4, 1.8, and APR 5, since E.M.'s representation had been paid for by a third party).

The mother filed a notice of discretionary review. RAP 2.3(b)(2), (3). On May 16, 2019, this Court granted Julia's motion to modify and granted discretionary review.

V. ARGUMENT

The juvenile court interfered with the attorney-client relationship and misapplied RCW 13.34.100, where E.M., a dependent child, was entitled to counsel, and in fact, had counsel.

A. The mother is an aggrieved party.

An aggrieved party may seek review of a court's final order. RCW 13.04.033. "An aggrieved party is one who was a party to the court proceedings, and one whose property, pecuniary, and personal rights were directly and substantially affected by the lower court's

judgment.” In re Dependency of B.F., 197 Wn. App. 579, 584, 389 P.3d 748 (2017) (quoting In re Welfare of Hansen, 25 Wn. App. 27, 35, 599 P.2d 1304 (1979)).

In B.F., the mother of a dependent child appealed the dispositional order of the child’s father – an order which had not ordered a psychosexual evaluation. Id. at 583. This Court determined the mother had standing to appeal the father’s dispositional order.

B.F. noted the elevated “interest of a parent in preventing [] harm to her child and in preserving and mending family ties with that child.” Id. at 585. The fact that a dependency has commenced in no way diminishes a parent’s interest, rights, or standing to protect her child. See id. After all, a parent’s fundamental rights have not been terminated during a dependency; a petition to terminate parental rights may not have even been filed.

The “primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties, and to alleviate the problems that prompted the State’s initial intervention.” In re Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005). The B.F. Court found that threats to one’s own child during the dependency process...

... directly implicate[] the child’s right to health and safety and the purpose of preserving and mending family ties. The threat to those interests in these circumstances directly affects the personal right of [mother], as a parent, to the safety of her child and the mending of family ties under RCW 13.34.020...”

197 Wn. App. at 586 (emphasis added).

As in B.F., Julia has a continuing “personal right” to the safety of her child and the mending of family ties. Id. After Julia’s son was removed and placed into foster care, E.M.’s family retained Ms. Sutton to represent E.M., so that the child would have a voice in the courtroom. CP ___, sub. no. 392.

Julia has an interest in ensuring that her son is represented by skilled and independent counsel. The court order striking Ms. Sutton’s notice of appearance, as well as striking Ms. Sutton’s motion to reconsider E.M.’s placement in foster care – a motion the mother joined – stands in the way of Julia’s interest. RP 4-22. The juvenile court refused to hear argument on the motion to reconsider the placement, since the court had stricken Ms. Sutton’s appearance and her pleadings, which were adopted by the mother. RP 14-21. The court’s striking of the mother’s motion to reconsider, and refusing to permit Ms. Sutton’s appearance, directly and substantially affects Julia’s rights. Julia is an aggrieved party. B.F., 197 Wn. App. at 585-86.

This Court’s Commissioner found “a circular quality to the Department’s argument that the mother is not aggrieved because retained counsel represented E.M., where the Department also argues that counsel did not and could not represent E.M.” Dep. of E.J.M., No. 78985-6-I (Mar. 14, 2019), at 4.

The mother’s standing to protect her son’s right to counsel is clear, and this Court should reverse the juvenile court order, based on the court’s interference with the attorney-client relationship and its misinterpretation of RCW 13.34.100(7).

B. The court wrongly interfered with the attorney-client relationship, refusing to let retained counsel appear.

It is well established in Washington that children have fundamental liberty interests at stake in dependency and termination of parental rights proceedings. In re Dependency of M.S.R., 174 Wn.2d 1, 22, 271 P.3d 234 (2012).

1. Dependent children are entitled to appointed or retained counsel.

An attorney may represent a child’s position during a dependency action “upon request of a parent, the child, a guardian ad litem, a caregiver, or the Department.” RCW 13.34.100(7)(a). This same statute recognizes that some children may be represented by privately retained

counsel, as was E.M. RCW 13.34.100(7)(b)(i). The Department conceded as much before the Commissioner. In re E.J.M., No. 78985-6, Commissioner’s ruling, at 4 (“The Department now acknowledges that the statute contemplates retained counsel for a child in some circumstances”).

The reason a dependent child may be entitled to counsel is tied to the fundamental liberty interest at stake. As the Court held in M.S.R. the child’s liberty interest in a dependency proceeding is very different from, but at least as great as, the parent’s.” 174 Wn.2d at 17-18. In fact, children have even more to lose during the dependency process than do their parents. Children in the foster care system are often moved between multiple placements and schools, as E.M. has experienced here.⁵ “It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another.” Id., at 16; see also Braam v. State, 150 Wn.2d 689, 694, 81 P.3d 851 (2003).

⁵ E.M. is in his fourth foster home since the court placed him in foster care one year ago.

Unlike the termination trial in M.S.R., a dependency proceeding much more directly implicates a child's fundamental liberty interests, triggering a child's need for – and right to – his or her own counsel. See M.S.R., 174 Wn.2d at 22 n.13 (suggesting a different analysis might apply in dependency). While termination proceedings focus primarily on parental fitness, a dependency is a complex civil proceeding that dictates every facet of a child's life. E.g., RCW 13.34.130. The dependency court issues orders stating who a child may visit, as well as the rules surrounding those visits; the services a child may or must receive; the school or daycare center a child will attend; and even the immunizations and other medical treatment a child may (and must) receive, as in this case involving E.M.

In light of these substantial interests, courts must respect a child's right to retain an advocate of choice and to have that advocate participate in the proceedings.

2. Because the court misapplied RCW 13.34.100(7) and erroneously refused to permit E.M.'s attorney to represent him, this Court must reverse and remand.

This Court must reverse because the juvenile court interfered with the relationship between retained counsel and her client. Here, the court interfered with Ms. Sutton's ability to even meet with her own

client. The court's decision to bar Ms. Sutton's appearance put the court's imprimatur on the Department's decision to insert itself in the attorney-client relationship by determining that Ms. Sutton, a highly respected attorney, would not even be given her own client's address. CP ___, sub. no. 392. The court misapplied RCW 13.34.100 and abused its discretion when it sanctioned the Department's conduct, and when it struck Ms. Sutton's notice of appearance and her motion.

The juvenile court order should be reviewed de novo, as it involves the court's interpretation and application of RCW 13.34.100(7). See In re Welfare of K.M.M., 187 Wn. App. 545, 349 P.3d 929 (2015) (interpretation of visitation statute is a question of statutory interpretation that appellate court reviews de novo); In re J.R., 156 Wn. App. 9, 230 P.3d 1087 (appellate court reviews issues of statutory interpretation de novo).

The court applied RCW 13.34.100(7) erroneously when it concluded that Ms. Sutton's notice of appearance conflicted with the statute or the RPC's because it was not pre-approved by the parties or by the court. RP 18-21; CP 263-64. The court's analysis, as discussed in M.S.R., pertains to appointed counsel cases, but it is inapposite to this retained counsel matter. RP 18-21; CP 263-64.

Without any authority, the juvenile court stated that because the client in this case was a child, Ms. Sutton could not be retained by a third party. RP 19. “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.” Id. (emphasis added). Since sub-section (b) of the statute specifically acknowledges retained counsel for children, the court’s conclusion is contrary to the statute. See RCW 13.34.100(7)(b)(i) (“... or the child is not represented by a privately retained attorney...”).

The trial court goes beyond its gatekeeper function when it interferes in the attorney-client relationship. The Department’s arguments below that Ms. Sutton had not met with E.M. are in bad faith, as the Department thwarted Ms. Sutton’s three attempts to meet with E.M. RP 12-13; CP __, sub. no. 392 (Department informed Ms. Sutton it would “not be providing [E.M.’s] contact information”). Ms. Sutton was unable to interview her client to assess his needs and condition, even at supervised visits. Nonetheless, counsel prepared a thorough motion to reconsider E.M.’s placement in foster care, based upon his legal interest in family integrity – a fundamental right – supported by

counsel's exhaustive research and supported by declarations. This motion was stricken by the trial court. RP 4-22.

Further, the juvenile court's procedure for refusing Ms. Sutton's appearance was fatally flawed. The court stated it relied upon several RPCs in its decision to strike Ms. Sutton's appearance, including RPC 1.2, 1.4, and 1.8, as well as Admission to Practice Rule (APR) 5(g). CP 263-64; RP 14-21. In addition, the court improperly solicited objections and argument against Ms. Sutton from opposing parties on the representation issue. RP 5. The RPCs are not to be invoked by opposing parties, lest they be deployed as litigation tactics. RPC Preamble (20).

Parties do not get to pick their opponents. The Department's and the father's objections to Ms. Sutton's representation were – in the words of the RPCs – invoked “as procedural weapons.” RPC Preamble (20). At the very least, the RPCs clearly state that the Department and the father, as “antagonist[s]” in the litigation, had no standing to seek enforcement of the RPCs against Ms. Sutton, as they did here. *Id.*

Even if the court had properly invoked the RPCs, the court erred when it found E.M.'s attorney had not complied with them. CP 263-64. The court stated it “relied” upon RPC 1.2 (including the comment

section), 1.4, and 1.8. CP 263-64. These rules govern the scope of representation (1.2), communication with a client (1.4), and conflict of interest (1.8). The court found that considering E.M.’s young age, this “really begs the question whether Ms. Sutton can properly comply” with these ethical duties to communicate with her client. RP 17.

The court’s order is in conflict with the comments that follow RPC 1.4, and indeed, with the comments that follow RPC 1.2 (cited by the court’s own order), particularly those regarding infancy and diminished capacity. CP 263.⁶ Ms. Sutton’s representation of E.M. was in compliance with RPC 1.2 and its comments, which were relied upon by the court:

If a lawyer is unsure of the extent of his or her authority to represent a person because of that person’s diminished capacity, paragraph (f) of this Rule does not prohibit the lawyer from taking action in accordance with Rule 1.14 to protect the person’s interests. Protective action taken in conformity with Rule 1.14⁷ does not constitute a violation of this Rule.

RPC 1.2, Comment 16.

⁶ “Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity.” RPC 1.4, Comment 6 (emphasis added).

⁷ RPC 1.14 (Clients with Diminished Capacity, including minority).

As to whether the court had a basis to interfere in the attorney-client relationship under RPC 1.4 (communication) or RPC 1.8 (conflict of interest), the record does not support the court's concerns. The Department prevented Ms. Sutton's several attempts to communicate with E.M., which precluded her ability to respond to the court's inquiries. CP __, sub. no. 392. No basis was provided to substantiate the court's apparent concern that the maternal grandmother provided Ms. Sutton's retainer. RP 15 (the court noted Ms. Sutton had not touched the retainer, which remained in trust). Third-party fee agreements are certainly not unusual where a client is either incapacitated or incarcerated, and cannot pay for his or her own representation.

Likewise, the court cited APR 5(g), which states in part, "I will accept no compensation ... unless this compensation is from or with the knowledge and approval of the client or with the approval of the Court." RP 15. The court acknowledged Ms. Sutton had not touched the retainer, so "whether she actually has accepted that I think there's a question." Id. The court stated APR 5(g) was implicated because the retainer funds had not come directly from E.M., who at the time, was three years old. Id. The court did not support its conclusion that this

third-party fee agreement, entered due to E.M.'s minority, ran afoul of APR 5(g) or of any of the cited RPCs. The court's order is not supported by the record.

Without more, the court's invocation of the RPCs and APR 5(g) was erroneous, and the court's unsupported concerns of a conflict of interest do not support its decision to interfere with the attorney-client relationship, barring Ms. Sutton and her pleadings from the courtroom.

3. Existing safeguards, such as GAL's or CASA's, are insufficient to protect E.M., particularly where E.M. was without a CASA for over two years of the dependency.

During dependency proceedings, the existing safeguards, including the appointment of a Court-Appointed Special Advocate (CASA) or Guardian ad Litem (GAL), are insufficient to protect the rights of a dependent child. In the Matter of the Dependency of Griffin Lee, 200 Wn. App. 414, 452-53, 404 P.3d 575 (2017) ("the appointment of a CASA is often insufficient.").

a. E.M. had no CASA for over two years of the three-year dependency, for "extended periods of time," including at times of "key events" affecting his life.

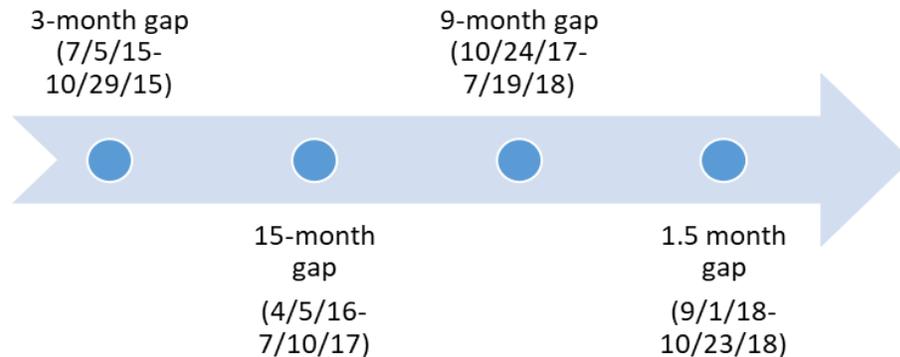
Even if this Court finds the CASA program to be a protective factor for dependent children in general, the program did not function as such in this case.

As Commissioner Neel discussed, “it is concerning that E.M. was without at CASA for extended periods of time during this ongoing dependency, including at the time of the key events here.” In re E.J.M., No. 78985-6, Commissioner’s ruling, at 4. In fact, E.M. languished without a CASA for over two years of this dependency. Id. at 3-4; see also Letter of Assistant Attorney General Kelly Taylor and attachments, filed in Court of Appeals, Feb. 15, 2019 (Taylor letter to Court). One significant time period without a CASA consisted of a gap of 15 months (04/04/16–07/10/17), followed by another period of nine months (10/24/17–07/19/18). Id.

Several “key events” transpired during these extended periods while E.M. was without a CASA to make recommendations to the court, or to advocate for E.M.’s best interest. E.J.M., Commissioner’s ruling, at 4. There was no CASA when the court ordered Julia to leave the grandmother’s home, separating her from E.M. for the very first time in the child’s life. See id. There was no CASA when the court denied Julia’s motion for placement of E.M. with herself and Mr. Kelly. There was no CASA when the court ordered E.M. placed in foster care. Id. E.M. also remained without a CASA when the grandmother retained Ms. Sutton to represent E.M. Id.

The timeline below displays the gaps in CASA involvement in E.M.’s dependency:

“Extended Periods of Time” Without CASA on E.M.’s Case



Interestingly, when the CASA program did reappear on E.M.’s case following the nine-month gap, CASA Emma Bergin appeared just one day following Ms. Sutton’s notice of appearance as E.M.’s counsel. CP __, sub. no. 392; Taylor letter to Court, supra.

According to the CASA program records, the program placed Ms. Bergin, a CASA with exactly “0” years experience, onto this highly contested case. Taylor letter to Court. Ms. Bergin only briefly served as E.M.’s CASA (a two-month appointment) – just long enough for the court to strike Ms. Sutton’s notice of appearance and for the motion practice regarding Ms. Sutton’s representation to be complete. Taylor letter to Court. Ms. Bergin then abruptly withdrew as E.M.’s CASA,

leaving yet another gap until the next CASA or GAL could be found.

Id.

The chart below illustrates the gaps in time where E.M. had no CASA or GAL to advocate for his best interest, as well as the “key events” in the case at the same time, as Commissioner Neel discussed:

<u>Periods w/no CASA</u>	<u>Gap- no CASA</u>	<u>“Key Events”- no CASA</u>
07/05/15 - 10/29/15	3 months (until Julie Kellogg- Mortensen appears)	Dependency petition filed (07/15). Shelter care hearing (08/15).
04/05/16 - 07/10/17	15 months (until Beth Campbell appears)	Dep’t motion - mom ordered to leave home, separating mom & child for first time (05/17)
10/24/17 - 07/19/18	9 months (until Emma Bergin appears, the day after Ms. Sutton files NOA)	Mom’s motion for placement; child placed in foster care. (05/18). Ms. Sutton appears (07/18) - Bergin appears one day later (on 07/19)
09/10/18 - 10/23/18	1 ½ months (until Megan Notter appears- present GAL)	

E.M. had no advocate in the courtroom for a majority of the dependency, particularly during “key events” that required the court to hear his voice. See E.J.M., Commissioner’s ruling at 4. As the Commissioner stated, this is concerning, particularly for a young child

like E.M. Id. It also mitigates in favor of his need for counsel, which E.M. actually had – and with which the juvenile court impermissibly interfered.

b. Even when they appear, GALs and CASAs are not attorneys and do not have the same duties, training, and ethical responsibilities to the child.

“The CASA is not required to be an attorney, does not protect the legal rights of the child, and ‘does not represent the child as an attorney represents a client.’” Lee, 200 Wn. App. at 452-53 (quoting S.K.-P., 200 Wn. App. 86, 110-11, 401 P.3d 442, aff’d, In re Dependency of E.H., 191 Wn.2d 872, 427 P.3d 587 (2018)). As this Court noted in Lee, “the ways that an attorney can assist a person in need – as Griffin plainly is – are sometimes limited only by the imagination, intellectual dexterity, and assertiveness of the lawyer.” 200 Wn. App. at 454.

Even when a CASA has been appointed for the child for a lengthy period of time – a scenario which did not exist here – the risk of erroneous decisions remains unacceptably high. A CASA does not share the same obligations to the child that an attorney has, nor does the CASA share the same training or ethical duties to a client. The M.S.R.

Court articulated some of the differences between attorneys and

CASAs:

We recognize that GALs and CASAs are not trained to, nor is it their role to, protect the legal rights of the child. Unlike GALs or CASAs, lawyers maintain confidential communications, which are privileged in court, may provide legal advice on potentially complex and vital issues to the child, and are bound by ethical duties. Lawyers can assist the child and the court by explaining to the child the proceedings and the child's rights. Lawyers can facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders.

174 Wn.2d at 21 (citing Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, 32 Loy. U. Chi. L.J. 1, 61-62 (2000)).

Unlike CASAs, attorneys are bound by the Rules of Professional Conduct (RPCs), and have a privileged and confidential relationship with their client. M.S.R., 174 Wn.2d at 19. The RPCs envision the representation of young clients, as well as those with limited capacity; trained lawyers have the skills required to communicate with those with

diminished capacity, including providing them with requested materials and information.⁸

Children represented by counsel at their first hearing are more likely to be placed with relatives or with “other caring adults they know throughout their dependencies;” representation dramatically reduces or eliminates the time children spend in foster care, as well. S.K.P., 200 Wn. App. at 117.⁹

Attorneys, unlike CASAs or other GALs, are subject to oversight by the Washington State Bar Association, which has an independent disciplinary complaint system.¹⁰ Because there is no review or disciplinary process for GALs, this can culminate in abusive litigation

⁸ RPC 1.14, Comment [1]. Even “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” Id. Parents are not denied counsel due to capacity issues; thus, capacity or infancy should not be used as an excuse to deny children counsel.

⁹ The Washington State Bar Association has called for attorney representation for children at every stage of dependency proceedings, due to the vulnerability of children in these actions. WSBA Resolution in Support of Attorney Representation for Children in Dependency Proceedings, September 17, 2015.

¹⁰ Amy Mulzer & Tara Urs, However Kindly Intentioned: Structural Racism and Volunteer CASA Programs, 20 CUNY L. Rev. 23, 59 (2016) (available at: <https://academicworks.cuny.edu/clr/vol20/iss1/3>) (the CASA does not have a client – “she is the client, a party to the case with all of the rights that entails, from notice and the right to be heard to the right to be represented by counsel.”).

tactics. See Dependency of A.E.T.H., ___ P.3d ___, No. 76964-2-I, 2019 WL 3775873 (Aug. 12, 2019), at *6-8 (finding the Snohomish County GAL program actively worked against the parents, created bias within the proceedings, and committed a variety of misconduct, resulting in a violation of due process).

This Court recently considered the role of counsel for the child in A.E.T.H., 2019 WL 3775873, at *11-12 (citing M.S.R., 174 Wn.2d at 22; E.H., 191 Wn.2d at 894. Particularly where, as here, a child’s interests may not be aligned with either the Department’s or the parents’, counsel for the child is appropriate. See A.E.T.H., 2019 WL 3775873, at *12. A GAL or CASA may represent what he or she believes are the best interests of E.M.; however, it is not the GAL’s role to “protect the legal rights of the child.” Id. (quoting M.S.R., 174 Wn.2d at 21).

Counsel was retained for E.M. here and appeared on his behalf. E.M.’s counsel filed a motion to reconsider his placement in foster care, in an effort to advocate for E.M.’s right to family integrity, which is a fundamental legal right, and a position not argued by the CASA program, nor by the Department. CP ___, sub. no. 392.

Even under the abuse of discretion standard, this Court should reverse. A court abuses its discretion when an “order is manifestly unreasonable or based on untenable grounds.” State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). A discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations original; emphasis omitted). Because the trial court’s order is based upon an errant interpretation of RCW 13.34.100(7), this Court should reverse.

VI. CONCLUSION

For the reasons set forth above, as well as those in the motion for discretionary review, Julia M. respectfully requests this Court reverse the juvenile court order, as the juvenile court impermissibly interfered in the attorney-client relationship, which deprived E.M. of his counsel.

DATED this 28th day of August, 2019.

Respectfully submitted,

s/ Jan Trasen

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