

FILED
SUPREME COURT
STATE OF WASHINGTON
8/17/2020 1:18 PM
BY SUSAN L. CARLSON
CLERK

NO. 98596-1

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of E.M., minor child.

**RESPONSE OF DEPARTMENT OF CHILDREN, YOUTH, AND
FAMILIES TO AMICUS BRIEF OF THE OFFICE OF CIVIL
LEGAL AID**

ROBERT W. FERGUSON
Attorney General

KELLY TAYLOR
Assistant Attorney General
WSBA #20073
Office Identification #91016
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7045

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF THE CASE2

III. OCLA DOES NOT DEMONSTRATE THE NEED FOR
FURTHER REVIEW5

 A. The Opinion Below Correctly Interpreted RCW
 13.34.100 and Further Review is Not Warranted5

 B. Identifying the Appropriate Legal Procedure Opens the
 Way for Increased Involvement of Retained Counsel for
 Children in Dependency Proceedings8

IV. CONCLUSION9

TABLE OF AUTHORITIES

Cases

<i>In re Dependency of E.H.</i> , 191 Wn.2d 872, 427 P.3d 587 (2018).....	6
<i>In re Dependency of E.M.</i> , 12 Wn. App. 2d 510, 458 P.3d 810 (2020).....	passim

Statutes

Laws of 2010, ch. 180, § 1	7
Laws of 2014, ch. 108, § 2.....	6
RCW 13.34.100	1, 5, 6, 7
RCW 13.34.100(1).....	6
RCW 13.34.100(7)(a)	6
RCW 13.34.100(7)(b)(i)	5, 6

Other Authorities

Black's Law Dictionary 474 (5th ed. 1979)	7
---	---

I. INTRODUCTION

The Court of Appeals properly concluded that the legislature envisioned that dependency courts would perform a gatekeeping role to ensure that attorneys representing dependent children are well-trained and without conflicts of interest. *In re Dependency of E.M.*, 12 Wn. App. 2d 510, 520, 458 P.3d 810 (2020). The arguments provided by the Office of Civil Legal Aid (OCLA) fail to point to some statutory distinction that establishes the dependency court's authority over guardians ad litem and attorneys appointed at public expense while exempting from the court's oversight the representation provided by privately retained attorneys representing these same children.

To support its position that any person can retain any attorney (regardless of training, experience, or possible conflicts) to represent a dependent child without oversight from the court, OCLA relies upon what it perceives to have been the status quo in dependency proceedings before 2014 statutory amendments to RCW 13.34.100. OCLA's reliance on those amendments to RCW 13.34.100 is mistaken, however, as prior to 2014, the dependency statutory framework contained no reference to privately retained counsel for children.

Lastly, OCLA misinterprets the Court of Appeals opinion, claiming that the ability to retain private counsel for dependent children has been

significantly impeded. Instead, the opinion clears the way for increased involvement of retained counsel for dependent children by clarifying the proper procedure. As OCLA fails to demonstrate the need for further review, discretionary review should be denied.

II. STATEMENT OF THE CASE

In the underlying dependency for now five-year-old E.M., the dependency court initially placed E.M. in the home of his grandmother. CP 63. Eventually, during the course of a lengthy and highly contentious dependency proceeding, Ms. M. filed a motion to remove E.M. from the grandmother's home, seeking placement of E.M. in the home of another individual (where Ms. M. also resided). CP 7-32. E.M.'s father filed a competing motion asking to place E.M. in foster care. CP 305-384. The Department's opposed Ms. M.'s motion to place the child in the same home as Ms. M. CP 385-412. The extensive motion process eventually resulted in a July 11, 2018 order placing E.M. in foster care. CP 1896.

On July 18, 2018, a lawyer named Aimée Sutton filed a notice of appearance to represent E.M. CP 1914. Ms. Sutton's notice of appearance was not filed in conjunction with any discovery request. CP 1930. The Department, E.M.'s father, and E.M.'s GAL initially did not know who had hired Ms. Sutton. CP 86, 1930, 1949. When asked, Ms. Sutton refused to

explain who had hired her. CP 86.

Ms. Sutton attempted to contact E.M., but the Department refused to provide his location in foster care, as this information is confidential. RP 7, 13. On July 19, 2018, an attorney from the King County Court Appointed Special Advocate program filed a notice of appearance for a trained dependency guardian ad litem named Emma Bergin. CP 1915-17. From E.M.'s GAL, Ms. Sutton unsuccessfully sought consent to represent E.M. CP 259. Then, five days after filing her notice of appearance, Ms. Sutton filed a motion to reconsider E.M.'s placement into foster care, seeking to return the child to the grandmother's home. CP 1918-1925. Ms. Sutton argued the court had violated state law by not deferring to the wishes of Ms. M. in regards to E.M.'s placement. CP 1918, 1921.

On July 30, 2018, along with its response to the motion for reconsideration, the Department filed an objection to the notice of appearance filed by Ms. Sutton. CP 85. E.M.'s father also objected to Ms. Sutton's representation, arguing that Ms. Sutton's lack of "any collateral information" was "extremely concerning." CP 1930. He expressed his belief that Ms. Sutton had not acted in accordance with the RPCs and "instead appears to be relying solely on information from the mother and acting based on the mother's directives..." CP 1935. The father also noted the confidential nature of information in dependency cases. CP 1930. He

argued in favor of a requirement for child’s counsel to be “court-appointed.” CP 1929. Instead of retained counsel for E.M., the father supported the current GAL appointment, noting that due to the age of the child, the GAL appointment was “sufficient to protect and advocate for his best interests in this case.” CP 1931.

The attorney for E.M.’s GAL argued that the notice of appearance filed by Ms. Sutton was “contrary to the procedure required by RCW 13.34.100,” as Ms. Sutton was attempting to appear “without an order for appointment of counsel for the child.” CP 1947. The GAL’s attorney argued that from reviewing the pleadings filed by Ms. Sutton, “it appears that the attorney has only reviewed the most recent legal documents, has not reviewed discovery and may not have met the child at the time of the filing of the Motion.” CP 1947.

On August 1, 2018, Ms. Sutton filed a declaration revealing that E.M.’s former relative caregiver had retained her to represent E.M. CP 265. The following day, the dependency court heard from all the parties and decided to strike Ms. Sutton’s notice of appearance and the motion for reconsideration. CP 263-64. Ms. M. sought review of this decision, and the Court granted discretionary review. On February 24, 2020, the Court of Appeals issued an opinion affirming the dependency court’s order. *Dependency of E.M.*, 12 Wn. App. 2d 510, 458 P.3d 810 (2020). After her

motion for reconsideration was denied, Ms. M. petitioned for review in this Court. Subsequently, OCLA filed an amicus brief supporting discretionary review. The Department now responds.

III. OCLA DOES NOT DEMONSTRATE THE NEED FOR FURTHER REVIEW

A. The Opinion Below Correctly Interpreted RCW 13.34.100 and Further Review is Not Warranted

To support its claim that the Court of Appeals erroneously interpreted RCW 13.34.100, OCLA focuses on the language found at RCW 13.34.100(7)(b)(i). OCLA Br. at 5-7. This statutory text provides: “If the court has not already appointed an attorney for a child, *or the child is not represented by a privately retained attorney: ...*” RCW 13.34.100(7)(b)(i) (emphasis added in OCLA Brief). Notably, while making its argument, OCLA fails to address the legislative history, related legislative findings, and the remainder of the statute, all of which properly formed the basis for statutory interpretation employed by the Court of Appeals. *E.M.*, 12 Wn. App. 2d at 518-20. Instead of focusing on only one portion of the statute, the Court of Appeals correctly noted that “words in a statute should not be read in isolation from the remainder of the statute.” *E.M.*, 12 Wn. App. 2d at 518 (citing *State v Lilyblad*, 163 Wash.2d 1, 9, 177 P.3d 686 (2008)).

Moreover, the portion of the statute relied upon by OCLA does not logically support its argument. OCLA relies upon the 2014 amendment to RCW 13.34.100 to support its claim that the “status quo” for retained counsel representing a dependent child was to operate without court oversight. OCLA Br. at 5. The conclusion made by OCLA that the language in RCW 13.34.100(7)(b)(i) serves to illuminate the status quo prior to 2014 fails for the simple reason that it was the 2014 amendment itself that included, for the first time in the dependency framework, the reference to privately retained counsel for a child. Laws of 2014, ch. 108, § 2. In addition, in terms of what is considered “status quo,” this Court has noted that historically “the statutory and common law viewed the presence of a guardian” for a child (not representation by an attorney) as providing necessary protection for dependent children. *In re Dependency of E.H.*, 191 Wn.2d 872, 878, 427 P.3d 587 (2018) (citing Code of 1881, ch. I, § 12).

There is no dispute here that the dependency court possesses authority over the appointments of guardians ad litem and appointed attorneys for children. *See* RCW 13.34.100(1) (“The court shall appoint a guardian ad litem for a child...”) and RCW 13.34.100(7)(a) (“The court may appoint an attorney to represent the child’s position in any dependency action...”). Black’s Law Dictionary defines “appointment” as “[t]he designation of a person, by the person or persons having authority therefor,

to discharge the duties of some office or trust.” Black's Law Dictionary 474 (5th ed. 1979) (citing *In re Nicholson's Estate*, 104 Colo. 561, 93 P.2d 880, 884). Read as a whole, RCW 13.34.100 contemplates that the dependency court maintains general oversight authority into GAL appointments, publicly appointed attorneys, and privately retained attorneys. OCLA provides no persuasive argument to explain why the dependency court would have authority over guardians ad litem and attorneys appointed at public expense but not over retained counsel. The conclusion reached by the Court of Appeals to determine that the dependency court has a gatekeeping role to play in regards to retained counsel is supported by the legislature's amendment to the statute in 2010, which added a finding stating, “when children are provided attorneys in their dependency and termination proceedings, it is imperative to provide them with well-trained advocates so that their legal rights around health, safety, and well-being are protected.” Laws of 2010, ch. 180, § 1. *E.M.*, 12 Wn. App. 2d at 519-20. This finding is especially significant when considering retained counsel for dependent children. Unlike the attorneys contracted through the OCLA, attorneys retained by some interested party may not be well-trained to represent a dependent child. And, while there is little risk of counsel appointed at public expense possessing a conflict of interest, the monetary pressures created by privately retained attorneys may serve to increase this

risk. That risk is heightened where, as here, the child is too young to give express direction to an attorney. The Court of Appeals properly considered related statutory provisions and the statutory findings to conclude that the legislature envisioned that dependency courts would perform a gatekeeping role to ensure attorneys representing children are well-trained in dependency issues and are representing children without a conflict of interest. OCLA's flawed reasoning addressing one isolated provision of RCW 13.34.100(7) does not warrant review of the legislative interpretation completed by the Court of Appeals.

B. Identifying the Appropriate Legal Procedure Opens the Way for Increased Involvement of Retained Counsel for Children in Dependency Proceedings

OCLA misreads the Court of Appeals opinion when it suggests that it prevents the retention of privately retained attorneys for dependent children. OCLA Br. at 2, 4. OCLA even presents the possibility of an outright ban on privately retained counsel for children. *Id.* at 7. But, the Court of Appeals held no such thing. The Court of Appeals identified its own holding as follows:

We hold that, while RCW 13.34.100(7) contemplates both privately retained counsel and publicly funded counsel in dependency proceedings, privately retained counsel must seek appointment by the trial court under RCW 13.34.100(7).

In re Dependency of E.M., 12 Wn. App. 2d 510, 520, 458 P.3d 810 (2020).

The decision then identifies the correct legal procedure for retained counsel to employ, which is to seek “appointment by the superior court in advance of seeking access and bringing motions.” *E.M.*, 12 Wn. App. 2d at 521. Instead of creating an undue impediment to retained counsel, the Court of Appeals cleared the way for retained counsel by identifying the correct procedure. Without such guidance, retained counsel would likely have been confused as to how to proceed in representing a dependent child. Such was the case here, as retained attorney Aimée Sutton believed that E.M.’s guardian ad litem needed to provide consent to E.M.’s representation and to “confirm counsel’s representation” of the child. CP 259. At the same time, the child’s guardian ad litem wanted the dependency court to authorize the attorney representation. CP 259. By identifying the appropriate procedure, the Court of Appeals opened the way for greater involvement of retained counsel for children in dependency procedures.

IV. CONCLUSION

Based upon the argument set forth above and in the Department’s Answer in Opposition to Petition for Review, the Department requests the

Petition for Review be denied.

RESPECTFULLY SUBMITTED this 17th day of August, 2020.

ROBERT W. FERGUSON
Attorney General

Kelly Taylor _____
KELLY TAYLOR
Assistant Attorney General
WSBA No. 20073

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Supreme Court of the State of Washington, under Case No. 98596-1, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Jan Trasen, Washington Appellate Project, wapofficemail@washapp.org; and jan@washapp.org;
2. Kathleen Martin, Dependency CASA Program, casa.group@kingcounty.gov; and kathleen.martin@kingcounty.gov; and
3. Jeffrey Even, Attorney General's Office, Office of Civil Legal Aid, Jeffrey.Even@atg.wa.gov.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2020, at Seattle, WA.

Patricia A. Prosser
PATRICIA A. PROSSER
Legal Assistant

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

August 17, 2020 - 1:18 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98596-1
Appellate Court Case Title: In re the Dependency of E.M.

The following documents have been uploaded:

- 985961_Answer_Reply_20200817131612SC521072_9182.pdf
This File Contains:
Answer/Reply - Other
The Original File Name was WSSC_Amicus_ResponseEMfinalPP_081720.pdf

A copy of the uploaded files will be sent to:

- Jeff.Even@atg.wa.gov
- jan@washapp.org
- jeffrey.even@atg.wa.gov
- kathleen.martin@kingcounty.gov
- sgoolyef@atg.wa.gov
- wapofficemail@washapp.org

Comments:

Response of DCYF to Amicus Brief of the Office of Civil Legal Aid

Sender Name: patricia prosser - Email: patp@atg.wa.gov

Filing on Behalf of: Kelly L. Taylor - Email: kellyt1@atg.wa.gov (Alternate Email: shsseaf@atg.wa.gov)

Address:
800 Fifth Ave., #2000
Seattle, WA, 98104
Phone: (206) 464-7045

Note: The Filing Id is 20200817131612SC521072