



**Washington State Supreme
Court
Commission on Children
in Foster Care**

**05/16/16
1:00 p.m.
Reception Room
Temple of
Justice**

Agenda

5 minutes	¹ 1. Welcome and Introductions	Justice Bobbe Bridge (ret.) Co-Chair
20 minutes	²⁰ 2. Dependency Timeliness Report	Matt Orme, Senior Research Associate Washington Center for Court Research
20 minutes	¹⁵ 3. Foster Youth & Alumni Summit Discussion	Fredrick Kingston, Director Mockingbird Society
20 minutes	²¹ 4. Report on Guardianship Program in Snohomish County	Judge Linda Krese, Superior Court Judge Snohomish County
40 minutes	¹⁶ 5. ChildRep Workgroup Recommendations & Discussion	Lisa Kelly, Professor UW Law
20 minutes	²⁰ 6. Blue Ribbon Commission on Children and Families	Andi Smith, Senior Policy Advisor Office of the Governor
15 minutes	¹⁵ 7. New Business • Reauthorization of the Court Improvement Program	Open to All Commission Members Justice Bobbe Bridge (ret.), Co-Chair CCFC
	8. Adjournment	Justice Bobbe Bridge (ret.) Co-Chair
	<u>Next Meeting:</u> August 3 rd , UW Center for Urban Horticulture	

1. **The role of AAG, Caseworkers, and CASA: clarify the roles and responsibilities of the Department, AGO, and CASA in assisting children and youth to obtain legal representation.**

DSHS

- a. Department social workers shall provide information to youth twelve years of age and older about their ability to request counsel as required by statute.

Additionally, Department social workers will provide all caregivers information about the ability of children and youth of all ages to request legal representation and the right of caregivers themselves to request appointment of counsel for the child, to retain a lawyer to make the request on the child's behalf or refer a child to a lawyer for purposes of making such request.

- b. The Department agrees to provide any individuals seeking legal representation for a dependent youth the form developed by the workgroup.

CASA

- a. GALS/CASAs shall provide information to children and youth twelve years of age and older about their right to request legal representation as required by statute.
- b. The CASA program will continue to provide information to its staff and volunteers on the right of all children to request counsel under RCW 13.34.100 and on the responsibility to inform the children of their rights to request an attorney.

OCLA

- a. The Workgroup recommends that the Office of Civil Legal Aid be charged with the responsibility to refer youth, caregivers and others to available legal resources to assist in the filing of motions for appointment of counsel. The Office of Civil Legal Aid is willing to take on this responsibility.

2. **Parties' Positions: develop agency-wide policies governing motions for appointment of counsel**

DSHS/AGO

The AGO/Department will not object to appointment of an attorney to a child who is 12 or older. The AGO/Department also affirmatively believes that counsel should be appointed to any child or youth who is subject to contempt proceedings. Otherwise, the AGO takes the position that the court's decision to appoint is discretionary under the statute, and at a minimum, the AGO takes the position that it must be governed by a Mathews analysis, as laid out in M.S.R. For children younger than 12, the AGO will determine its position on a case-by-case basis.

CASA

CASA is unable to make any agency-wide policy regarding motions for the appointment of counsel; decisions will be made on a case by case basis on the best interest of the child.

3. Referrals: develop policies to inform and protect caregivers and other involved individuals who wish to retain counsel for a child or make referrals to counsel for purposes of filing motions for appointment.

Under the statute, any individual may refer a child to a lawyer to file a motion to request appointment of counsel at public expense. When a youth is of an age to make the contact on his or her own without adult assistance, the youth may certainly do so. However, the Workgroup understands that many children, and even teenagers, may need adult support to facilitate a meeting with a lawyer to discuss his or her right to request an attorney at public expense.

The Workgroup agrees that when the child, the child's care giver, or any individual makes a request for the appointment of any attorney, this request will be brought to the court's attention in a timely manner with consideration given to the facts of the case and the nature of the circumstances of the request. Furthermore, the Workgroup has developed a form that any individual may use to bring the matter of attorney representation for the child to the courts attention. Local practice and policy will dictate how the court will handle the request for the youth's appointment of an attorney.

The perceived barrier by some members of the workgroup was that if the request was not made by formal motion (for example, in a CASA report, an oral report), any appellate action could be severely limited by how the matter was brought before the court. The workgroup was unable to reach consensus on this issue.

In some jurisdictions, legal assistance may be available for those seeking to file a motion for legal representation for youth at public expense. For these types of limited appointments, The Department, and the AGO on its behalf, should provide basic case information to an attorney who represents a caregiver or a child (either directly or by third-party retainer), when such representation is indicated through a formal notice of appearance on the attorney's letterhead. This notice should be directed to the social worker, if known, and/or the AGO. This letter then authorizes the Department and AGO on its behalf to share otherwise confidential information under RCW 13.50.100(7).

Basic case information includes the case number, the caption of the case, the names of assigned counsel for the parties, and any other information necessary to enable the counsel to file a limited notice of appearance. It also includes, but is not limited to at the court's discretion: the age of the child; the status of the case; the names of the child and other parties in order to facilitate conflicts checking; the county in which the child resides; and the county with jurisdiction over the case. Caregivers, social workers, and others connected to the child are also permitted to relay this basic information to an attorney to facilitate the representation once the letter of representation has been provided.

4. Attorney-Client Privilege: develop policies designed to educate all parties on the protections of confidentiality and privilege between attorneys and children.
 - a. Upon the court’s ruling on the appointment of council for the youth, the Department social worker may assist in facilitating this contact by notifying the caregiver that this contact is acceptable, and should be in private.
 - b. The relationship between the attorney and his or her child client is subject to the Rules of Professional Conduct and should be guided by the Meaningful Legal Representation Standards adopted by the Administrative Office of the Courts and referenced in RCW 13.34.100(6)-(7). As such, attorneys maintain a confidential relationship with their clients and disclose information only in accordance with the Rules of Professional Conduct. However, under both the Rules of Professional Conduct and the applicable standards, it is understood that attorneys for children will engage in information sharing (to the extent of the client’s consent), and will problem-solve with necessary parties and non-parties in order to achieve their clients’ goals. A child, like any other client, may permit or restrict the attorney’s disclosure of information.
 - c. The Department will provide information for social workers, caregivers, and service providers to understand confidential role that attorneys have with their child clients.
 - d. CASA will continue to provide information for its volunteers to understand the confidential role that attorneys have with their child clients.

5. Children With Disabilities: identify protective measures for children with significant disabilities as well as children who may be requesting counsel pro se without the assistance of an attorney

The Workgroup was charged with “identifying protective measures for children with significant disabilities.” The Workgroup recognizes that very young children as well as those with significant disabilities have legal interests that attorneys can protect. The Workgroup recommends that the policies developed herein be applied with equal force and effect to all children, without respect to cognitive ability or disability.

6. Discovery and Other Records: develop policies for the AGO and the Department when responding to discovery requests related to motions for appointment of counsel

The Workgroup agrees that an attorney appointed to a child shall have full access to discovery and other records just as any other full party to the case.

There’s a divergence of opinion on discovery and other records requests when the attorney appointment is limited. Some workgroup members prefer that that a limited notice of appearance be filed and the court rule on granting access to the dependency court file prior to the release of discovery or other records pertaining to the child. Other workgroup members suggest that providing a letter from the limited notice attorney on letterhead should suffice for

access to records.

The Workgroup does agree that in a case-by-case analysis, each case will present its own individual discovery needs. However, below is a list of documents that may be relevant to the child's motion:

- Any evaluations of the child
- Any progress reports from the child's treatment providers
- IEPs, if any
- Info re SAY issues, if any
- Potential criminal investigations and charges
- Case notes regarding the child.

7. How Children May Be Accessed for Purposes of Filing Motions for Appointment of Counsel: develop policies with regard to how counsel may obtain access to children and youth in order to respond to a request by the child, a referral or retainer to file a motion for appointment of counsel.

Much like the discovery issue, the workgroup is unable to come to consensus on how this may be successfully achieved. There are those who believe that the court should rule on the attorney appointment prior to granting access to the child, and those who believe that in order to file a compelling motion, access should be granted prior to the court's decision.

8. Transportation: develop policies for the options for transportation of children and youth to legal meetings
- a. Meetings between the child and the child's counsel should take place at reasonable times and locations that are familiar to the child, which may include the child's home (when agreed to by the caregiver), school, and other familiar settings. Meetings also may take place at attorney's offices when necessary to achieve privacy or to otherwise meet the child's wishes. When possible, the child's attorney should attempt to avoid disrupting the child's schooling. The Department may help facilitate this contact by communicating the need for the attorney to meet in private with the child to the child's caregiver. By agreeing to facilitate the Department is not agreeing to transport all foster children to meet with their attorneys.
 - b. The Department should presume that it will be transport all children to hearings on their motions for appointment of counsel, unless it is informed otherwise



Washington State Supreme Court Commission on Children in Foster Care (CCFC)

Children's Representation Workgroup

In response to new legislation (SB 6126), the Washington State Supreme Court Commission on Children in Foster Care is reconvening its Workgroup to review practical barriers for children in dependency and termination proceedings requesting counsel and for individuals making referrals to children for an attorney.

Workgroup Goal

The new provisions of RCW 13.34.100 will increase the numbers of children, youth, and other individuals who will request legal representation for children in dependency and termination proceedings. The Workgroup will ensure that Commission members' respective agencies are aware of these changes in the law and assist them to develop statewide practices and procedures, which will serve to remove barriers to children and other individuals designated by the statute as they seek to exercise their rights under RCW 13.34.100.

Chair

- Professor Lisa Kelly, Children & Youth Advocacy Clinic, University of Washington School of Law

Background

Washington State has consistently been ranked in the bottom ten states in each of the *First Star's National Report Cards*, most recently earning an "F" grade because children and youth are routinely unrepresented in their dependency and termination proceedings. The Commission supports providing counsel to all children and youth.

Senate Bill 6126 (2014) partially responds to the need for counsel for children and youth in dependency and termination proceedings in Washington State. Effective July 1, 2014, appointment of counsel is required six months after entry of the order that makes the child legally free. However, the court has discretion to appoint an attorney for children and youth earlier in the dependency process. Requests for appointment may now be made by a parent, child, GAL, caregiver, or the department. The statute also provides that the child's caregiver or any individual may refer a child to an attorney for the purposes of filing a motion for appointment of counsel, and that the child him or herself may retain counsel for the purpose of filing such motions.

Workgroup Tasks

The Children's Representation Workgroup is tasked with making consensus recommendations to the Commission regarding:

1. The role of AAG, Caseworkers, and CASA: clarify the roles and responsibilities of the Department, AGO, and CASA in assisting children and youth to obtain legal representation.
2. Parties' Positions: develop agency-wide policies governing motions for appointment of counsel
3. Referrals: develop policies to inform and protect caregivers and other involved individuals who wish to retain counsel for a child or make referrals to counsel for purposes of filing motions for appointment.

4. Attorney-Client Privilege: develop policies designed to educate all parties on the protections of confidentiality and privilege between attorneys and children.
5. Children With Disabilities: identify protective measures for children with significant disabilities as well as children who may be requesting counsel pro se without the assistance of an attorney
6. Discovery and Other Records: develop policies for the AGO and the Department when responding to discovery requests related to motions for appointment of counsel
7. How Children May Be Accessed for Purposes of Filing Motions for Appointment of Counsel: develop policies with regard to how counsel may obtain access to children and youth in order to respond to a request by the child, a referral or retainer to file a motion for appointment of counsel.
8. Transportation: develop policies for the options for transportation of children and youth to legal meetings



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December 2, 2015

Justice Bobbe Bridge, Co-chair
Jennifer Strus, Co-chair
Washington State Supreme Court Commission on Children in Foster Care
c/o Nichole Kloepfer
Administrative Office of the Courts-Commissions
1112 Quince St SE
Olympia, WA 98501

RE: Children's Representation Workgroup

Workgroup Goal: The new provisions of RCW 13.34.100 will increase the numbers of children, youth, and other individuals who will request legal representation for children in dependency and termination proceedings. The Workgroup will ensure that Commission members' respective agencies are aware of these changes in the law and assist them to develop statewide practices and procedures, which will serve to remove barriers to children and other individuals designated by the statute as they seek to exercise their rights under RCW 13.34.100.

Professor Lisa Kelly was designated as the Chair of the Children's Representation Workgroup. Professor Kelly has completed a report based on the contributions of the members of the Workgroup. The Office of the Attorney General (AGO) and the Department of Social and Health Services (the Department) participated fully in the Workgroup, worked to achieve consensus when it could be achieved, and these areas are addressed in Professor Kelly's report. The purpose of this letter is to explain the reasons why the AGO and the Department did not agree with certain proposed procedures recommended by a majority of the Workgroup members.

Based on contributions from all involved, consensus was reached on a number of areas addressed by the Workgroup's charter, including with regard to the use of a form to alert the court that an interested person believes the child needs a court-appointed attorney. Where the Department and the AGO were not in agreement, our concerns related to ensuring both the necessary level of confidentiality for child welfare records and appropriate access to our most vulnerable children. To that end, the AGO and the Department agree to share basic case information with an attorney who sends a letter indicating that he or she has been retained to represent a youth and the attorney will be filing a Limited Notice of Appearance and a Motion

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for Appointment of Counsel for the Child. The AGO and the Department also agree that once an attorney files a Limited Notice of Appearance, he or she is representing that child for the purposes of filing a motion. The AGO and the Department recognize that the attorney will need enough discovery to be able to file a motion for appointment of counsel for the child which addresses the *Mathews v. Eldridge* factors. Discovery needs will be case specific, depending on the circumstances of each child. The AGO and the Department agree that the documents that may be relevant to the motion for appointment of an attorney are those presented on page 7 of Professor Kelly's report.

The AGO and the Department recognize that the child's attorney will need access to the child as part of his or her representation of that child. The AGO and the Department understand that if an attorney is contacted by an individual interested in securing counsel for a child, the attorney will want to confirm with that child that the child actually wants an attorney to represent him or her. However, the AGO and the Department do not agree with the general proposition that any attorney who submits a notice of intent to file a Limited Notice of Appearance on letterhead will have access to the child. First, the children in the Department's care and custody have been abused or neglected and have suffered some amount of trauma. Additionally, in some cases, the attorney may not be able to confirm whether the child wants an attorney due to the child's age and developmental level. In these cases, it is not clear whether an attorney will proceed if the attorney is unable to confirm that the child would like to have an attorney. This practice probably varies from attorney to attorney. Further, under RCW 13.34.100, "any individual" may refer the child to an attorney or retain one for the child. "Any individual" could encompass a great deal of people: parents (offending as well non-offending), caregivers, relatives, teachers, service providers, or community members. In order to protect children from the risk of harm, the AGO and the Department advocate moving cautiously when "any individual" decides to contact an attorney because he or she believes the child should be appointed an attorney. There should be transparency regarding the identity of the individual who is seeking appointment of an attorney for the child and the reason for appointment before the attorney has access to the child and the child's confidential records.

Therefore, the AGO and the Department propose that if an attorney is going to file a motion to appoint an attorney for the child, the attorney should file a Limited Notice of Appearance before being granted access to the child and the child's confidential records, and should request a preliminary hearing to address access to the child and the child's confidential records. A preliminary hearing provides notice to the parties that a motion to appoint an attorney for the child will be filed and it gives the parties an opportunity to indicate whether there will be any objections to the motion. If there are no objections and the court agrees to appoint an attorney for the child, there will be no need for the attorney to obtain a court order for discovery and an agreed order of appointment would obviate the need for a further hearing. The preliminary hearing could potentially save a great deal of time and energy for all involved, while ensuring transparency and safe and appropriate access to children and their confidential records. If a party does intend to object to appointment of an attorney, the hearing would allow the court

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to determine the appropriate scope of discovery and access to the child needed to pursue the motion, based on the facts of each particular case.

In addition, the AGO and the Department are concerned about, and do not agree to, the following proposals contained in Professor Kelly's report:

1. The Preamble. The preamble contains legal argument with which the AGO and the Department do not agree. While some of these statements may be the position of certain advocacy groups who seek universal representation of dependent children in active appeals, they are not the position of the AGO and the Department. Instead, the AGO and the Department propose that the preamble should describe the statutory changes made to RCW 13.34.100(7) and the tasks assigned to the Workgroup.
2. Workgroup Tasks. Currently, Professor Kelly's report contains under Informing Children and Youth of their Right to Counsel: "The Workgroup recommends that the Office of Civil Legal Aid be charged with the responsibility to refer youth, caregivers and others to available legal resources to assist in the filing of motions for appointment of counsel. The Office of Civil Legal Aid is willing to take on this responsibility." In order to avoid possible conflicts of interest or preferences of one agency over another, the Department cannot agree to recommend any specific agency when asked about referrals for legal resources for children and youth.
3. Under Facilitating the Representation of Children for Purposes of Moving for Appointment of Counsel at Public Expense, Professor Kelly's report goes too far in describing what the Department's policies should say in regard to the appointment of an attorney for a child. The Department retains the discretion to develop its own policies. Traditionally, the Department has worked with external stakeholders when developing its policies. The Department should be allowed to follow its own procedures for developing its own policies.
4. In regard to transportation, the report contains the following under Facilitating the Attorney-Client Relationship for Represented Children Bringing Motions: "The Department should presume that it will be transport all children to hearings on their motions for appointment of counsel, unless it is informed otherwise." The needs of each child vary and the resources available to a caseworker also varies. Therefore, the Department proposes the following language: "With sufficient notice of a hearing and the child's wish to attend the hearing, the Department will agree to transport children to court. The child's schedule and impacts on the child's ability to attend school and participate in extracurricular activities should be considered when setting a court date."

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5. Regarding youth or other individuals who decide to request an appointment of an attorney directly from the court without the assistance of counsel, the majority of Workgroup members agreed that it was worth exploring whether a form could be developed which provided the information necessary for a court to determine whether an attorney should be appointed or not. Such a form was created, and is attached. However, the Workgroup participants disagreed regarding the best way to incorporate the form into the various attorney appointment processes used in each of the 39 counties. In recognition of the diversity in appointment procedures used across the state, the AGO recommends that the form be made available to the courts and that the stakeholders in each county should determine whether and how best to incorporate it into their practice and procedures.

Sincerely,

KAREN M. DINAN
Senior Counsel