

**KENNY A. DOES NOT LIVE HERE: EFFORTS IN
WASHINGTON STATE TO IMPROVE LEGAL
REPRESENTATION FOR CHILDREN IN FOSTER CARE**

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I. INTRODUCTION

While many states in the nation are conducting complex discussions about the *role* that children’s attorneys should play in dependency and termination of parental rights proceedings, a smaller number of states are still looking forward to merely beginning that discussion. Advocates in states like Florida and Washington, where most children are denied a legal advocate in their dependency and termination proceedings, are struggling to convince anyone who will listen that the interests of children, families, and due process demand legal counsel be appointed for every child.

This article discusses advocates’ efforts in Washington State to build consensus around the right to counsel for children and youth in foster care and how that consensus can be used to convince decision-makers to ensure that each child has an attorney who can protect their rights, who can promote their interests, and who can ensure that children and youths’ voices are heard in legal proceedings that impact so many areas of a child’s life and liberty. Whether the advocacy in Washington will ultimately prevail is yet to be determined, but the process has resulted in a strong alliance that will not likely disappear in the near future.

II. THE LEGAL LANDSCAPE IN WASHINGTON STATE

A. *The Law*

Washington State's legal representation landscape in dependency proceedings reflects a baffling mix of approaches. The state's jurisprudence boasts some of the earliest and most powerful declarations about parents' rights to counsel in dependencies and terminations.¹ Recently, the state has invested substantial resources into improving the quality of parents' legal counsel, helping the innovative Parents Representation Program improve the legal process for many adults in child welfare proceedings.²

Around the same time as the Washington Supreme Court's strong endorsement of the need for parent representation, the issue of children's representation took a different course. In 1977, the nation's first Court Appointed Special Advocates (CASA) program was launched in Seattle—the program's model was conceived out of a judge's frustration that juvenile courts were being deprived of sufficient information to protect a child's best interests in abuse and neglect proceedings.³ The CASA program enlisted citizen volunteers to serve as non-attorney guardians ad litem (GALs) who would speak up for children's best interests in the courtroom.⁴ Currently, there is a volun-

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1. See *In re Welfare of Luscier*, 524 P.2d 906, 908 (Wash. 1974) (en banc) (finding a right to counsel for parents in termination proceedings, while not distinguishing between the Federal and Washington Constitutions), *abrogated by* *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981), *as stated in* *Bellevue Sch. Dist. v. E.S.*, 257 P.3d 570 (Wash. 2011); *In re Welfare of Myricks*, 533 P.2d 841, 841 (Wash. 1975) (en banc) (finding that parents' right to counsel extends to dependencies as well as terminations).

2. *Parents Representation Program*, WASH. ST. OFF. PUB. DEF., <http://www.opd.wa.gov/PRP-home.htm> (last updated Nov. 9, 2010). The PRP's website notes that "[k]ey elements of the [PRP] include: [T]he implementation of case load limits and professional attorney standards; access to expert services and independent social workers; [Office of Public Defense] oversight; and ongoing training and support." *Id.* The PRP operates in twenty-five of Washington's thirty-nine counties. *Id.*

3. *About Us*, CASAFORCHILDREN.ORG, http://www.casaforchildren.org/site/c.mtJSJ7MPISE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm (last visited Feb. 26, 2012).

4. *Id.*

teer CASA or non-attorney GAL program in the vast majority of the state's thirty-nine counties.⁵

As for dependent children receiving the protection of lawyers, however, the state has remained solidly stuck among the worst states in the nation—current state law fails to guarantee counsel to any child involved in an ongoing dependency proceeding and provides unfettered discretion to the courts to decide whether children get counsel (with two very small exceptions, as discussed below).⁶ The statute only empowers children to raise the issue of counsel when they reach the age of twelve.⁷ Prior to that age, the statute dictates that they must rely on the non-attorney GAL, who is most often a volunteer CASA, or the court, *sua sponte*, to raise the issue of appointment of counsel.⁸ And, even if the child or non-attorney GAL requests counsel for the child, the court may deny the request.⁹ Additionally, nothing in state law requires juvenile courts to even make a finding as to whether a child needs counsel if it is raised by another party—there is no way for advocates to know under what circumstances children *are* being provided counsel.

In looking back, it is interesting that Washington's statute was actually stronger in years past. Prior to 1993, the statute specifically articulated that the court could appoint an attorney to represent the child—with no mention of age—but that year the legislature amended the dependency chapter and struck the provision articulating that “[t]he court shall . . . appoint ~~an attorney and/or~~ a [GAL] for a child”—leaving only the requirement that the court shall appoint a non-attorney GAL for the child “unless a court for good cause finds the appointment unnecessary.”¹⁰ This last provision sets Washington apart from the rest of the nation yet again, in that it statutorily empowers juvenile courts to deny even a GAL to the child, even though this provision clearly violates federal law.¹¹

5. See *CASA Programs in WA*, WASH. ST. CASA, <http://www.washingtonstatecasa.org/casa-volunteering/find-a-program> (last visited Feb. 26, 2012).

6. See WASH. REV. CODE § 13.34.100(1) (2011).

7. *Id.* § 13.34.100(6)(a)(i)–(iii).

8. See *id.* § 13.34.100(1)–(2). “If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child’s position.” *Id.* § 13.34.100(6)(f).

9. See *id.* “[T]he court *may* appoint an attorney to represent the child’s position.” WASH. REV. CODE § 13.34.100(6)(f) (emphasis added).

10. H.B. 1165, 53d Leg., Reg. Sess. § 2(1) (Wash. 1993).

11. See VICKIE WALLEN, OFFICE OF THE FAMILY & CHILDREN’S OMBUDSMAN, 1999 ANNUAL REPORT 32 (1999), available at http://governor.wa.gov/ofco/reports/1999/ofco_1999_annual.pdf, which “found that approximately one-third of Washington children who are involved in child abuse and neglect proceedings do not have a GAL to represent their best interests.” The report recommended that “state law be amended to make clear that a GAL

The two seemingly arbitrary circumstances under which children are guaranteed the protection of an attorney in a dependency proceeding include the instances where a child does not have a GAL *and* a party or the court raises the issue with the juvenile court,¹² or where a legally free child petitions the juvenile court to reinstate his/her parents' parental rights.¹³ Interestingly, in other civil legal areas, the courts and the legislature have not been shy about providing children with counsel, ensuring that they have attorneys in most status offense proceedings—including At-Risk Youth (ARY)¹⁴ and Child in Need of Services petitions¹⁵—as well as mental health commitment proceedings¹⁶ and the contempt phase for both truancy¹⁷ and dependency proceedings.¹⁸

Thus, Washington's Legislature has created a situation in which no child is required to have counsel until and unless he or she tries to reestablish

shall be appointed to represent the best interests of every child who is the subject of a child abuse and neglect proceeding." *Id.* The Child Abuse Prevention and Treatment Act (CAPTA) requires State plans to include:

an assurance . . . that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes . . . 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 . . . 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.

CAPTA Reauthorization Act of 2010, 42 U.S.C. § 5106a(b)(2)(B), (B)(xiii) (2006 & Supp. IV 2010).

12. *See* WASH. STATE CT. JUCR 9.2(c)(1) (1997). This rule *requires* the appointment of an attorney for a juvenile who has no GAL, "[u]pon request of a party or on the court's own initiative." *Id.* The authors believe this provision is almost never invoked.

13. *See* WASH. REV. CODE § 13.34.215(3). This statute *requires* the appointment of an attorney for a juvenile who petitions the juvenile court to have his/her parents' parental rights reinstated. *Id.* The child must be twelve years old to file a petition, although "[u]pon the child's motion for good cause shown, or on its own motion, the court may hear a petition filed by a child younger than twelve years old." *Id.* § 13.34.215(1)(e). To be able to petition, in the three years since parental rights were terminated, the child must have not achieved permanency. *Id.* § 13.34.215(1)(c)–(d).

14. *Id.* § 13.32A.192(1)(c). "When a proper at-risk youth petition is filed by a child's parent under this chapter, the juvenile court shall . . . [a]ppoint legal counsel for the child." WASH. REV. CODE § 13.32A.192(1).

15. *Id.* § 13.32A.190(1). "[T]he court shall . . . appoint legal counsel and/or a guardian ad litem to represent the child at the review hearing." *Id.*

16. *Id.* § 71.34.710(3). "The minor . . . has a right to have an attorney appointed to represent him or her before and at the hearing if the minor is indigent." *Id.*

17. *See* *Tetro v. Tetro*, 544 P.2d 17, 19–20 (Wash. 1975) (en banc) ("[W]herever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation.").

18. WASH. REV. CODE § 13.34.267(4); *see also* *In re Dependency of A.K.*, 174 P.3d 11, 22 (Wash. 2007) (en banc) (Madsen, J., concurring).

parental rights after three years floating around in foster care.¹⁹ Additionally, the legislature has, in violation of federal law, made it legal for children to even be denied a GAL, resulting in children being completely unrepresented in their dependency and termination proceedings.²⁰ This system has deservedly placed Washington State among the bottom ten states in each of *First Star's National Report Card on Legal Representation for Abused and Neglected Children* (2007 and 2009).²¹

Perhaps more problematic, it is an undecided question as to whether children in Washington State are actually *parties* to the legal proceedings that deal with their physical and other fundamental liberty interests or when the State seeks to permanently sever their relationships with their families. Though children were clearly parties to dependency proceedings until 1993, when the legislature amended the dependency chapter that year and removed the provision allowing courts to appoint attorneys, as noted above, it also struck the section of the statute that articulated that a child was a party to the proceedings.²² What is clear about children's party status, however, is that the court, pursuant to section 13.34.165 of the *Revised Code of Washington (RCW)*, recognizes a child as a party capable of being held in civil contempt and detained when not in compliance with an order entered by the juvenile court in a dependency action.²³

19. WASH. REV. CODE § 13.34.215(1)(d), (3).

20. Compare *id.* § 13.34.100(1) with CAPTA Reauthorization Act of 2010, 42 U.S.C. § 5106 a(b)(2)(B)iii (2006 & Supp. IV 2010).

21. FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN 10–11, 108–09 (1st ed. 2007), available at <http://www.firststar.org/documents/firststarreportcard07.pdf>. In 2007, Washington received an F grade, obtaining only 31 out of 100 possible points and ranking among the bottom five states. *Id.* at 10. In 2009, Washington's grade bumped to a D grade—obtaining 61 out of 100 points—but, that was primarily due to a change in First Star's grading method. See *id.* at 9, 108; FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 21, 23, 126–27 (2d ed. 2009) [hereinafter NATIONAL REPORT CARD, SECOND EDITION], available at http://www.cachildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf. Washington remained among the bottom nine states. *Id.* at 21.

22. See H.B. 1165, 53d Leg., Reg. Sess. § 2 (Wash. 1993).

23. See WASH. REV. CODE § 13.34.165; *In re Dependency of A.K.*, 174 P.3d at 21 (Madsen, J., concurring) (“[A]s long as a dependency court employing the sanctions . . . under RCW 13.34.165(2) provides an opportunity for a juvenile to purge the contempt, the sanction is remedial.”).

B. *Justice by Geography*

Despite Washington's weak statutory protections, some counties have taken it upon themselves to provide greater protection than is required by state law. King County, the state's most populous county,²⁴ provides attorneys to all children twelve years old and older.²⁵ Another judicial jurisdiction, Benton-Franklin County, provides attorneys to all children nine years old and older, although the local court rules allow the appointment of an attorney for any child who is six years old or older who does not have a GAL.²⁶ In the other thirty-seven counties, attorney appointment appears to follow no pattern, except for in the counties where attorneys are never appointed.²⁷

In 2008, spurred on by legislative efforts discussed below and in an attempt to map appointment of attorneys to adolescents, the Washington State Office of Civil Legal Aid (OCLA) surveyed stakeholders in the dependency judicial system.²⁸ The result was as advocates expected; the study found that "there is no discernable basis for decision-making in this area either state-

24. Desiree Phair, *King County Profile*, EMP. SECURITY DEPARTMENT, WASH. ST., <https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profile/king-county-profile> (last updated Jan. 2012).

25. WASH. KING SUPER. CT. LJUCR 2.4(a) (2005).

Any parent, guardian and/or legal custodian of the child, *or child age [twelve] or older*, who appears at the [seventy-two] hour hearing may be represented, at [the initial shelter care] hearing, by [c]ourt-appointed counsel regardless of financial status unless the party expressly waives this right or has retained counsel.

Id. (emphasis added).

26. WASH. BENTON/FRANKLIN SUPER. CT. LJUCR 9.4(A) (2008); WASH. BENTON/FRANKLIN SUPER. CT. LJUCR 9.2(A)(1)(e)-(i) (1988). In speaking with the Benton-Franklin Counties Juvenile Court Administrator, Sharon Paradis, the authors learned that the two local court rules work in tandem to ensure that no child goes without some sort of advocate in their dependency and termination proceedings. Telephone Interview with Sharon Paradis, Juvenile Court Adm'r for Benton-Franklin Cntys. (Dec. 16, 2011) (on file with *Nova Law Review*). Ultimately, all children ages nine and older are provided attorneys, but the court rules "fill the gap" if there are not enough volunteer non-attorney GALs to represent children ages eight and under. *Id.*; see also WASH. BENTON-FRANKLIN SUPER. CT. LJUCR 9.4(A) (2008). Thus, the court rules allow children as young as six to be appointed an attorney if there are not enough volunteer GALs in the county. Telephone Interview with Sharon Paradis, *supra*; see also WASH. BENTON/FRANKLIN SUPER. CT. LJUCR 9.2(A)(1)(e)-(i) (1988).

27. See Press Release, Wash. Defender Ass'n, Washington Supreme Court to Hear Significant Case Regarding Foster Children's Right to an Attorney (Jan. 25, 2011), <http://www.defensenet.org/news/press-release-washington-supreme-court-to-hear-significant-case-regarding-foster-childrens-right-to-an-attorney>.

28. WASH. STATE OFFICE OF CIVIL LEGAL AID, PRACTICES RELATING TO THE APPOINTMENT OF COUNSEL FOR ADOLESCENTS IN JUVENILE COURT DEPENDENCY PROCEEDINGS IN WASHINGTON STATE 1 (2008) (on file with *Nova Law Review*).

wide or in the counties.”²⁹ Further, even within individual counties “there is little consistency in perceptions relating to the practice of appointment of counsel.”³⁰ In many other counties, however, adolescents are appointed counsel in less than one-third of the cases.³¹ As one judge interviewed for the study put it, “[t]here seem to be two models for adolescent representation: ‘[A]lmost always’ and ‘almost never.’”³²

Thus, whether a child gets an attorney in Washington State depends mostly on where the child lives, as opposed to some individualized determination of need.³³ The current approach to the appointment of counsel is highly problematic and results in the arbitrary denial of justice. This result is unsurprising, given that neither the statute nor case law requires the trial court to consider whether to appoint an attorney; nor does either provide any standards or guidelines for the courts to consider whatsoever.

III. LEGISLATIVE EFFORTS TO CHANGE THE LANDSCAPE

In 1977, the Washington Legislature passed the Juvenile Court Act, setting up the framework for dependency proceedings.³⁴ As noted above, in 1993, the legislature amended the statute to account for the federal requirement that all children must be appointed a GAL.³⁵

Unfortunately, the amendment actually *narrowed* not only the type of advocate a child could receive—removing the provision that children may be represented by “an attorney”—but it also added the “good cause” exception for appointing a GAL.³⁶ Additionally, the amendment removed the explicit provision that children were parties to the proceedings, and made them “subjects” of the proceeding—though it likely did not truly remove their party status.³⁷ Since that time, no meaningful changes had been made to the statutory system of representation, until 2007, when the legislature granted children—not parents—the ability to petition the court to reinstate their parents’ parental rights if the child had floundered in the foster care system for three years after termination.³⁸ In such a case, with the urging of child advocates,

29. *Id.* at 9.

30. *Id.* at 7.

31. *Id.* at 6. The report did not analyze how often children younger than twelve were appointed counsel. *See id.* at 5.

32. WASH. STATE OFFICE OF CIVIL LEGAL AID, *supra* note 28, at 5.

33. *See id.* at 6.

34. 1977 Wash. Sess. Laws 1002.

35. *See* H.B. 1165, 53d Leg., Reg. Sess. § 2 (Wash. 1993).

36. *Id.* § 2(1); *see* WALLEN, *supra* note 11, at 60.

37. H.B. 1165, 53d Leg., Reg. Sess. § 2(1).

38. WASH. REV. CODE § 13.34.215(1)(c) (2007).

the legislature included in the bill a provision that the child petitioner would have an attorney to assist in pursuing reinstatement.³⁹

By 2008, a strong coalition of child advocates had been formed and began focusing on the need to improve the statutes that govern the appointment of attorneys to children and youth involved in dependency proceedings.⁴⁰ The coalition included advocates from civil legal services and the public defense community, child welfare lobbyists, clinical law professors, and, perhaps most importantly, youth who were at that time, or had been, in foster care.⁴¹ These youth were brought into the conversation by a local foster care advocacy organization, the Mockingbird Society, which has come to represent the “youth voice” in Washington.⁴²

Despite momentum from the child advocacy community and the youth themselves, there was, and remains, major resistance to the idea of legal representation within the legislature.⁴³ One opposition camp believes that if children are provided lawyers, those lawyers may advocate for children to return to their biological homes, which may be unsafe.⁴⁴ Another camp expressed concern that children’s lawyers would argue against their parents, putting parents in the position of defending themselves against their children in court.⁴⁵ Advocates quickly realized that any work done in the legislature was going to require a great deal of education about the complex dependency process, in addition to the intricacies of the different roles and obligations of

39. *Id.* § 13.34.215(2).

40. See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 21, at 5–6; ANDREW E. ZINN & JACK SLOWRIVER, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHICAGO, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1–2 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/428.pdf.

41. See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 21, at 5–6; ZINN & SLOWRIVER, *supra* note 40, at 1.

42. The Mockingbird Society is “dedicated to building a world-class foster care system that ensures the care, support, and resources necessary for children, youth, and families to thrive.” *Our Mission*, THE MOCKINGBIRD SOC’Y, <http://www.mockingbirdsociety.org/about/our-mission> (last visited Feb. 26, 2012). Its mission “is to advocate for systems reform based on the personal experiences of children, youth, and families impacted by the foster care system.” *Id.*

43. See Andrea Khoury, A.B.A., Testimony Before the House Judiciary Committee of the Washington State Legislature Regarding House Bill 3048, Providing for Child Representation in the Court Process 4 (Jan. 25, 2008) (transcript available on A.B.A. website).

44. Response Brief of Department of Social & Health Services (DSHS) at 36, Dep’t of Soc. & Health Servs. v. Luak (*In re* Dependency of M.S.R. & T.S.R.), No. 64736-9-I (Wash. Ct. App. Nov. 22, 2010).

45. See Supplemental Brief of Respondent Department of Social & Health Services at 21, Dep’t of Soc. & Health Servs. v. Luak (*In re* Dependency of M.S.R. & T.S.R.), No. 85729-6 (Wash. Aug. 10, 2011).

a non-attorney GAL or volunteer CASA and an attorney.⁴⁶ This posed a challenge, considering only a very small handful of the forty-nine senators and ninety-eight representatives were lawyers themselves,⁴⁷ and considering the legislature had provided millions of dollars in funding to the CASA program in recent years.⁴⁸

Despite initial resistance, advocates began talking with legislators about House Bill 3048,⁴⁹ which proposed developing the Dependent Youth Representation Pilot Program.⁵⁰ The pilot would operate in at least two counties that “lack[ed] a strong system [of] appointing attorneys for dependent children [twelve] years and older.”⁵¹ The pilot would not only ensure that all children ages twelve and older are appointed an attorney, but also

that all of the attorneys involved are trained in dependency matters; that no attorney has a caseload larger than [eighty] current cases; and that the judges, commissioners, GALs, and CASAs receive training in dependency matters to better understand the attorney’s role in the proceedings with respect to their own roles.⁵²

The bill also required an evaluation.⁵³ House Bill 3048 died, as did a budget provision that would have accomplished the same end.⁵⁴ Both efforts were killed due to opposition to the legal representation for dependent children, as opposed to representation by a non-attorney GAL or volunteer CASA. Despite the failure, the effort generated enough interest by members of the House Judiciary committee that it led to the OCLA study referenced above.⁵⁵ Legislators wanted to know where and why children were being provided attorneys and under what circumstances were they being denied an attorney.⁵⁶ Again, the OCLA study found wide disparities throughout the state.⁵⁷

46. See Press Release, *supra* note 27.

47. See Katherine Long, *Washington Legislature Average in College Grads, Low in Lawyers*, SEATTLE TIMES, June 12, 2011, http://seattletimes.nwsources.com/html/localnews/2015304719_legislators13m.html.

48. WALLEN, *supra* note 11, at 59.

49. See, e.g., Khoury, *supra* note 43, at 5; Jim Theofelis, *Testimony to the Judiciary Committee on HB 3048*, MOCKINGBIRD TIMES, Feb. 2008, at 1, <http://www.mockingbirdsoc.org/files/pdf/feb08.pdf>.

50. H.B. REP. No. 60-3048, at 2 (2008).

51. *Id.*

52. *Id.*

53. See *id.*

54. See WASH. STATE OFFICE OF CIVIL LEGAL AID, *supra* note 28, at 1–2.

55. *Id.* at 1.

56. *Id.*

57. *Id.*

The survey study, though far from scientific, would become very useful to later efforts.

In 2009, with the economic picture looking quite different than it did in the spring of 2008, advocates attempted to craft a budget-neutral bill.⁵⁸ The result was House Bill 1183, which reflected the information found in the OCLA study⁵⁹ and would have simply required dependency courts to make a finding, on the record, as to whether counsel for children twelve and older was necessary and the reasons for the finding.⁶⁰ As long as some reason was noted on the record, the bill would have still allowed the court to exercise unfettered discretion in denying counsel to a child.⁶¹ Unfortunately, judges' and clerks' associations expressed concern that this would take significant judicial time and would thus cost too much to implement.⁶² The fiscal note estimated that five minutes of court time at each hearing would be required for the "judicial officer inquiring and then stating reasons for the appointment of an attorney, or the reasons for not appointing an attorney."⁶³ As a result of the costs associated with this estimate, the bill died.

In 2010, advocates had to yet again revise their expectations downward and attempt to craft a bill that even in the eyes of judges and court clerks would be fiscally neutral, but that would keep the legislature's attention focused on providing adequate protection of children's rights in dependency proceedings.⁶⁴ That bill, House Bill 2735, was the meekest of all the bills to date, requiring solely that children twelve and older be advised of their already-existing right to *request* legal counsel.⁶⁵ Advocates reasoned that since adolescents already had a right to request counsel, and GALs and agency caseworkers were already required to talk to children, it would be difficult to justify how the bill would impose a fiscal impact.⁶⁶ However, the Superior Court Judges Association, despite testifying that the Association "certainly

58. See H.R. 1183, 61st Leg., Reg. Sess. (Wash. 2009).

59. Compare *id.*, with WASH. STATE OFFICE OF CIVIL LEGAL AID, *supra* note 28. The legislative intent section of the bill noted that "[t]he legislature recognizes that inconsistent practices in and among counties have resulted in few children in Washington being afforded adequate legal representation in dependency proceedings, thereby putting the health, safety, and welfare of children at risk." H.R. 1183.

60. *Id.*

61. *Id.*

62. See ADMIN. OFFICE OF THE COURTS, JUDICIAL IMPACT FISCAL NOTE, OFFICE OF FIN. MGMT. ST. OF WASH., <https://fortress.wa.gov/ofm/fnspublic> (search "Session Year 2009" and "Bill Number 1183", then click on "04/17/2009" link) (last visited Feb. 26, 2012).

63. *Id.*

64. See H.R. REP. NO. 61-2735, at 1-2 (2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House%20Final/2735%20HBR%20FBR%2010.pdf>.

65. *Id.* at 2.

66. ADMIN. OFFICE OF THE COURTS, *supra* note 62.

concur[red] with the underlying policy,” again expressed concern about the fiscal impact, reasoning that judges

want[ed] to make sure if the request for counsel is there that there is going to be counsel that is going to be available and . . . that we have the funding necessary to ensure that those rights of the individuals are protected with the attorney. . . . [T]he concern is that it’s, in a sense, an unfunded mandate because there is not going to be opportunity to pay for the counsel to be there when they request it.⁶⁷

The fact that children were being denied attorneys simply because they were not asking for an attorney came as no surprise to advocates working on the bill. The fiscal note expressed an additional concern that requiring judges to inquire about whether children were notified of their right to request counsel would add an average of five minutes to court hearings.⁶⁸

Based on strong testimony and advocacy from youth, coupled with ongoing reassurances that the bill established no right to counsel and retained the judges’ absolute discretion to deny counsel for any reason or no reason whatsoever, the bill passed both houses unanimously, and was signed into law with no amendment ever being offered.⁶⁹ While the requirement of notice to adolescents that they could ask for an attorney was a meaningful step in the right direction, the bill’s intent section bolstered arguments made by youth and advocates for several years—that attorneys did, in fact, “have different skills and obligations than [GALs and CASAs], especially in forming a confidential and privileged relationship with a child.”⁷⁰ The bill added that “[w]ell-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care.”⁷¹ Perhaps the bill’s most important contribution, however, was the requirement that “the administrative office of the courts . . . [along] with the state supreme court commission on children in foster care, shall develop recommen-

67. House Judiciary Committee, *Public Hearing H.B. 2523, H.B. 2735, H.B. 3039, & H.B. 3058*, TVW.ORG, at 1:00:10–1:01:26 (Jan. 27, 2010), http://tvw.org/index.php?option=com_tvwplayer&eventID=2010010154. The Superior Court Judges’ Association’s testimony opposing H.B. 2735 can be found at 1:00:55. *Id.*

68. ADMIN. OFFICE OF THE COURTS, *supra* note 62. The fiscal note said that this would cost the counties and the state more than \$150,000 in a fiscal year. *See id.*

69. H.B. 2735, 61st Leg., Reg. Sess. (Wash. 2010).

70. *Id.* § 1(2).

71. *Id.*

dations for voluntary training and caseload standards for attorneys who represent youth in dependency proceedings.⁷²

House Bill 2735's small legislative victory regarding notice to youth in foster care was couched in what some advocates believe was a far more important win—the recognition by the legislature that attorneys have an important role to play in the lives of children and youth in abuse and neglect proceedings.

IV. LITIGATION EFFORTS TO CHANGE THE SYSTEM

From the beginning of the local advocacy community's renewed focus on this issue, advocates were under no illusion that meaningful change would likely have to come through the establishment of a constitutional right to counsel—legislative advocacy would not likely yield the same result as a court holding. How to obtain a court victory, however, was subject to some debate.

A. *Could We Have a Kenny A.?*

One approach advocates discussed, and the most recent example of success, was the Georgia litigation brought by the organization Children's Rights in the 2005 *Kenny A. ex rel. Winn v. Perdue*⁷³ case. The litigation, a child welfare class action reform case, included a claim that the extraordinarily high caseloads of children's attorneys in Fulton and DeKalb Counties resulted in a violation of dependent children's constitutional due process rights.⁷⁴ In the most clear decision on children's right to counsel to date, the Federal District Court of the Northern District of Georgia held that indeed, pursuant to Georgia statute and the Due Process Clause of the Georgia Constitution, children in foster care had a right to counsel in deprivation proceedings, and that the caseloads carried by attorneys there were violating that right.⁷⁵

Later that year, the Supreme Court of Washington took note of *Kenny A.* The citation came in *Carvin v. Britain (In re Parentage of L.B.)*⁷⁶—in which the court avoided ruling on children's rights to counsel, but noted that “[w]hen adjudicating the ‘best interests of the child,’ we must in fact remain centrally focused on those whose interests with which we are concerned,

72. *Id.* § 5.

73. 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

74. *Id.* at 1355.

75. *Id.* at 1357–59.

76. 122 P.3d 161 (Wash. 2005) (en banc).

recognizing that not only are they often the most vulnerable, but also powerless and voiceless.”⁷⁷ This citation led advocates to believe successful litigation in state court was a distinct possibility. However, a number of problems still stood in the way of bringing any claim in Washington, much less a successful one. First, unlike in Georgia, attorneys were not being provided to children by statute in Washington State, thus the claim would have been significantly different.⁷⁸ Second, the claims in *Kenny A.* were smartly made in the context of a larger reform case. In Washington, the class action reform case, *Braam ex rel. Braam v. State*,⁷⁹ had been initiated seven years prior to the *Kenny A.* ruling, and such claims were not included.⁸⁰ Additionally, the fact that children were not appointed attorneys created a tricky situation, in that it became difficult to access children who could actually assert the necessary claims.⁸¹

Some progress was made when, in 2007, the Washington Defender Association, with the help of funding from the Children’s Justice Act, created a Children’s Representation Project (CRP).⁸² The goals of the CRP were to both improve the quality of legal representation for dependent children, and also to improve the accessibility of it.⁸³ Advocates worked with the CRP to create a template motion for appointment of counsel for children, adaptable for any situation.⁸⁴ Using the template, and with the technical assistance of the CRP, advocates intervened in a number of cases throughout the state to obtain counsel for children in their cases.⁸⁵ The idea was, first and foremost, to make it easier for parents’ attorneys or GALs to move the juvenile court to appoint legal counsel for children in individual cases—other parties would not have to reinvent the wheel if they wanted to obtain an attorney for a

77. *Id.* at 179 n.29.

78. See Amici Curiae Brief of Kidsvoice et al. in Support of Appellant at 2, Dep’t of Soc. & Health Servs. v. Luak (*In re* Termination of M.S.R. & T.S.R.), No. 85729-6 (Wash. Sept. 26, 2011).

79. 81 P.3d 851 (Wash. 2003) (en banc).

80. Compare *id.* at 854, with *Kenny A.*, 356 F. Supp. 2d at 1355.

81. See *Braam ex rel. Braam*, 81 P.3d at 854–57, 863.

82. See generally *Children’s Justice Act*, ADMIN. FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/justice_act.htm (last visited Feb. 26, 2012); see also *Children’s Representation Project*, WASH. DEFENDER ASS’N, <http://www.defensenet.org/childrens-representation-project> (last visited Feb. 26, 2012).

83. *Children’s Representation Project*, *supra* note 82.

84. See generally *Sample Motion to Appoint Counsel for Dependent Youth*, WASH. DEFENDER ASS’N, available at <http://www.defensenet.org/childrens-representation-project> (follow “Motion to Appoint Counsel for Dependent Youth” hyperlink; then follow “Sample Motion for Appointment of Counsel FINAL 11-13-09(2).doc” hyperlink).

85. See generally *id.*; *Children’s Representation Project*, *supra* note 82.

child/children.⁸⁶ Another purpose behind posting the template motion, however, was that if any motion was denied, it would be appealable and the attorney would already be connected to the statewide association that supports public defense agencies.⁸⁷ Prior to 2009, however, the authors were unaware of any motions for counsel that were not resolved before appeal, thwarting, or at least complicating, an affirmative litigation effort.

B. *Bellevue School District v. E.S. Provides a Glimmer of Hope*

As the years stretched on after the *Kenny A.* ruling, it became more apparent that appellate advocacy, rather than affirmative litigation, might be the best way to resolve the issue in Washington State.⁸⁸ In 2009, the state court of appeals ruled in *Bellevue School District v. E.S.*⁸⁹ that children in initial truancy hearings had a constitutional due process right to counsel, given the educational, privacy and physical liberty interests at stake in those proceedings.⁹⁰ Though the decision mistakenly indicated that dependent children already had a statutory right to counsel, underscoring the confusion around the issue, the ruling appeared to clear the way to establish such a right for dependent children given that dependency proceedings turn over almost all decisions about a child's life to the state and require years—perhaps a child's entire lifetime—of court involvement.⁹¹

In 2009, shortly after the *Bellevue* decision was issued by the court of appeals, there was an opening to bring the dependency issue before the appellate courts. After her children had spent four years in foster care, a trial court in rural northeastern Washington terminated the parental rights of T.R.⁹² T.R.'s then twelve-year-old daughter, D.R., and eleven-year-old son, A.R., had been represented by the same volunteer CASA since their entry

86. See *Children's Representation Project*, *supra* note 82.

87. See *id.*

88. See, e.g., *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1017 (Wash. Ct. App. 2009), *reh'g granted*, 210 P.3d 1018 (Wash. 2009), and *rev'd*, 257 P.3d 570 (Wash. 2011).

89. 199 P.3d 1010 (Wash. Ct. App. 2009), *reh'g granted*, 210 P.2d 3d 1018 (Wash. 2009), and *rev'd*, 257 P.3d 570 (Wash. 2011).

90. *Id.* at 1017.

91. See *id.* at 1014, 1017. The court noted that “[t]ruancy hearings are the only type of proceeding, civil or criminal, in which a juvenile respondent is not provided counsel.” *Id.* at 1013 (citing WASH. REV. CODE § 13.34.100(6) (2011)). That statute, however, fails to guarantee attorneys for children twelve or older in dependencies. See WASH. REV. CODE § 13.34.100(6). See *supra* Section II(A) of this article for an overview of what section 13.34.100(6) does and does not provide.

92. Appellant's Opening Brief at 8, 15, *State v. Roberts (In re D.R. & A.R.)*, No. 27394-6-III (Wash. Ct. App. Feb. 26, 2009) [hereinafter Appellant's Opening Brief, *In re D.R. & A.R.*].

into care.⁹³ At no point during the life of the dependency did the CASA ever meet A.R., who had been involuntarily institutionalized for a year in the state's most intensive child psychiatric hospital and then placed across the state away from his mother and sister.⁹⁴ The CASA met face-to-face with D.R. no more than three times since being assigned to the case, the longest encounter being forty-five minutes.⁹⁵

During the termination trial (during which D.R. turned twelve), T.R.'s counsel asked for the court to appoint counsel to D.R.⁹⁶ The court asked the CASA to speak to the child about the issue.⁹⁷ The CASA did not talk with D.R. about the issue of counsel, despite several requests from the court.⁹⁸ The CASA testified at the termination trial that she did not want to bring up with D.R. the idea of getting an attorney because she was concerned the discussion might cause D.R. anxiety.⁹⁹ Despite that the CASA and D.R.'s therapist testified that they did not understand the legal impact the termination would have on D.R.,¹⁰⁰ the court denied the mother's motion to appoint counsel to D.R.¹⁰¹ The court noted that the "denial of counsel would raise an [appealable] issue," but "that it was simply 'too late in the game' for another lawyer to catch up with the progress of the case."¹⁰²

The mother, T.R., appealed the termination and her counsel moved to appoint appellate counsel for the children.¹⁰³ The court appointed Columbia Legal Services and the Center for Justice to represent D.R. and A.R., respectively.¹⁰⁴ The children filed briefs supplementing the mother's argument that her children's due process rights were violated and that all dependent children have a constitutional right to counsel in dependency and termination proceedings.¹⁰⁵ The children's briefs added salient facts about the effect upon the children of being "represented" by only a CASA who never met with

93. Appellant Child D.R.'s Opening Brief at 3–4, *State v. Roberts (In re D.R. & A.R.)*, No. 27394-6-III (Wash. Ct. App. June 5, 2009).

94. *Id.* at 4, 9; Brief of Appellant A.R. at 12–13, *State v. Roberts (In re Dependency of D.R. & A.R.)*, No. 27394-6-III (Wash. Ct. App. June 5, 2009).

95. Appellant Child D.R.'s Opening Brief, *supra* note 93, at 4.

96. Appellant's Opening Brief, *In re D.R. & A.R.*, *supra* note 92, at 13–14.

97. *Id.* at 13.

98. *Id.* at 14.

99. *Id.*

100. *See* Motion to Reverse & Remand Case to Superior Court at 2, *In re Dependency of D.R. & A.R.*, No. 27394-6-III (Wash. Ct. App. July 1, 2009).

101. Appellant's Opening Brief, *In re D.R. & A.R.*, *supra* note 92, at 14.

102. *Id.* at 14–15 (citations omitted).

103. Appellant Child D.R.'s Opening Brief, *supra* note 93, at 10.

104. *See id.*; Brief of Appellant A.R., *supra* note 94.

105. Appellant Child D.R.'s Opening Brief, *supra* note 93, at 1–2; Brief of Appellant A.R., *supra* note 94, at 2.

A.R. and who testified in favor of termination even though D.R.—who she had barely met with, over four years—opposed the termination.¹⁰⁶

Instead of responding to the children's briefs, the State surprisingly filed a motion to reverse and remand the termination, conceding that both D.R. and A.R. should have had counsel during the termination (despite the fact that nobody had ever requested counsel for A.R.).¹⁰⁷ In its concession, the State wrote "that the trial court abused its discretion in denying legal counsel for A.R. and D.R.; [and] that this error may well have affected the outcome of the case."¹⁰⁸ The State admitted that D.R. opposed the termination and that "her significant legal concerns were not represented" at trial by the children's volunteer CASA and that the CASA did not have "the ability to advocate for [D.R.'s] legal position."¹⁰⁹ The State further admitted that "A.R. also had significant legal issues" and "[l]ike D.R., [he] was not able to adequately present a legal argument to the court opposing termination because he did not have counsel."¹¹⁰ The State recommended reversal—stating counsel would be appointed for the children in the underlying dependency—but opposed any consideration by the court of appeals of the children's claim regarding any dependent child's *constitutional* right to counsel.¹¹¹ The court of appeals reversed and remanded the case but did not rule on the constitutional issue presented by the children.¹¹² At the children's request, the Supreme Court of Washington accepted review in May 2010.¹¹³ Even though the children had asked the Court to review the right to counsel in both dependencies and terminations, the Court limited its review to the right to counsel in termination proceedings.¹¹⁴

The children briefed the issue of the right to counsel in terminations under the federal and state due process clauses and coordinated an amicus ef-

106. Appellant Child D.R.'s Opening Brief, *supra* note 93, at 4; Brief of Appellant A.R., *supra* note 94, at 12.

107. Motion to Reverse & Remand Case to Superior Court, *supra* note 100, at 1.

108. *Id.* at 1–2.

109. *Id.* at 2.

110. *Id.* at 3.

111. *See id.* at 3–4.

112. Order Denying Motion to Modify Commissioner's Ruling at A2, A4, *In re Termination of D.R. & A.R.*, No. 27394-6-III consolidated with No. 27395-4-III (Wash. Ct. App. Dec. 28, 2009).

113. *In re Termination of D.R. & A.R.*, 231 P.3d 840, 840 (Wash. 2010); Amicus Curiae Brief of the American Civil Liberties Union of Washington at 2, *In re Termination of A.R. & D.R.*, No. 84132-2 (Wash. Jan. 11, 2011).

114. *In re Termination of D.R. & A.R.*, 231 P.3d at 840.

fort that resulted in the filing of eight briefs in support of the children.¹¹⁵ The amici represented a diverse group of stakeholders that ranged from foster youth and alumni of care, to foster parent advocacy groups, local legal service agencies and the statewide chapter of the ACLU, national advocacy groups, and the Washington State Psychological Association.¹¹⁶

On January 27, 2011, the Supreme Court of Washington heard oral arguments.¹¹⁷ As this was an issue of first impression, it was unclear what to expect from the court, but the questions ranged from whether a ruling on this issue would impact children's right to an attorney in a private dissolution action, to whether the issue would be resolved if all CASAs and GALs were provided attorneys.¹¹⁸ The court seemed to struggle with the notion that attorneys could represent even very young children, and focused on the fact, at the time of oral argument, D.R. and A.R. had attorneys because of the State's concession.¹¹⁹ The court wanted to know why it should rule on a case that appeared to lack aggrieved parties, given that the children had prevailed at the court of appeals.¹²⁰ Advocates for the children argued that the case presented an issue of continuing and substantial public interest, was likely to continue evading review, and that the court should decide the issue because it had never before come to the court's attention.¹²¹

Only five days after oral argument, the Supreme Court of Washington dismissed review of the case, pointing to the statutory amendments in House

115. See, e.g., Amicus Curiae Brief of the American Civil Liberties Union of Washington, *supra* note 113, at 1; Amicus Curiae Brief of the Mockingbird Society at 3, *In re Dependency of D.R. & A.R.*, No. 84132-2 (Wash. Mar. 24, 2010); Appellant Child D.R.'s Opening Brief, *supra* note 93, at 1–2; Appellant's Opening Brief, *In re D.R. & A.R.*, *supra* note 92, at 1; Brief of Appellant A.R., *supra* note 94, at 20; Amici Curiae Brief of Kidsvoice et al. in Support of Petitioners at 1, 5, *In re Termination of D.R. & A.R.*, No. 84132-2 (Wash. Dec. 23, 2010); Amicus Curiae Brief of the Washington State Psychological Association at 5, *In re Termination of D.R. & A.R.*, No. 84132-2 (Wash. Jan. 11, 2011).

116. See, e.g., Amicus Curiae Brief of the American Civil Liberties Union of Washington, *supra* note 113, at 1; Amicus Curiae Brief of the Mockingbird Society, *In re Dependency of D.R. & A.R.*, *supra* note 115, at 1; Amici Curiae Brief of Kidsvoice et al., *In re Termination of D.R. & A.R.*, *supra* note 115, at 19; Amicus Curiae Brief of the Washington State Psychological Association, *In re Termination of D.R. & A.R.*, *supra* note 115, at 1.

117. *Supreme Court Calendar*, WASH. CTS. (Jan. 27, 2011), http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2011&file=20110127.

118. See generally Oral Argument, *In re Termination of D.R. & A.R.*, No. 84132-2 (Wash. Jan. 27, 2011), available at http://twv.org/index.php?option=com_tvwplayer&eventID=2011010025B.

119. *Id.* at 16:23–17:00, 58:23.

120. *Id.* at 16:40, 57:00.

121. See *id.* at 16:25.

Bill 2735 that came about since the appeal¹²² and that there was no aggrieved party.¹²³ It was unclear what the amendment to the statute had to do with the status of the parties, given that the statute still provided no right to counsel and would not have pertained to A.R.¹²⁴ The outcome was devastating to the clients and the advocates who had been working on this case since early 2009.

C. *Life After In re* Termination of D.R. & A.R.

The attention brought to the issue through *In re Termination of D.R. & A.R.*¹²⁵ prompted attorneys regularly working on dependency and termination appeals to consider making the right to counsel argument in their cases. While *In re Termination of D.R. & A.R.* was being briefed for argument before the Supreme Court of Washington, another case was working its way up the appellate chain.

*Department of Social & Health Services v. Luak (In re Dependency of M.S.R. & T.S.R.)*¹²⁶ involved twin children who were nine years old when their mother's rights were terminated.¹²⁷ In that case, unlike in *In re Termination of D.R. & A.R.*, counsel had never been requested for the children, perhaps due to the fact that the statute allowed appointment for children under age twelve only upon request by the GAL or where the trial court, *sua sponte*, felt it necessary.¹²⁸ But the mother, frustrated by the fact that the volunteer CASA would only stipulate to how the children *might* feel about the termination, wanted the children's actual wishes to be represented to the court.¹²⁹ The trial court denied the request to hear directly from the child-

122. See discussion *supra* Part III.

123. Order Dismissing Review, *In re Termination of D.R. & A.R.*, No. 84132-2 (Wash. Feb. 1, 2011); H.B. 2735, 61st Leg., Reg. Sess. (Wash. 2010); Jessica Breslin, *WA Supreme Court Declines to Rule on Child's Right to Counsel in Termination of Parental Rights*, XXX NAT'L CTR. FOR YOUTH L., Jan.–Mar. 2011, http://www.youthlaw.org/publications/yln/2011/jan_mar_2011/wa_supreme_court_declines_to_rule_on_childs_right_to_counsel_in_termination_of_parental_rights/.

124. See H.B. 2735.

125. 231 P.3d 840 (Wash. 2010).

126. Appellant's Opening Brief at 4, *Dep't of Soc. & Health Servs. v. Luak (In re Dependency of M.S.R. & T.S.R.)*, No. 64736-9-I (WASH. CT. APP. Oct. 14, 2010).

127. *Id.*

128. Supplemental Brief of Respondent Department of Social & Health Services, *supra* note 45, at 5–6 (quoting WASH. REV. CODE § 13.34.100(6)(f) (2011)); see also discussion *supra* Part III.

129. Supplemental Brief of Appellant Luak at 3, *Dep't of Soc. & Health Servs. v. Luak (In re Dependency of M.S.R. & T.S.R.)*, No. 85729-6 (Wash. July 7, 2011).

ren.¹³⁰ The mother appealed the termination and argued that due process requires that all children have an attorney to protect their fundamental liberty interests during termination of parental rights proceedings.¹³¹

Shortly after dismissal of *In re Termination of D.R. & A.R.*, and prior to the *In re Dependency of M.S.R. & T.S.R.* court of appeal's oral argument date, the Supreme Court certified the case for review.¹³² The mother's attorney, having been well-versed in the issues in her prior job where she represented national amici in *In re Termination of D.R. & A.R.*, moved the court to appoint appellate counsel for the children.¹³³ The State opposed the motion, and the court denied the mother's request.¹³⁴ The court did, however, allow nineteen amicus parties—almost all of whom had also participated as amici in *In re Termination of D.R. & A.R.*—to submit six briefs to the court.¹³⁵ Thus, in a case examining whether children have a constitutional right to counsel in termination proceedings, the children in the case went unrepresented in the dependency, the termination, and on appeal, and amici would be left to argue about the children's rights and interests without any access to the record.¹³⁶ The CASA did not appear in the appeal, leaving any

130. *Id.*

131. *Id.* at 3–4.

132. *In re Termination of D.R. & A.R.*, 231 P.3d 840, 840 (Wash. 2010).

133. *See* Motion to Appoint Counsel for Children at 1, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Apr. 6, 2011).

134. Answer of DSHS Opposing Ms. Luak's Motion to Appoint Counsel for Children at 1, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Apr. 14, 2011); Order, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. June 10, 2011).

135. *See* Amicus Curiae Brief of the Mockingbird Society at 1, Dep't of Soc. & Health Servs. v. Luak (*In re Termination of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Sept. 26, 2011); Amici Curiae Brief of Columbia Legal Services & the Center for Children & Youth Justice in Support of Appellant at 2, Dep't of Soc. & Health Servs. v. Luak (*In re Termination of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Sept. 26, 2011); Amici Curiae Brief of the Children & Youth Advocacy Clinic in Support of Appellant at 3, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Sept. 26, 2011); Brief of Amici Curiae American Civil Liberties Union of Washington et al. at 1, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Sept. 26, 2011); Amicus Curiae Brief of the Washington State Psychological Ass'n in Support of Petitioner at 2, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Sept. 5, 2011); Amici Curiae Brief of Kidsvoice et al., *supra* note 78, at 2; *see* sources cited *supra* note 115.

136. *See* Amicus Curiae Brief of the Mockingbird Society, *In re Termination of M.S.R. & T.S.R.*, *supra* note 135, at 1; Amici Curiae Brief of Columbia Legal Services & the Center for Children & Youth Justice, *supra* note 135, at 2; Amici Curiae Brief of the Children & Youth Advocacy Clinic, *supra* note 135, at 3; Brief of Amici Curiae American Civil Liberties Union of Washington et al., *supra* note 135, at 1; Amicus Curiae Brief of the Washington State Psy-

child's representative completely absent from the process. Ultimately, the arguments presented to the court mirrored those argued in *In re Termination of D.R. & A.R.*—that because termination proceedings are among the most intrusive and destructive legal proceedings to which any child or adult could ever be subjected, every court in the past thirty years has found that appointment of counsel to all children is constitutionally required.¹³⁷ The mother's counsel and amici argued that Washington is among a minority of states that fail to provide a universal right to counsel and that its method of appointing counsel is sporadic and results in “justice by geography.”¹³⁸ Amici brought the perspective of the people most affected by the decisions made in a termination proceeding—children and youth.¹³⁹ One example of this perspective was found in the brief submitted by the Mockingbird Society, which stated that:

If the parent-child relationship is terminated, it is the child who is exposed to the foster care system. It is the child who is often bounced from one foster home to another. It is the child who is forced to live in sometimes overcrowded and unsanitary conditions. It is the child who may suffer from abuse and neglect at the hands of substitute guardians. It is the child who is punished or detained in contempt for contacting the estranged biological parents. It is the child—not the State, not the parents, not the judge, and not the [GAL or CASA]—who must cope with living in a strange and often daunting world that lacks any nurturing or stability.¹⁴⁰

Finally, amici reminded the court that unlike almost any other criminal or civil proceeding, there is little certainty when state involvement will end, with cases lasting up to eighteen years—an entire childhood.¹⁴¹

The State's argument largely rested on its belief that because parents did not have a right to counsel under *Lassiter v. Department of Social Services of Durham County, North Carolina*,¹⁴² then children could not possibly

chological Association, *supra* note 135, at 2; Amici Curiae Brief of Kidsvoice et al., *supra* note 78, at 2.

137. See Supplemental Brief of Appellant, *supra* note 129, at 4.

138. See Amici Curiae Brief of Columbia Legal Services & the Center for Children & Youth Justice, *supra* note 135, at 17–20.

139. See *id.*

140. Amicus Curiae Brief of the Mockingbird Society, *In re Termination of M.S.R. & T.S.R.* *supra* note 135, at 6 (citations omitted).

141. Amici Curiae Brief of the Children & Youth Advocacy Clinic, *supra* note 135, app. at 7.

142. 452 U.S. 18 (1981).

have a right to counsel.¹⁴³ The State's argument not only ignored the strong constitutional pronouncements made by the Supreme Court of Washington in *In re Welfare of Luscier*¹⁴⁴ and *In re Welfare of Myricks*¹⁴⁵—instead arguing that these holdings were eviscerated by *Lassiter*—but also equated children to chattel who could not have greater or even equal rights to their parents.¹⁴⁶

The court heard oral argument in *In re Dependency of M.S.R. & T.S.R.* on October 18, 2011, nine months after the dismissal of *In re Termination of D.R. & A.R.*¹⁴⁷ It will be perhaps quite some time before a decision is issued, but advocates hope that the Supreme Court of Washington is not the first in thirty years to declare that children lack a constitutional right to counsel in cases that permanently sever children from their family members.

D. *What About Dependency Proceedings?*

While Washington's child advocacy community waits for a decision from the state supreme court regarding the right to counsel in termination proceedings, advocates are keeping a close eye on another case in the Washington Court of Appeals. *In re Dependency of K.A.S.*,¹⁴⁸ raises the issue of the right to counsel in dependency proceedings, which could affect the nearly 10,000 children that are in the foster care system in Washington State.¹⁴⁹ In *K.A.S.*, a parent appealed the finding of dependency and argued that all children have a right to counsel in dependency proceedings, relying heavily on

143. *Id.* at 24, 26–27, 34; Supplemental Brief of Respondent Department of Social & Health Services, *supra* note 45, at 8–13.

144. 524 P.2d 906 (Wash. 1974) (en banc), abrogated by *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981), *as stated in* *Bellevue Sch. Dist. v. E.S.*, 257 P.3d 570 (Wash. 2011).

145. 533 P.2d 841 (Wash. 1975) (en banc).

146. *Id.* at 841; *In re Welfare of Luscier*, 524 P.2d at 908; Supplemental Brief of Respondent Department of Social & Health Services, *supra* note 45, at 8–13.

147. *See generally* Oral Argument, Dep't of Soc. & Health Servs. v. Luak (*In re Dependency of M.S.R. & T.S.R.*), No. 85729-6 (Wash. Oct. 18, 2011) *available at* <http://twv.org/media/mediaplayer.cfm?evid=2011100005C&TYPE=V&CFID=8351653&CFTOKEN=38197884&bhcp=1>; Order Dismissing Review, *supra* note 123.

148. Brief in Support of Motion for Accelerated Review at 1, *In re Dependency of K.A.S.* No. 65769-1-I (Wash. Ct. App. Dec. 17, 2010).

149. *Id.* For information about the number of children in the care of the Children's Administration, see the 2010 Year in Review Report. *See* WASH. STATE DEP'T OF SOC. & HEALTH SERVS., CHILDREN'S ADMINISTRATION: 2010 YEAR IN REVIEW (2011), <http://www.dshs.wa.gov/pdf/ca/year-in-review2010.pdf>. The report notes that of the "11,625 children in the care of Children's Administration" in 2010, "9757 were in out-of-home care such as foster care or group homes." *Id.*

briefing from *In re Termination of D.R. & A.R.*¹⁵⁰ Despite arguing that all children should have counsel at their dependency trial, the mother declined to request appellate counsel for the child.¹⁵¹ When advocates filed a motion requesting leave to file amicus briefs, the court of appeals denied the motion and proceeded to oral argument without hearing any arguments directly from the child, the GAL—who did not participate in the appeal—or from the legions of stakeholders that participated as amici in *In re Termination of D.R. & A.R.* and *In re Dependency of M.S.R. & T.S.R.*¹⁵²

The court of appeals heard oral argument on November 4, 2011, less than a month after oral argument in *In re Dependency of M.S.R. & T.S.R.*¹⁵³ Like the supreme court case, it is unclear when a decision will be issued, or how it might be affected by the supreme court's ruling in *In re Dependency of M.S.R. & T.S.R.*

V. CONCLUSION: WASHINGTON'S LONG ROAD AHEAD

The right to counsel remains to be established, but significant gains have been made. For example, House Bill 2735 resulted in the development of a report on standards and caseloads by experts from the key child welfare constituency groups, including the Attorney General's Office and CASA which begins with the pronouncement that, "[a]ll children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues."¹⁵⁴ This consensus is no small feat, and it is one that came about after significant community education and consistent pressure.¹⁵⁵ Obviously, the pronouncement is likely to have little effect until the supreme court or the legislature become part of

150. See Brief in Support of Motion for Accelerated Review, *supra* note 148, at 8–22; see also Amicus Curiae Brief of the American Civil Liberties Union of Washington, *supra* note 113, at 5–7; Amici Curiae Brief of Kidsvoice et al., *In re Termination of D.R. & A.R.*, *supra* note 115, at 4–7.

151. See Brief in Support of Motion for Accelerated Review, *supra* note 148, at 8–22.

152. See generally *In re Dependency of K.A.S. No. 65769-1-I* (Wash. Ct. App. Dec. 17, 2010); see sources cited *supra* note 115, 135.

153. Appellate Court Case Summary, *In re Dependency of K.A.S., No. 657691*, WASH. CTS. (July 29, 2010), http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=657691&searchtype=aNumber&crt_itl_nu=A01&filingDate=2010-0729%2000:00:00.0&courtClassCode=A&casekey=152650874&courtname=COA,%20Division%20I.

154. STATEWIDE CHILDREN'S REPRESENTATION WORKGROUP, WASH. COURTS ADMIN. OFFICE OF THE COURTS, MEANINGFUL LEGAL REPRESENTATION FOR CHILDREN AND YOUTH IN WASHINGTON'S CHILD WELFARE SYSTEM: STANDARDS OF PRACTICE, VOLUNTARY TRAINING, AND CASELOAD LIMITS IN RESPONSE TO HB 2735 at 5, available at <http://www.law.washington.edu/Directory/Docs/Kelly/HB2735.pdf>.

155. See *id.* at 1–2.

the consensus, but the decisions of both of these bodies are necessarily affected by a community's maturation on an issue. Advocates hope that either, or both, will take note of this fact, as well as the emerging national consensus reflected by the American Bar Association's Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Cases. There have been other advances as well. Anecdotal information indicates that the substantive provisions of House Bill 2735 have resulted in more children being appointed attorneys simply because more children are asking for attorneys. More attorneys for parents, bolstered by the availability of briefing, are moving for counsel for children. Appellate attorneys, as well, are looking at this issue.

In light of the recession, efforts in Washington may only get more difficult. The only certainty, it appears, is that the issue is coming to a head with the result having major repercussions for the rights of children in Washington State and beyond. It is certainly possible that the courts and the legislature may reinforce the status of children as chattel. But such a result would be contrary to the now overwhelming opinion among stakeholders and the youth themselves—that children and youth have the most at stake in these proceedings and that their rights can only fully be protected by well-trained and well-supported attorneys.