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Amici Curiae Brief of the Children and Youth
Advocacy Clinic in Support of Appellant. In Re the
Dependency of M.S.R. and T.S.R. v. Luak, No.
85729-6 (Wash. Sept. 16, 2011)

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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF

M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B. 10/10/00)

D.S.H.S., STATE OF WASHINGTON

Respondent,

v.

NYAKAT LUAK,

Appellant

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STATE OF WASHINGTON
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**AMICI CURIAE BRIEF OF THE CHILDREN AND YOUTH
ADVOCACY CLINIC**

IN SUPPORT OF APPELLANT

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ORIGINAL

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I. SUMMARY OF THE ARGUMENT

Attorneys in Washington have the resources and established standards to effectively represent children and youth in termination of parental rights (“TPR”) proceedings. Children who face TPR proceedings need the type of advice and advocacy that only trained lawyers can provide. While parents, social workers, foster parents, therapists, and guardians ad litem may provide substantial support to dependent children, only lawyers can protect their legal rights in complex adversarial proceedings, especially when all of the other parties are represented by counsel. In the context of a confidential relationship with a lawyer, a dependent child can provide critical information and meaningfully participate in the most important legal proceeding of his or her life.

The Children and Youth Advocacy Clinic (“CAYAC”) has trained students and lawyers in Washington to provide meaningful representation to children, even young children, under the Rules of Professional Conduct (“RPC”). While representing young clients may present numerous challenges, lawyers can learn to advocate effectively for children and adolescents. Despite the challenges associated with representing youth, children should not be denied the critical safeguard of counsel in proceedings where their most significant relationships are at stake.

CAYAC is the home of the Court Improvement Training Academy (“CITA”). For the last four years, CITA has provided training to judges, attorneys, and other professionals within the dependency system. For the last two years, the annual Children’s Justice Conference, the largest child welfare training conference in Washington, has had a specific “legal track” spearheaded by CITA, which provides attorneys the opportunity to hone their skills and knowledge with respect to lawyering for children. Recently, the federal government selected Washington as one of two pilot sites nationally to study the impact of training on the representation of children and youth in the dependency system. To implement this study, CITA developed a training curriculum with the University of Michigan and Emory law schools. As a result of this project, attorneys throughout Washington will receive innovative training to represent children and youth effectively in the child welfare context using a stated interest model. This cadre of trained lawyers will stand together with those already trained by CITA and CAYAC to advocate for the interests of children and youth in TPR proceedings.

The Director of CAYAC also chaired the Children’s Representation Workgroup (“Workgroup”) of the Washington State Supreme Court Commission on Children in Foster Care (“Commission”). The Workgroup crafted standards of practice, voluntary training, and

caseload limits. These standards provide attorneys with comprehensive guidance as to their duties and obligations as counsel for children and youth in all stages of the dependency process, including TPR proceedings.

II. IDENTITY AND INTEREST OF AMICUS

CAYAC is a clinical law program at the University of Washington School of Law. Since 1996, CAYAC has trained law students to represent children and youth in dependency and TPR proceedings. The interest of *Amicus* in the current matter is set forth further in *Amicus'* Motion for Leave to File *Amicus Curiae* Brief.

III. STATEMENT OF THE CASE

Amicus adopts the Mother's statement of the case.

IV. ARGUMENT

A. Attorneys find guidance for effective representation of children and youth in the RPC as well as in state and national standards for child representation.

1. The RPC provide guidance to attorneys representing children.

The RPC specifically address the importance of providing children with legal counsel. “[C]hildren as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” RPC

1.14, *Comment 1*. Accordingly, the RPC seek to provide attorneys with effective guidance regarding the representation of children.

CAYAC's clients have ranged in age from four to nineteen and have had varying degrees of diminished capacity due to trauma, educational deficiencies, mental health, or other disabilities. Even young children or children with significant disabilities can understand when a lawyer is "on their side" and that the lawyer can speak to the judge on their behalf. As a result, it is possible for children's lawyers to maintain many aspects of the "normal attorney-client relationship" as contemplated by RPC 1.14(a).¹

Lawyers can learn to meaningfully interact with their young clients and accommodate their developmental and cognitive differences.² When a lawyer is unable to maintain a normal attorney-client relationship, and the child is at risk of "substantial physical, financial or other harm unless

¹ See RPC 1.14, American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, D-2 (adopted Feb. 5, 1996) found at <http://www.abanet.org/child/repstandwhole.pdf> (last visited 09/14/11). CAYAC teaches students how to meet their ethical responsibilities by explaining the complicate concepts in dependency and termination proceedings in a way that children can understand. There are many resources available to students and lawyers to assist them in understanding how to interview and communicate with child clients.

² Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 St. John's L. Rev. 601, 625 (2007); Laura Cohen and Randi Mandelbaum, *Kids will be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 Temp. L. Rev. 357 (2006).

action is taken,” the child’s lawyer is permitted to take “protective action.” RPC 1.14, *Comment 5*. Taking protective action can involve consulting with family members or other professionals while still being guided by the client’s values and wishes. *Id.* In dependency and termination proceedings, this provision can be very useful to lawyers who must counsel and advocate for children on complex issues requiring knowledge about culture, psychology, child development, and education.

RPC 1.14 also gives counsel for children the option to move for the appointment of a guardian ad litem where necessary. *Id.* For many children, an attorney and a guardian ad litem together can ensure that the court has all of the information necessary to make an accurate decision.

2. *Other state and national standards also provide effective guidance to attorneys representing children.*

In addition to the RPC, Washington lawyers receive guidance from the American Bar Association Standards for Representing Children in Abuse and Neglect Cases (“ABA Standards”). These standards provide comprehensive guidelines for the competent representation of children, including everything from “meeting with the child client” to requesting appointment of a guardian ad litem. *See* ABA Standards at C-1, B-4.³ The

³ ABA Standards B-4(1) provides; “To the extent that a child cannot express a preference the child’s attorney shall make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a guardian ad litem.”

ABA Standards are exceedingly useful for training law students to be effective lawyers for dependent children in Washington.⁴

Finally, at the request of the legislature, experts in Washington have recently developed specific caseload and performance standards for lawyers representing children in dependency and termination proceedings. 2010 Wash. Laws, ch. 180, § 5 (“HB 2375”). In HB 2375, the legislature requested the Administrative Office of the Courts to work with the Commission to develop recommended training and caseload standards for lawyers representing youth in dependency proceedings under RCW 13.34.

In the purpose section of HB 2375, the legislature found 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.” *Id.* In the TPR context, attorneys can provide the child with an understanding of what TPR means, can negotiate possible solutions that meet the specific needs and desires of the child including possible open adoption terms, can introduce evidence and cross-examine witnesses in support of the child’s stated interest at trial, and can explain the results of

⁴ See also American Bar Association House of Delegates, Resolution 101A Adopting the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (August 2011). The ABA recently adopted a model act requiring appointment of counsel for all children in termination proceedings and setting forth standards for representation.

one of the most important legal decisions that a child could possibly experience at the close of trial.⁵

The Workgroup of the Commission drafted recommendations as required by HB 2375. The Workgroup was chaired by the Director of CAYAC, and was comprised of experts from the key child welfare constituency groups, including the Attorney General's Office and Court Appointed Special Advocates ("CASA"). Together, they developed a document that begins with the pronouncement that, "[a]ll children subject to dependency or termination of parental rights proceedings should have legal representation as long as the court's jurisdiction continues." *See Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System*, attached as Appendix A, p. 5.

The Workgroup presented these standards to the Commission on December 20, 2010, where they were unanimously adopted by the Commission. On December 22, 2010, the Administrative Office of the Courts adopted the recommendations in their entirety. The legislature

⁵ CAYAC students have engaged in all of these activities and more on behalf of children and youth in TPR proceedings. In one TPR, for example, the students filed a motion for summary judgment arguing that the case should be dismissed. As a result, negotiations ensued and their client's case was dismissed. Eventually, the client was reunified with his parent. The youngest children, who did not have attorneys, had their parental rights terminated.

received these standards by the December 31, 2010 deadline set forth in HB 2375.

In the future, it is anticipated that these standards, based in large part on the ABA Standards, will be instructive to lawyers throughout Washington who represent children in dependency and termination proceedings.

B. Attorneys in Washington are trained to represent children and youth effectively in termination of parental rights proceedings.

For the past fifteen years, CAYAC has trained law students to represent children and youth in the child welfare context. The style of representation taught at CAYAC has been informed by the RPC, ABA Standards, and the HB 2375 recommendations.⁶ This education has been deployed using multiple pedagogies, including seminars, externships with agencies representing youth in King County, and clinical education.

At CAYAC, law students have directly participated in the representation of children and youth in dependency and TPR proceedings.⁷ This representation is closely supervised by faculty and supported by concurrent course work. Over one hundred students have already

⁶ See Appendix A.

⁷ See University of Washington School of Law, Children and Youth Advocacy Clinic, found at <http://www.law.washington.edu/Clinics/Child/default.aspx> (last visited 09/14/11).

graduated from this clinical program. Through CAYAC, students learn how to interview and counsel children and youth in a developmentally appropriate manner and how to advocate for their clients' informed stated interests. Many other students have been supervised by faculty and practicing attorneys in externship placements, and many more still have taken the Child Advocacy Seminar in which they have been exposed to interdisciplinary course work drawing on the fields of law, social work, medicine, and psychology.

The opportunities to learn do not begin and end in law school. For the past four years, CITA has offered numerous trainings throughout Washington for lawyers interested in representing children and youth in the child welfare system.⁸ In addition to these ongoing training opportunities, CITA will be working with the Center for Children and Youth Justice, the University of Chicago's Chapin Hall Research Institute, and the University of Michigan and Emory University law schools to create a curriculum that will be deployed in Washington and Georgia. This effort is part of the federally-funded National Quality Improvement Center on the Representation of Children in the Child Welfare System. The

⁸ See Court Improvement Training Academy, About, found at <http://uwcita.org/CITAv1008/aboutcita.html> (last visited 09/14/11). Many of these trainings were conducted in partnership with the Washington Defender Association and the Children's Justice Task Force.

federal government selected Washington as one of two national pilot sites to research the impact of training on the performance of lawyers for children and youth.⁹ As a result of this effort, more attorneys will undergo intensive training over the next four years.

V. CONCLUSION

Now is an exciting time for the emerging child advocacy bar. For fifteen years, CAYAC has trained students to represent children. For the last four years, CITA has provided resources to the bench and bar alike on how to effectively serve the children and youth in our system. While the Court deliberates this critical issue, additional training opportunities are being supported by federal grants that have selected Washington as a demonstration and research site. Should the Court hold that children and youth have the constitutional right to counsel in termination proceedings, a well-trained and eager bar will be prepared to take on the serious responsibility of advocating for those voices that are at the heart of our child welfare system.

⁹ See, QIC-ChildRep, Research and Demonstration Sites, found at <http://www.improvechildrep.org/DemonstrationProjects/ResearchDemonstrationSites.aspx> (last visited at 09/14/11).

Respectfully submitted, this 16th day of September, 2011.

A handwritten signature in cursive script that reads "Lisa Kelly". The signature is written in black ink and has a long, sweeping tail that extends to the right.

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**APPENDIX – A report from the Statewide Children’s Representation Workgroup,
“*Meaningful Legal Representation for Children and Youth in Washington’s
Child Welfare System*”, (2010).**



WASHINGTON
COURTS
ADMINISTRATIVE 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*

Statewide Children's Representation Workgroup

Appointed by the Washington Supreme Court Commission on Children in Foster Care

Statewide Children's Representation Workgroup

Members:

Prof. Lisa Kelly, University of Washington School of Law (UWLS), Chair

Zematra Bacon, Youth Representative

James Bamberger, Office of Civil Legal Services (OCLA)

Patrick Dowd, Office of the Family and Children's Ombudsman

Michael Griesedieck, Assistant Attorney General (AAG)*

Steven Hassett, Assistant Attorney General (AAG)

Christie Hedman, Washington Defender Association (WDA)

Jana Heyd, Society for Counsel Representing Accused Person (SCRAP)

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Timothy Jaasko-Fisher, Court Improvement Training Academy (CITA)

Jacqueline Jeske, King County Superior Court Commissioner

Anne Lee, TeamChild

Linda Lillevik, Carey & Lillevik

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Joanne Moore, Statewide Office of Public Defense (OPD)

Heidi Nagel, Court Appointed Special Advocates (CASA)

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Sharon Paradis, Benton-Franklin County Juvenile Court Administrator

Hon. Michael Trickey, King County Superior Court

Casey Trupin, Columbia Legal Services (CLS)

Ex-Officio

Janet Skreen, Administrative Office of the Courts

Support Staff:

Carrie Gaasland, UWLS

Ruvyn Munden, CLS

Joseph Timmons, Center for Children & Youth Justice (CCYJ)

*Each agency had one appointed member and was allowed to name a person to serve as an alternate in the event that its appointed representative was unavailable to attend. Michael Griesedieck served as alternate for Steven Hassett in representing the Attorney General's Office. Lori Irwin served as alternate for Heidi Nagel of the King County Dependency CASA. Jill Malat served as alternate for Christie Hedman of WDA. Erin Shea McCann served as alternate for Casey Trupin of Columbia Legal Services.

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Introduction

The Children's Representation Workgroup (hereinafter, "the Workgroup") was appointed and charged by the Washington State Supreme Court Commission on Children in Foster Care (hereinafter, "the Commission") to propose recommendations regarding practice standards for attorneys representing youth in proceedings under RCW 13.34.

Section 5 of HB 2735, quoted below, was the impetus for this work:

By December 31, 2010, and within available resources, the administrative office of the courts, working in coordination with the state supreme court commission on children in foster care, shall develop recommendations for voluntary training and caseload standards for attorneys who represent youth in dependency proceedings under chapter 13.34 RCW. The administrative office of the courts shall report its recommendations to the appropriate committees of the legislature by December 31, 2010.

In the purpose section of HB 2735, the Legislature recognized:

...that 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. Attorneys, who have different skills and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child, should be trained in meaningful and effective child advocacy, the child welfare system and services available to a child client, child and adolescent brain development, child and adolescent mental health, and the distinct legal rights of dependent youth, among other things. Well-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. Well-trained attorneys for a child can:

- (a) Ensure the child's voice is considered in judicial proceedings;
- (b) Engage the child in his or her legal proceedings;
- (c) Explain to the child his or her legal rights;
- (d) Assist the child, through the attorney's counseling role, to consider the consequences of different decisions; and
- (e) Encourage accountability, when appropriate, among the different systems that provide services to children.

Section 1 of HB 2735 referred to attorneys for "children" and Section 5 referred to attorneys for "youth." RCW13.34.100 currently contemplates the discretionary appointment of attorneys for children at any age if requested by the Guardian Ad Litem or brought up by the Court, *sua sponte*, though only children age twelve and older can request counsel. Practices vary throughout the state and Juvenile Court Rule 9.2 mandates appointment without respect to age when there is no guardian ad litem and a party or the court moves for appointment. Therefore, the Workgroup set out to craft standards that would apply any time that an attorney was appointed to represent a child, whatever his or her age.

Bearing in mind HB 2735's charge and purposes, the Workgroup divided into three sub-workgroups focused on these three issues: 1) voluntary training standards; 2) caseload standards; and 3) general

practice standards for the attorney representing children in dependency and termination proceedings. Each sub-workgroup circulated and reported their work to the Workgroup as a whole, discussion ensued and new drafts were proposed and circulated until a consensus of the entire group was achieved. On a few occasions, members of the Workgroup believed that a clearer understanding of the standards required Commentary explaining the bases upon which the standards were formed or a minority view surfaced that required acknowledgment in order to achieve agreement. Accordingly, the Standards include a few sections of Commentary.

By working in sub-workgroups and reporting out to the whole, members were able to focus their efforts and review the literature and research in each of their areas as well as draw upon their own considerable expertise and familiarity with the needs of Washington State. The wisdom of the entire group was also brought to bear in collegial and challenging discussions in which sub-workgroup members were required to explain to their colleagues the bases for their recommendations.

After reviewing the ABA Standards of Practice for Attorneys Representing Children in Abuse and Neglect Proceedings,¹ the National Association of Counsel for Children Standards,² the ABA Model Act³ and the QIC-Child Representation Standards from the University of Michigan,⁴ the Practice Standards sub-workgroup chose to use the ABA Standards of Practice as its framework, although sections have been added and subtracted to suit the needs and realities of Washington State.

The Caseload Standards sub-workgroup reviewed the practices of other states as well as Washington's own standards established by the Office of Public Defense's Parent Representation Project. Ultimately, the Caseloads Standards sub-workgroup chose to base its recommendations on the Office of Public Defense Parent Representation Project with some alteration to recognize the different types of proceedings in which a child's attorney may also become involved.

Finally, the Training sub-workgroup considered the National Association of Children's Counsel's (hereinafter, "the NACC") training certification program, syllabi used in the Children and Youth Advocacy Clinic and Seminar at the University of Washington School of Law, trainings developed by Court Appointed Special Advocates (CASA), the Washington Defender Association and the Court Improvement Training Academy as well as the requirements in place at other states. Ultimately the Training sub-workgroup recommendations were informed by all of these programs as well as the pre-existing continuing legal education requirements for Washington State attorneys.

These final recommendations represent the consensus views of the members of the entire workgroup on each of the three tasks before it. The Chair has merged the work of the Caseload Standards sub-workgroup into the Practice Standards sub-workgroup document. While this document references a Voluntary Training Program in Section 1.2, the recommendations of the Training sub-workgroup stand on their own as a recommended program and are contained in a separate document.

¹ Attached in Supporting Documents Sections of this Report.

² NACC standards can be accessed by clicking on the link at the bottom of the page at <http://www.naccchildlaw.org/?page=PracticeStandards>.

³ The ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings can be accessed at http://www.abanet.org/litigation/standards/docs/child_modelact.pdf.

⁴ "The QIC-ChildRep, is a five-year, 5 million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child's legal representative, and provide one of the first empirically-based analyses of how legal representation for the child might best be delivered." See, <http://www.improvechildrep.org/Home.aspx>. It is housed at the University of Michigan School of Law and funded by the U.S. Children's Bureau. It has promulgated a model, grounded largely in the ABA standards, upon which it intends to base its empirical research. This model can be found at: <http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx>.

Executive Summary

The Children's Representation Workgroup (hereinafter, "the Workgroup") was appointed and charged by the Washington State Supreme Court Commission on Children in Foster Care to propose recommendations regarding practice standards for attorneys representing youth in proceedings under RCW 13.34. The practice standards listed in this report are modeled after the ABA Standards of Practice for Attorneys Representing Children in Abuse and Neglect Proceedings and are the result of Workgroup consensus. These standards are designed to be applicable throughout the state any time that an attorney is appointed to represent a child of any age. The attorney remains bound at all times by the Washington State Rules of Professional Conduct as well.

Section 1: General Duties

It is vitally important for the attorney to gain the child's trust and confidence and doing so requires the attorney to structure communication to account for the child's age, developmental level, and cultural context. Furthermore, attorneys have a duty to provide legal counsel to the child in an age and developmentally appropriate manner and should represent the child's stated interests throughout the course of litigation. Due to limited resources, attorneys may be appointed to represent more than one child in a sibling group so long as doing so does not create a conflict of interest. Attorneys should receive interdisciplinary training and should represent clients throughout the duration of a case. To ensure that attorneys can effectively represent and communicate with their clients, attorneys should have a caseload of no more than sixty clients at a time, involving a total of eighty cases. This maximum caseload standard is based on a series of assumptions that are set forth more fully in the standards and if any of these assumptions are not met in the individual attorney's situation, the number of clients and cases should be adjusted downward accordingly.

Section 2: Relationship/Communication with the Child

Attorneys should maintain sufficient and frequent contact with their clients, including communicating in person. Attorneys should provide legal counsel in a manner that is age and developmentally appropriate and respectful of the child's parents, family and cultural background.

Section 3: Communication with Other Professionals

Attorneys should communicate regularly with professionals involved in the child's dependency or termination case, including social workers, case managers, and professionals at the child's school.

Section 4: Discovery and Court Preparation

Attorneys should visit their client prior to court hearings and when informed of emergencies or significant events impacting the child. Attorneys should investigate issues relating to the case, develop a strategy to implement at hearings, file pleadings in a timely manner, and fully participate in settlement negotiations.

Section 5: Hearings

Attorneys have a duty to diligently represent their client at all hearings and to participate in all conferences with the court involving their client. Attorneys should explain to their client what is expected to happen before, during, and after each hearing. Attorneys should advise the child on the nature of the hearing and follow the child's decision regarding whether or not he or she will attend the court hearing. Attorneys should be fully aware of the child's competency in regards to testifying, counsel the child regarding a decision to call the child as a witness, and fully prepare the child to testify before the court.

Section 6: Advocacy for Services

Consistent with the child's stated interest, the child's attorney should seek appropriate child welfare services and implement a service plan. Also, attorneys should ensure that children with special needs receive appropriate services to address physical, mental, and developmental disabilities.

Section 7: Post Hearings/Appeals

Attorneys should review all court orders and monitor their implementation. Attorneys should discuss the consequences of court orders with the child in an age and developmentally appropriate manner and discuss with the child the possibility of appeal. When a decision is received, attorneys should meet with their client, explain the outcome of the case, and discuss the end of the legal representation process.

Section 8: Withdrawal and Termination of Representation

Attorneys should close the case and withdraw from representation when a final resolution of the case and permanency has been achieved and the attorney's responsibilities to the client have been completed. If necessary, attorneys must obtain a court order allowing withdrawal prior to case resolution.

Voluntary Training Recommendations

Attorneys should participate in a minimum of forty hours of initial training over a three-year period. No less than ten of these hours are to be completed each year and no more than one-third of training is to be completed via video, webinar or teleconference. An additional ten hours of training should be completed each year to maintain currency. The Workgroup recommends that a certificate be awarded to verify when a course of study has been completed and that an entity such as the Administrative Office of the Courts issue the certificates. Finally, trainings should be conducted by qualified individuals.

Child Representation Practice Standards

PREFACE

All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues. These Child Representation Standards are meant to apply when a lawyer is appointed for a child in any legal action based on RCW 13.34 and 13.36 (guardianship).

These standards are not meant to supplant the professional judgment of an attorney or the requirements set forth in the Rules of Professional Conduct.

Commentary

RCW 13.36 was recently added in the 2010 session to replace Washington State's former dependency guardianship system and allow for a dependency action to be dismissed after the successful appointment of a guardian through a 13.36 petition. The Workgroup wanted to be clear that these standards should pertain to an attorney's activities representing a child in the guardianship proceedings that resulted from a dependency proceeding as well as within those actions covered by RCW 13.34.

1. General Duties

1.1 Role of Child's Attorney

The child's trust and confidence in the decision making process is often a function of the responsiveness of that process. The child's attorney may be the first contact the child has with the process; therefore the attorney has a critical role in developing and guarding the child's trust, confidence and participation in the process including basing decision making within the attorney-client relationship on respect for the child's capacity to make informed decisions. A lawyer who provides legal services for a child owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client:

- (1) The child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, developmental level, level of education, cultural context, disability if any, and degree of language acquisition.
- (2) The child's attorney should determine whether the child's capacity to make adequately considered decisions in connection with a representation is diminished pursuant to the Rules of Professional Conduct (RPC 1.14), with respect to each issue in which the child is called upon to direct the representation. For the purposes of child representation in dependency and termination of parental rights proceedings, a determination of "diminished capacity" should never be based solely on the child's chronological age.
- (3) The child's attorney should elicit the child's preferences, provide counsel and advise the child, in a developmentally appropriate manner.
- (4) As counselor and advisor, the attorney should provide the child with an informed understanding of the child's legal rights and obligations and explain their practical implications. The attorney should explain all aspects of the case and provide comprehensive counsel and advice on the advantages and disadvantages of different case options to assist the child in identifying case goals and making informed decisions. During these discussions, the attorney should address the child's legal rights and interests as well as issues regarding the child's safety, health and welfare. At the same time, the attorney should be

Careful not to usurp the child's authority to decide and direct efforts to achieve the case goals consistent with RPC 1.2 and 1.4.

(5) The child's attorney should be fully informed about racial disproportionality in the child welfare system, and affirmatively represent his/her client to prevent adverse consequence of institutional bias. The attorney should also be fully aware of his or her own personal biases and the potential impact these may have on the conduct of his or her representation and the discharge of ethical duties to his or her client.

(6) The child's attorney should represent the child's stated interest and follow the child's direction throughout the course of litigation.

(7) If the child is pre-verbal or unable to communicate a stated interest, the determination of the child's legal interests should be based on the laws that are related to the purposes of the proceedings, the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

(8) The child's attorney should attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child consistent with the child's stated interest.

(9) Due to limited resources for child representation an attorney may be appointed to represent more than one child in a sibling group. As this situation can raise issues regarding a conflict of interest an attorney must diligently comply with RPC's addressing conflict of interest and specifically RPC 1.7 and RPC 1.8. Ultimately, the appointed attorney must consider the circumstances of the case and determine whether or not he or she can effectively and ethically represent more than one child in a sibling group.

Commentary

Section (7) seeks to describe the attorney's role in those cases in which she or he represents a child who is pre-verbal or otherwise unable to communicate. Given RCW 13.34.100(6) which contemplates appointment of counsel for children twelve years of age and older, it is the unusual case that an attorney finds him or herself representing a pre-verbal or nonverbal child. However, it is not impossible for such a case to arise. For example, under Juvenile Court Rule 9.2, the court must appoint counsel for any child who does not have a GAL upon motion of any party. In addition, even the child over the age of twelve may suffer from a disability that precludes communication with counsel. There were those in the Workgroup who believed that in such a case the only option ought to be an appointment of a guardian ad litem, reasoning that this would be the procedure used for an adult client who was unable to communicate with counsel. However, it was pointed out that in Washington State it is likely that the GAL who would be appointed for the child would likely not be an attorney, given the practice of using CASA in this role, and that therefore, even if a GAL were to be appointed, there would still be a need for counsel for the child.

Section 7 seeks to place such an attorney in the role of advocating for the child's legal interest. The child's legal interest is somewhat distinct from either his or her stated or best interest. Rather, it is a role that looks to the purpose of the underlying laws governing whatever the stage of the proceedings and seeks to secure the child's rights within those proceedings. Our Section (7) includes the purposes of the law as a guiding principle together with advocacy for "the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available."

1.2 Education, Training & Experience

Counsel must be qualified through training or experience to effectively fulfill the duties of representing children in child welfare proceedings. As set forth in the Recommended Voluntary Training Standards Report, counsel must acquire sufficient knowledge in a wide range of subject areas including but not limited to:

- (1) All relevant federal and state laws, regulations, policies, rules, and relevant court decisions;
- (2) Infant, young child, and adolescent development needs and abilities, including the impact of trauma and disability;
- (3) Developmentally appropriate interviewing and counseling skills;
- (4) The role of the attorney for the child and his or her ethical responsibilities to the client;
- (5) Racial disproportionality within the child welfare system;
- (6) Other biases that operate within the child welfare system and the justice system itself that could interfere with the ability of the attorney to successfully advocate for the child's stated interest;
- (7) Cultural competency;
- (8) The types of experts who can consult with attorneys on various case issues;
- (9) Family dynamics and dysfunction such as substance abuse, domestic violence and mental health;
- (10) Child welfare and family preservation services available in the community;
- (11) The role and authority of the Division of Children and Family Services and both public and private organizations within the child welfare system; and
- (12) An awareness and appropriate level of understanding of the ancillary legal systems and issues that impact children and youth in the dependency system, such as educational issues, family law, juvenile offender matters, public benefits and immigration.

1.3 Continuity of Representation

It is expected that the attorney of record shall continue to represent the child from the initial court proceeding through all subsequent dependency and/or termination proceedings until resolution, and permanency is achieved.

1.4 Caseloads

Full-time attorneys representing children in dependency and termination hearings should handle no more than sixty clients at a time, involving a total of eighty cases. Each child must be considered a separate client, even if the attorney does represent his or her siblings. It is expected that children's attorneys will adhere to the Children's Representation Practice Standards.

The following key assumptions or expectations are critical to allowing the attorney to handle the maximum client load standard of sixty. To the extent that any of these assumptions do not reflect the reality of the attorney's practice, the number of clients should be decreased to a number lower than sixty to accommodate the individual attorney's practice:

- (1) The Standard assumes that attorneys appointed to represent youth in dependency proceedings will have commensurate knowledge, training, experience, and ability to communicate effectively with children.
- (2) The Standard assumes that attorneys appointed to represent youth in dependency proceedings will have access to adequate social work and clerical support as well as office space, computer access and means of transportation to visit clients.

(3) The Standard assumes that contracts for representation of children in dependency proceedings will contain provisions that address compensation for extraordinary cases that take an extraordinary amount of preparation and time.⁵

(4) It is expected that attorneys for children in dependency proceedings will participate in the children's representation training program and that if an attorney needs additional training at the beginning of a contract in order to improve his or her skills, such training will be built into the contract hours and compensation.

(5) This recommended caseload assumes that the attorney's entire practice is devoted to the representation of children involved in RCW 13.34 proceedings. If a children's attorney has a part-time children's representation contract, the children's representation contract must be based on the actual percentage of time available for children's cases, and the attorney must devote the appropriate number of hours to his or her children's cases each week.

(6) This recommended caseload assumes that the attorney will not represent the child on appeal but that s/he will advise his or her client regarding his or her right to appeal, will assist the child in finding counsel for appeal, and will confer with any appellate counsel to ensure that the child's goals and objectives are carried forward into the appeal.

Commentary

Legal representation is rendered meaningless and ineffective if the caseload of an attorney is not reasonably related to the actual work that must be done to represent his or her client. The representation of children and youth in the dependency contexts requires a trained attorney to spend significant time building a relationship of trust with his or her client and making sure that the client understands a complex proceeding that has dramatic consequences in his or her life.

This caseload recommendation includes 60 ongoing dependency cases and 20 additional or collateral representations, comprising terminations, guardianships, reinstatement proceedings, authorized family law proceedings, and administrative or judicial proceedings. Each child client is counted individually, taking care in the event of sibling group representation, to count each individual child as his or her own representation.

This caseload recommendation is based on (1) the research surveys and experience of the Parents' Representation Project (PRP) of the Washington State Office of Public Defense (OPD), and (2) a survey taken of attorneys who currently represent dependent youth in Washington State. The OPD caseload standard is also 80 cases comprised of a combination of dependency and termination proceedings, resulting in an average of sixty clients per attorney.⁶ The workgroup conducted a survey of their own in which Washington attorneys who currently represent both youth and parents were asked dependency proceeding questions relating to representation of both these groups. Based upon the attorneys who responded, the survey indicated youth clients presented approximately the same complexity requiring approximately the same time commitments as adult clients. A significant minority of respondents, however, believed that youth clients present significantly greater time expenditures than adult clients, particularly if youth have legal or capacity complications arising from mental health conditions, educational delays, substance abuse issues, or criminal acts, or if youth are placed at a great distance from the attorney or have difficulty accessing services.

⁵ See, RCW 10.101.060.

⁶ Washington State Office of Public Defense Parent's Representation Program Standards of Representation, 2009. Available at <http://www.opd.wa.gov/ParentsRepresentation/090401%20Program%20Attorney%20Standards.pdf>

2. Relationship/Communication with the Child

The attorney should be aware of the unique developmental issues facing the child and take appropriate steps to ensure that these issues do not interfere with effective representation.

In all cases counsel must maintain sufficient and frequent contact with the child to establish a trusting relationship and maintain an attorney-client relationship that will enable counsel to understand the child's interests and needs, as well as the child's position on issues or questions in the case. Communication should include the following elements:

- (1) Provide the child and the child's caretaker with contact information in writing and establish a message system that allows regular attorney-client contact.
- (2) Counsel should meet with the child in person well before court hearings at which the substantive interests of the child are at issue. An initial meeting between shelter care and the case conference is particularly important in establishing a trusting relationship with the child and gaining an understanding of the child's interests. At these meetings, counsel should listen to the child's understanding of the case and fully answer the child's questions. Counsel should visit or meet at least once in the child's home/current placement. If the child's placement changes during the proceeding, the attorney should visit or meet the child in the new placement as well.
- (3) Counsel will speak respectfully regarding the child's parents, family and cultural background.
- (4) Counsel should advise the child about all legal matters related to the case in a developmentally appropriate manner. Depending on the child's age and functioning, multiple meetings of short duration may be required to fully discuss the service plan, the child's rights and potential consequences in the pending proceeding, any orders entered regarding expectations of the child and the potential consequences of failing to obey court orders or cooperate with service plans.
- (5) Counsel will adhere to the Rules of Professional Conduct (RPC) 1.6, and other laws related to confidentiality and the disclosure of client information.

3. Communication with Other Professionals

Child welfare cases require the child's attorney to communicate regularly with numerous professionals involved in the child's dependency or termination case, as well as attorneys who may represent the child in offender matters, truancy, or other cases. Some of these individuals are parties to the proceeding and represented by counsel, while many others are not. The attorney should provide the child's assigned social worker or case manager with the attorney's contact information. The attorney should establish a professional, working relationship with the social worker or case manager to facilitate the prompt and effective resolution of matters related to the child's case.

The attorney should communicate regularly with other parties and professionals, including professionals at the child's school, involved in their client's case as required to obtain current information regarding the child. While dependency proceedings may at times appear informal, it is important that all counsel fully respect the attorney-client relationship and abide by the RPC's governing communication with other parties to the proceeding, and communications with third parties.

4. Discovery and Court Preparation

4.1 Meet with Child

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

4.2 Investigate

To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

- (1) Obtaining copies of all pleadings and relevant notices;
- (2) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;
- (3) Informing other parties and their representatives, including guardians ad litem and court appointed special advocates, that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- (4) Participating in depositions, negotiations, discovery, pretrial conferences, and hearings; conduct a thorough and independent investigation at every stage of the proceeding and when appropriate utilize expert services as needed;
- (5) Counseling the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- (6) Identifying appropriate family and professional resources for the child;
- (7) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;
- (8) Obtaining necessary authorizations for the release of information;
- (9) Interviewing individuals involved with the child, including child welfare case workers, court appointed special advocates or guardians ad litem, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
- (10) Reviewing relevant photographs, video or audio tapes and other evidence;
- (11) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed; and
- (12) Developing a theory and strategy of the case to implement at hearings, including factual and legal issues.

4.3 File Pleadings

The child's attorney should timely file pleadings such as: petitions, reports, declarations motions, responses or objections as necessary to advocate for the child's stated interest. Relief requested may include, but is not limited to:

- (1) A mental or physical examination of a party or the child;
- (2) A parenting, custody or visitation evaluation;
- (3) An increase, decrease, or termination of contact or visitation;
- (4) Restraining or enjoining a change of placement;
- (5) Contempt for non-compliance with a court order;
- (6) Termination of the parent-child relationship;
- (7) Reinstatement of parental rights
- (8) Establishment of paternity and child support;
- (9) A protective order concerning the child's privileged communications or tangible or intangible property;
- (10) Request services for child or family; and
- (11) Dismissal of petitions or motions.

4.4 Negotiate Settlements

The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child and in a manner consistent with the child's stated interest. The child's attorney should use suitable mediation resources.

5. Hearings

5.1 Court Appearances

The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child. If a child is attending a court hearing the attorney must appear in person.

During any hearing or trial, counsel has a professional duty to diligently represent his or her client. This includes, but is not limited to, the following:

- (1) Prepare and make all appropriate motions, including *motions in limine* with accompanying briefs if necessary, and evidentiary objections to advance the child's position at trial or hearing and to preserve issues for appeal;
- (2) Present and cross-examine witnesses, including experts as necessary, prepare and present exhibits;
- (3) Request the opportunity to make opening and closing arguments;
- (4) Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client; and
- (5) Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.

5.2 Client Explanation

The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

5.3 Child at Hearing

In most circumstances, the child should be present at court hearings at which the substantive interests of the child are at issue, regardless of whether the child will testify. The child's attorney shall consult with the child prior to each scheduled hearing to ensure that the child understands his or her right to be present

at the hearing, to advise the child on the nature of the hearing, and to determine whether the child wishes to be present. After consultation, the attorney shall follow the child's decision regarding whether he or she will attend the court hearing.

5.4 Whether Child Should Testify

The attorney's responsibility for developing and guarding the child's trust, confidence and participation in decision-making is particularly important when it comes to the decision of whether a child should testify in a dependency or termination proceeding. Consistent with RPC 1.2 and 1.4, the child's attorney shall fully counsel and advise the child regarding a decision whether or not to call the child as a witness. First among the factors that should be considered is the child's need or desire to testify. Other factors include, but are not limited to, potential repercussions of testifying or not testifying, including potential criminal/juvenile offender liability, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination.

5.5 Child Witness

The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child. The child's attorney will work with other parties who may call the child as a witness to ensure as much as possible that the child is afforded an opportunity to testify in a manner that safeguards the child's emotional well-being and legal interests. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

5.6 Challenges to Child's Testimony/Statements

The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

5.7 Conclusion of Hearing

If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

5.8 Expanded Scope of Representation

The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, to further the child's stated interest.

6. Advocacy for Services

6.1 Services

Consistent with the child's stated interest, the child's attorney should seek appropriate child welfare services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and parental visitation;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;

- (7) Parenting education;
- (8) Semi-independent and independent living services;
- (9) Long-term foster care;
- (10) Termination of parental rights action;
- (11) Adoption services;
- (12) Education;
- (13) Recreational or social services;
- (14) Housing;
- (15) Food and clothing.

6.2 Special Needs

Consistent with the child's stated interest, the child's attorney should ensure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

- (1) Special education and related services;
- (2) Supplemental security income (SSI) to help support needed services;
- (3) Therapeutic foster or group home care; and
- (4) Residential/in-patient and out-patient psychiatric treatment.

7. Post Hearings/Appeals

7.1 Review of Court's Order

The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

7.2 Communicate Order to Child

The child's attorney should discuss the order and its consequences with the child.

7.3 Implementation

The child's attorney should monitor the implementation of the court's orders, take reasonable steps to ensure that all parties comply with the court's order, assess and investigate material changes in circumstances that affect the child's stated interests and the effective implementation of court orders, and determine whether the case needs to be brought back to court.

7.4 Decision to Appeal

The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and there is a basis in law and fact for doing so the lawyer should take all steps necessary to perfect and initiate the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

7.5 Participation in Appeal

Whether an appeal is filed on behalf of the child or by another party, the child's attorney should take necessary steps to ensure that the appropriate appointing authority is aware of the child's request/need to be appointed appellate counsel. Counsel for the child shall also file all necessary documents for the appointment of counsel on appeal and coordinate with the child's appellate counsel to assure that appropriate steps are taken to protect the client's interests while the appeal is pending.

7.6 Conclusion of Appeal

When the decision is received, the child's attorney should meet with the child and explain the outcome of the case.

7.7 Cessation of Representation

The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

8. Withdrawal and Termination of Representation

8.1 Withdrawal upon Resolution of Case

The attorney shall close case and withdraw from representation in a timely manner when a final resolution of the case and permanency has been achieved and the attorney's responsibilities to the client have been completed. In general, the attorney should close the case and withdraw from representation within 30 days of entry of a final order.

8.2 Withdrawal Prior to Resolution of Case

(1) If circumstances necessitate the attorney's withdrawal prior to resolution of the case, counsel shall obtain a court order allowing withdrawal and substitution of attorney. The attorney must serve the child and all parties with notice of intent to withdraw and date and time of motion. If motion to withdraw is granted, the attorney shall take reasonable steps to protect the client's interests and arrange for the orderly transfer of the client's file and discovery to substituting counsel.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Voluntary Training Recommendations

40 Training Hours Over Three Years

The Children's Representation Workgroup recommends a minimum of 40 hours of initial training over a three-year period. During this initial three year training period, no less than 10 hours of training should be completed each year. No more than 1/3 of the recommended training may be via video, webinar or teleconference. Topics for initial training and recommended time are set out in detail in Attachment A to this recommendation. Upon completion of the initial training, attorneys will receive a "certificate of completed training" (see below). In addition to the initial 40 hours of training for the first three years, 10 hours of additional child welfare related training per year should be completed to maintain currency. As with the initial 40 hours of training, no more than 1/3 of the recommended training to maintain currency may be via video, webinar, or teleconference.

Certificate of Completed Training

The Workgroup recommends that a certificate of completion be used as a means of verifying that a course of study has been completed as opposed to formally certifying lawyers by attempting to make qualitative judgments about an individual's practice.

A group issuing certificates of completion would need, at a minimum, to undertake the responsibility for 1) determining what trainings qualify towards certification, 2) determine when the initial 40 hours of training is complete, 3) maintain a list of individuals who received certificates and, 4) verify that continuing training requirements are met. An entity such as the Administrative Office of the Courts might be in the best position to undertake such a role, as it is a neutral body with experience in administering continuing education programs. Consideration was also given to certification being hosted by the WSBA, WA Supreme Court, or through a system of self-regulation or report.

The Workgroup further recommends that all attorneys, regardless of experience level, complete the initial 40 hours of study to promote consistency in practice, build a common framework for the youth representation bar, and as a means of adding value to the trainings for all attending. The Workgroup further recommends that credit be given towards the initial 40-hour training requirement for training or coursework done within three years prior to a request for a certificate of completed training. This may include law school classes or training for law students which meet the standards as set forth by the certifying body. Any such credit should be given on a case-by-case basis by the certifying authority.

Quality of Training

The quality of training is as important as the topics trained. When possible, training should be conducted by individuals with a minimum of five years experience in their respective fields. Trainers should be familiar with principles of adult learning, and should strive to engage participants in multiple styles of learning.

Workgroup Report Appendices omitted

DECLARATION OF DOCUMENT FILING AND SERVICE

I, Lisa Kelly, declare that on the 16th day of September, 2011, I caused the original Motion and Amici Curiae Brief of Children and Youth Advocacy (CAYAC) to be filed by email in the Supreme Court of Washington State and a true copy of the same to be served by email on the following:

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