ORIGINAL

No. 62879-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE COALITION FOR THE HOMELESS; ANITA ELLIOTT, and her minor child, JUSTIN; et al.; and other persons similarly situated,

Respondents/Cross-Appellants

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Appellants/Cross-Respondents.

BRIEF OF AMICUS CURIAE

July 22, 1996

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INTRODUCTION

Thousands of children are homeless in the State of Washington. In 1990, 171,000 homeless men, women, and children sought emergency shelter in Washington State; between July 1991 and June 1992, these shelters turned away 23,500 families with 49,800 minor children for lack of space. CP 1248 (Findings of Fact No. 2). The Governor's Task Force on Homelessness reported in 1990 that the majority of Washington's homeless are families with small children. Id.

Amici, the Alliance for Children, Youth, and Families; the American Academy of Pediatrics; the Church Council of Greater Seattle; the Northwest Women's Law Center; the Washington Academy of Family Physicians; the Washington Association of Churches; the Washington State Psychological Association; and YouthCare, are providers of services to the State's homeless population. The amici know firsthand what the trial court found: homelessness devastates children in Washington State. See Appendix 3 to Brief of Respondents and Cross-Appellants, Section II.

The testimony before the trial court established another fact that amici also know firsthand: homelessness causes or prolongs foster care placements that exact heavy tolls from homeless children and their families. See Appendix 4 to Brief of Respondents and Cross-Appellants, Section III.

The law assigns some responsibility to the Department of Social and Health Services ("DSHS") to respond to these troubling circumstances. Amici urge the Court to affirm the trial court's decision and order, and to rule affirmatively on respondents' foster care claims.

ARGUMENT

A. The Relevant Statutes Should Be Construed in a Manner That Protects the Children of Our State.

1. This Court favors interpretations that protect children.

In numerous cases, this Court has announced the State's responsibility for the welfare of children, especially those who are distressed or needy. This Court has not only reiterated the Legislature's intent to protect the State's children, it has also repeatedly stated its own commitment to the State's children. The Court's concern for the welfare of children informs its assessments of factual questions, as well as the interpretation of child welfare laws and constitutional provisions.

When answering factual questions, this Court has consistently focused on "the welfare of the child" as a guiding principle. For example, the welfare of the child is the "paramount consideration" when a court is called upon to determine the custody of that child. Fuhrman v. Arvin, 21 Wn.2d 828, 834-35, 153 P.2d 165 (1944). Likewise, when resolving legal issues arising under the Constitution, statutory law, and common law, the welfare of children has been a guiding, and sometimes governing, principle. Especially when interpreting child welfare statutes, this Court has relied on the best interests of the child to derive legislative intent. See In re Esgate, 99 Wn.2d 210, 214, 660 P.2d 758 (1983) (statute governing termination of parental rights construed in the manner that "best serves the legislative goal of insuring that the best interests of the child are protected").

This Court has taken the welfare of children into account in a wide variety of circumstances. In a challenge to the constitutionality of a statute providing for alternative residential placements, this Court emphasized the fundamental rights of the child. In re Sumey, 94 Wn.2d 757, 765, 621 P.2d 108 (1980) (interpreting family reconciliation provisions). This Court expressed its concern for "the welfare and best interests of the child as well as the strengthening of the family unit" in upholding the constitutionality of the statute.

Likewise, when determining the standard of proof necessary to terminate parental rights, this Court explained that "[i]t is with the welfare of the children in mind that the rights of the parents are examined." In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973) ("Before [parental rights can be terminated], the facts supporting permanent deprivation must 'clearly show that the welfare of the children will be substantially subserved by such action'")(citations omitted). When considering whether an action to determine the paternity of a child should be allowed, this Court emphasized that the best interests of the child must be ascertained. McDaniels v. Carlson, 108 Wn.2d 299, 310-13, 738 P.2d 254 (1987).

In an equal protection analysis related to child support, this Court declared that the interests of children were paramount:

> Further, this court's greatest concern is the welfare of the child and the protection for the child's fundamental right to support.

State v. Wood, 89 Wn.2d 97, 102, 569 P.2d 1148 (1977) (citations omitted). Recently this Court reiterated that, under the Juvenile Court Act,

"the child's best interests should be paramount." In re J.B.S., 123 Wn.2d 1, 11, 863 P.2d 1344 (1993). This Court noted that, in making placement decisions, trial courts must be mindful of the Legislature's preference for family autonomy and stability and the Court's concern for a "continuity of established relationships." Id. at 12-13.

This Court has also found that the welfare of children may prevail over other fundamental rules of statutory or constitutional jurisprudence. For example, this Court has concluded that the need to protect children may prevail over the rule that criminal statutes be narrowly construed:

> While the case before us involves a charge of a crime, and the statute is to be construed with all the strictness of a criminal law, yet, in arriving at a proper construction, we are not required to close our eyes to the broad underlying policy and the dominant purpose of the whole law of which the section under consideration is a part.

State v. Adams, 95 Wash. 189, 191, 163 Pac. 403 (1917) (construing delinquency statute).

The protection of the best interests of children has even compelled the United States Supreme Court to limit well-established constitutional values. For example, the Court has limited the First Amendment right to free speech in order to protect children depicted in non-obscene pornography. See New York v. Ferber, 458 U.S. 747, 756-65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). The Court has also concluded that the Sixth Amendment right of a criminal defendant to confront an accuser may yield to a state's interest in protecting a child victim. See Maryland v. Craig, 497 U.S. 836, 851-60, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

Finally, emphasizing the goal of helping and rehabilitating juvenile delinquents, the Court has held that a juvenile defendant does not have a Sixth Amendment right to a jury trial. McKeiver v. Pennsylvania, 403 U.S. 528, 544-47, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

The best interests of children support an interpretation of the relevant statutes that requires this Court to affirm the trial court's decision and order and rule affirmatively on respondents' foster care claims.

2. The rule of statutory construction that favors protecting the interests of children is consistent with other rules of statutory construction.

The protection given to the interests of children is consistent with other well-established principles of statutory construction. Legislation that benefits the poor, relates to public health and safety, or is remedial in nature, should be liberally construed. Legislation that benefits particular persons should be construed in their favor.

Courts have generally recognized that statutes intended to provide for the proper care of persons who are unable to care for themselves must be liberally construed:

> The care of the state for its dependent classes is considered by all enlightened people as a measure of its civilization, and provisions for the proper care and treatment at public expense of the indigent, sick, and of those who for other reasons are unable to take care of themselves, is said to be among the unquestioned objects of public duty. Therefore, statutes enacted in fulfillment of this recognized public obligation should at all times be liberally interpreted so that the undesirable social effects resulting from the neglect of the poor may be eliminated.

Sutherland, Statutory Construction, § 72.01 (4th ed. 1972).

Washington courts have specifically recognized that remedial statutes, as well as legislation designed to protect certain classes of persons or the public welfare must be liberally construed. For example, when interpreting a statute concerning child support enforcement, this Court stated that remedial statutes must be liberally construed to achieve their purposes. Yetter v. Commeau, 84 Wn.2d 155, 158, 524 P.2d 901 (1974). When interpreting a statute regarding health districts, the Court of Appeals explained that "statutes concerning public health and safety should be liberally construed." Snohomish County Builders Ass'n v. Snohomish Health Dist., 8 Wn. App. 589, 595, 508 P.2d 617 (1973). Finally, when interpreting the Industrial Insurance Act, the Court of Appeals emphasized that "any doubt as to the meaning of the statute should be resolved in favor of the claimant for whose benefit the act was passed." Gaines v. Department of Labor & Indus., 1 Wn. App. 547, 552, 463 P.2d 269 (1977).

Statutes concerning homeless children fit all of these categories of legislation. Homeless children are poor and unable to care for themselves. Living on the streets or in shelters, their health and safety is constantly threatened. The statutes at issue are intended to remedy their plight. Consequently, they should be construed in a manner that protects the interests of children.

B. The Courts Must Declare DSHS's Duties and Require Effective Compliance.

1. Washington courts are empowered to determine DSHS's duties under the law.

The trial court held that DSHS had not adequately complied with its duty under state law to develop and implement a coordinated and comprehensive plan that addresses the needs and care of homeless children. CP 1252-1253 (Conclusion of Law No. 1); See RCW 74.13.031(1). The trial court's limited and restrained order was well within the authority of the judiciary. The Court should reject DSHS's proposed limits on the judiciary's authority to review agency default.

Washington courts' powers derive from Article IV of the State Constitution, §§ 1 and 6, as well as from the full equitable powers inherited from the English Chancery courts:

> [B]y the constitution, and independently of any legislative enactment, the judicial power over cases in equity has been vested in the courts, and, in the absence of any constitutional provisions to the contrary, such power may not be abrogated or restricted by the legislative department.

Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 415, 63 P.2d 397 (1936). The court also characterized the injunction as the "principal and the most important process issued by courts of equity." Id.

That the Washington judiciary has the power to interpret the law is well established:

> Both history and uncontradicted authority make it clear that "it is emphatically the province and duty of the judicial department to say what the law is"... even when that

> interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch."

In re: Juvenile Director, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (citations omitted). The inherent powers of Washington courts also include the power to review administrative action that is "contrary to law" or arbitrary and capricious. Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 694, 658 P.2d 648 (1983); Rettkowski v. Department of Ecology, 122 Wn.2d 219, 233-34, 858 P.2d 232 (1993) (superior court possessed inherent authority to invalidate an erroneous agency order).[1]

2. This Court should affirm the trial court's decision to require DSHS's effective compliance with its statutory duties.

The trial court concluded that DSHS had not fulfilled its duty under state law to devise and implement a plan to serve the State's homeless children. In so ruling, the court rejected DSHS's contention that documents entitled "State of Washington Child Welfare Plan, FY 1994-1997" ("Child Welfare Plan") and "Department of Social and Health Services (DSHS), Comprehensive Plan to Coordinate Services for Homeless Children and Families July 1993" ("July 1993 Plan") satisfied the agency's duty under RCW 74.13.031(1). The court found that the Child

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[1] This Court has guarded against any infringement on judicial powers. See, e.g., Spokane v. J-R Distributors, Inc., 90 Wn.2d 722, 727, 585 P.2d 784 (1978) ("[j]udicial power may not be abrogated or restricted by any legislative act" (citations omitted)); Orwick v. Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984) ("[t]he superior courts have broad and comprehensive original jurisdiction over all claims which are not within the exclusive jurisdiction of another court . . . [b]ecause of this specific constitutional grant of jurisdiction, exceptions to this broad jurisdiction will be read narrowly").

Welfare Plan would have only an incidental effect on homeless children in Washington state and that the July 1993 Plan was not a coordinated or comprehensive plan addressing the needs and care of homeless children. CP 1250-1252 (Findings of Fact Nos. 9-14). Accordingly, the court ordered DSHS to prepare "a coordinated and comprehensive plan that establishes, aids and strengthens services for homeless families and their children." CP 1253.

It is the task of the courts to assess the substance of agency action in determining its consistency with applicable statutory directives. In Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983), for example, the Fifth Circuit assessed the adequacy of a state's dental program under the federal-state Medicaid program. The trial court had found that state cutbacks had rendered the program inadequate because it failed to provide eligible children with quality preventative dental care. In so ruling, the trial court did not hesitate to determine whether the program's specific details complied with the general mandate of the statute at issue. The trial court specifically found that the state's triennial periodicity schedule was inadequate to meet the "reasonable dental needs" of eligible children and that the state was required to reinstate several basic dental services in developing a minimally acceptable program. Id. at 342-43.

The Fifth Circuit affirmed, finding that Congress clearly intended to provide children with preventative dental services through the dental program. The Fifth Circuit also upheld the trial court's decision that the dental services at issue were necessary components of adequate dental

care. In so ruling, the court emphasized the important role that courts assume in evaluating an agency's implementation of social welfare statutes:

> [s]ocial fiscal programs lead to disputes as to the requirement of the undertaking and the rights of the individuals sought to be benefited. As a consequence, tribunals such as this are required to resolve disputes in areas in which, quite frankly, little judicial expertise exists. We are, nonetheless, required by our oaths as is the district judge who tried this case, to interpret and uphold the laws of the land; in this case, laws admittedly dealing with issues of grave political and social consequence.

Id. at 352.

The court's decision in Lampkin v. District of Columbia, 879 F. Supp. 116 (D.D.C. 1995), also illustrates the active role courts must play in ensuring that statutory directives are fulfilled. In Lampkin, the court addressed the adequacy of the District of Columbia's ("District's") provision of educational services to homeless children under the McKinney Act. The McKinney Act requires states subject to the Act to adopt procedures that "address problems with respect to the education of homeless children and homeless youths including problems caused by . . . transportation issues." See 42 U.S.C. § 11432(e).

The court first addressed the District's decision to delay the commencement of educational services to homeless children who have applied for emergency shelter services but have not yet been placed. The court found that this policy violated the requirement that states address the needs of homeless children and eliminate barriers to the enrollment of homeless children and youth in schools. The court reasoned that the

McKinney Act protects the needs of all homeless children, including those who have not yet gained entrance into a homeless shelter. Id. at 122-23.

The court further found that the District's policy of providing public transportation tokens to homeless children who must travel more than 1.5 miles to school was also inadequate under the McKinney Act. The court ordered the District to make transportation tokens available to homeless children who must travel more than 1.5 miles to school; to make tokens available to a homeless parent or other designated escort who may accompany a child to school; and to eliminate transportation delays associated with the District's distribution system. Id. at 125-27.

The court concluded that its order would require the District to take important steps in furtherance of its obligation under the McKinney Act to provide a "free and appropriate public education" to homeless children.

In Resources Limited, Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1993), the Ninth Circuit assessed the adequacy of the Flathead National Forest Land and Resources Management Plan under the Endangered Species Act. The court found that the Forest Service ("Service") acted arbitrarily and capriciously when it concluded that the Plan would not jeopardize threatened or endangered species, noting that the "Forest Service's own studies raise serious questions" about the Plan's effect on the grizzly bear. The court further found that the Service's reliance on a Fish and Wildlife Service ("FWS") opinion that the Plan would not jeopardize the continued existence of a listed species was not justified in light of the

Service's failure to provide the FWS with all required information. Id. at 1304-05.

These cases demonstrate how courts will take decisive action to ensure that the substance of agency action serves to achieve statutory requirements. In this case, the trial court, in a very restrained order, fulfilled its responsibility to assess the adequacy of DSHS's action by conducting a critical evaluation of the Child Welfare Plan and the July 1993 Plan. The trial court's decision should be affirmed.

C. State and Federal Laws Strongly Favor Services That Prevent or Shorten Foster Care Placements.

State and federal laws consistently favor keeping families together and reuniting them whenever possible. Accordingly, they disfavor the unnecessary separation of children from their parents. Consistent with these purposes, state and federal laws require DSHS to provide preventive and reunification services. At a minimum, DSHS must provide housing assistance when such assistance has been determined, by DSHS's own caseworkers or by the dependency court, to prevent or shorten foster care placement.

1. State law.

This Court has recognized that:

> Washington statutes and case law make it abundantly clear that the paramount goal of child welfare legislation is to reunite the child with his or her legal parents, if reasonably possible.

In re J.H., 117 Wn.2d 460, 476, 815 P.2d 1380 (1991).

The Washington legislature has recognized the importance of preserving and reuniting families in numerous contexts. For example, in the Juvenile Court Act, the legislature declared that:

> [T]he family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized .... The right of a child to basic nurturing includes the right to a safe, stable, and permanent home ....

RCW 13.34.020.

The legislature has also made family preservation a leading purpose of the child welfare laws set forth in chapters 74.13 and 74.15 RCW. In RCW 74.13.085, the legislature explained that:

> It shall be the policy of the state of Washington to:
> (1) Recognize the family as the most important social and economic unit of society and support the central role parents play in child rearing.

The legislature also reiterated the importance of preserving families and exhausting alternatives to foster care placement:

> The purpose of chapter 74.15 RCW and RCW 74.13.031 is ... (2) To strengthen and encourage family unity and to

> sustain parental rights and responsibilities to the end that foster care is provided only when a child's family, through the use of all available resources, is unable to provide necessary care.

RCW 74.15.010(2).

The legislature has clearly recognized the harm that children who are removed from their homes may suffer:

> The legislature declares that removing the child from the home often has the effect of further traumatizing the child.

RCW 26.44.063. The legislature also recognized that removing children from their homes threatens the important bond shared by children and parents:

> The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian.

RCW 26.44.010. Consequently, in the Children and Family Services Act, the legislature linked the goal of family integrity to the need for alternatives to foster care:

> The legislature declares that the goal of serving emotionally disturbed and mentally ill children, potentially dependent children, and families-in-conflict in their own homes to avoid out-of-home placement of the child, when that form of care is premature, unnecessary, or inappropriate, is a high priority of this state.

RCW 74.14A.010.

These public policies reflect the consensus between the legislature and child welfare professionals that "the best place for children is in their own homes cared for by their own parents." Making Reasonable Efforts:

Steps for Keeping Families Together, pages 62-63 (National Council of Juvenile and Family Court Judges, Child Welfare League of America, Youth Law Center, and National Law Center for Youth Law).

2. Federal law

A wide consensus that states were unnecessarily placing an excessive number of children in foster care and failing to provide adequate alternative services prompted Congress to pass the Adoption Assistance and Child Welfare Act of 1980 (AACWA):

> During the 1970s, Congress and the nation became aware that the child welfare system was not adequately protecting children and their families. Children were removed from their families too frequently, sometimes unnecessarily, and were placed into foster homes or institutions. Once removed, children were seldom reunified with their biological families. Children who could not return to their homes lingered in temporary care rather than going to new homes with adoptive families. Thousands of children were caught for years in 'foster care drift,' moving continually from one foster family to another.

Making Reasonable Efforts, at 7.

In enacting the AACWA, Congress found that states were failing to help preserve or reunite families and prevent or minimize the need for foster care. Congressman George Miller, a sponsor of the AACWA,[2]

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[2] When interpreting a statute, the statements of sponsors deserve to be accorded substantial weight. Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564; 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1975).

emphasized that:

> Many children are removed from their natural homes needlessly, because appropriate services were not provided their parents;
>
> Many children are kept in inappropriate, overly restrictive foster placements far longer than necessary;

123 Cong. Rec. 24214 (July 20, 1977).

In order to encourage the states to strengthen families rather than separate them, Congress required states receiving funding under the AACWA to develop plans that provide for "reasonable efforts" to avoid removing children from their homes and placing them in foster care. See 42 U.S.C. § 671(a)(15). Congress also required such plans to provide for reasonable efforts to reunite children with their own families and return them to their original homes as soon as possible. Id.

The AACWA restructured financial incentives under federal law to minimize foster care placements. Prior to enactment of the AACWA, the law provided unlimited federal funding for state foster care placements. This encouraged states to place and keep children in foster care, but did not require states to provide alternative services. The AACWA changed the law

> to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.

S. Rep. No. 96-336, reprinted in 1980 U.S. Code Cong. & Admin. News 1448, 1450 (96th Cong., 2d Sess.); see 42 U.S.C. § 671(a). This served to shift the emphasis from foster care to family preservation.[3]

3. DSHS must provide housing assistance that its caseworkers or a dependency court conclude is necessary to prevent foster care placements.

This Court should find that DSHS's duties under state and federal law include the provision of housing assistance that its caseworkers or a dependency court find to be necessary to prevent foster care placements. This conclusion is consistent with the decisions of other courts that have required state social welfare agencies to provide housing assistance when necessary to preserve family unity.

In In re: S.A.D., 555 A.2d 123 (Pa. Super. Ct. 1989), for example, a Pennsylvania Superior Court reversed a foster care placement order because the state agency had not tried to help a homeless mother obtain housing and because the facts did not support a dependency finding. The court emphasized that budgetary constraints did not excuse the agency's obligation to preserve the family unit under the state's Juvenile Act:

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[3] Continued concern about the overuse of foster care and the lack of alternative services prompted Congress to reaffirm its commitment to family preservation in 1993. See Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 § 13711 (1993) (codified at 42 U.S.C. § 629). In establishing the Family Preservation and Support Services Program, Congress expressed its intent:

> [To] encourag[e] and enabl[e] each State to develop and establish, or expand, and to operate a program of family preservation services and community-based family support services.

42 U.S.C. § 629(a). Congress also authorized appropriations of nearly $1 billion over a five-year period for the Program. See 42 U.S.C. § 629(b).

> It is well-settled that the Juvenile Act was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take children of the illiterate and crude and give them to the educated and cultured, nor to take the children of the weak and sickly and give them to the strong and healthy. Neither will this Court tolerate the separation of a young child from a parent to protect agency funding.

Id. at 128-29 (citations omitted).

Similarly, in In re: Nicole G., 577 A.2d 248 (R.I. 1990), the Supreme Court of Rhode Island found that a Family Court could order a state child welfare agency to provide housing assistance as part of the agency's obligation to reunite families under state law. The court rejected the agency's argument that the state legislature did not intend the agency to serve as a housing or income-maintenance agency. Id. at 250. The court also rejected the agency's argument that requiring the agency to provide housing assistance would divert funds from other programs designed to preserve and reunite families:

> The state's policy set forth in § 42-72-2 includes the responsibility to help parents meet their obligations to their children and to provide services designed to prevent the unnecessary removal of children from their homes. In view of these policies, we believe that the provision of housing assistance is well within the scope of [the agency's] powers.

Id.[4]

Finally, in Martin A. By Aurora A. v. Gross, 524 N.Y.S.2d 121 (Sup. 1987) the court granted injunctive relief to the plaintiffs after finding

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[4] The court also noted that the cost of subsidizing housing may be more cost effective for the agency than providing subsidized foster care. Id.

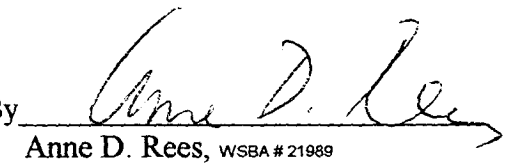
[5] The court further noted that "[i]ronically, the cost of foster care often outstrips the cost of preventive services." Id. (citations omitted).

in light of overwhelming evidence, that DSHS lacked such an effective plan.

This Court should also rule affirmatively on Respondents/Cross-Appellants' cross-appeal. Such a ruling is consistent with state and federal laws that favor the prevention of foster care placements, as well as the decisions of other courts that have addressed similar issues.

DATED this 22nd day of July, 1996.

PRESTON GATES & ELLIS

By 

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