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.

APPELLANTS' REPLY TO BRIEF OF AMICUS CURIAE

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COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes & Regulations

Other Authorities

I. INTRODUCTION

The Amici assert that the child welfare statutes at issue in this case impose a duty upon the Department of Social and Health Services ("Department" or "DSHS") to provide a comprehensive plan of housing assistance for homeless families. They do not cite any statutes or case law to support their argument.

The Appellants, in their memoranda, have examined the language of the individual statutes, the amendments, the legislative history, the relevant regulations and the administrative interpretation of chapter 74.13.031(1) RCW and have found no evidence of a legislative intent to require the Department to engage in housing planning for any group of children or families. Appellants' Brief at 15-37, Appellants' Reply at 5-22.

Instead, the legislature intended to provide child welfare services to all children, including homeless children. This is what the Department has done. Similarly, the "reasonable efforts" and "reasonable services" language of chapter 13.34 RCW were not intended to create an open-ended comprehensive housing assistance program for

homeless families. The legislature intended that the court examine efforts and services to families before children are removed from their families or parents have their rights terminated. Appellants' Brief at 53-8, Appellants' Reply at 45-54.

A. The Amici Urge the Court to Establish a Comprehensive Housing Assistance Program for Homeless Families that the Legislature did not Create.

1. The best interests of the child standard is only used in placement and termination decisions and has never been used to create a service.

Amici claim that the best interests of the child require that this court uphold the trial court decisions in this case. The best interests standard, however, is not the appropriate standard for construing statutes. The standard of the best interests of the child is used for making factual determinations related to modifying or changing placement decisions, and in decisions regarding the termination of parental rights. In re J.B.S., 123 Wn.2d 1, 11, 863 P.2d 1344 (1993); In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973).

The Supreme Court has not used the best interests of the child standard in construing the federal child welfare statute at issue. Appellants' Reply Brief at 33-38. Similarly, there

is no legal authority for using this standard to provide meaning to the general policy language of chapter 74.13 RCW.

The Amici assert that the best interests of the child standard permit this court to affirm the trial court order regarding housing assistance pursuant to chapter 13.34 RCW. But, the best interests of the child standard is used in placement decisions and involves a highly factual inquiry in each individual case. In re J.B.S., 123 Wn.2d at 11. It is not used to create assistance or service programs. The legislature could have added a reference to housing assistance if it intended the court to supply such assistance; it is not the court's role to add words to statutes when interpreting them. See King County v. Seattle, 70 Wn.2d 988, 991, 425 P.2d 887 (1967), State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980).

The Amici also ignore the intent of the dependency statute in general and the intent of the specific language at issue. The dependency statute ". . . is to allow a court to assert protective custody over a child (see generally RCW 13.34) and to terminate all parental rights if it would serve the best interests of the child." In re Henderson,

29 Wash. App. 748, 750, 630 P.2d. 944 (1981). Chapter 13.34 RCW is a procedural statute that defines the standards necessary for dependency, termination of parental rights and the review process necessary for dependent children. See Appellants' Brief at 55-6, RCW 13.34 et. seq. It is not a statute that compels the Department to establish a housing assistance program for homeless families.

The specific language of the statute allows a court to refuse to place a child in foster care if reasonable efforts are not made to prevent or eliminate the need for removal. RCW 13.34.060(8), RCW 13.34.130(1)(b). The other sections of chapter 13.34 RCW imply that services to families will be services that exist within the Department or within the community. See RCW 13.34.030(9) [defining preventive services as family preservation services and other "reasonably available" services]; RCW 13.34.130(3)(b)(iv) [reasonable services are those available within the agency, within the community, or that DSHS has existing contracts to purchase]. When the Department is unable to provide a reasonable service, the statute does not authorize creation of the service, but directs the Department

to report that fact to the court. Id.

2. Liberal construction of statutes does not allow courts to create new remedies or add services that the legislature did not mandate in a statute.

The Amici argue that the statutes at issue should be liberally construed to protect children because they are remedial in nature. A court, however, cannot go beyond reasonable bounds in applying the liberal construction in order to stay within the parameters set by the legislature. Sutherland, Statutory Construction, § 60.01 (4th Ed. 1986).

The general rule of liberal construction does not allow a court to create new remedies, which is what the trial court did in this case. Contrary to the suggestion of the Amici, the Department does not dispute the Court's authority to compel compliance with legal duties. In this case the trial court created new legal obligations. There is no statutory language which indicates that the legislature intended to require the Department to provide a housing plan or housing assistance for homeless children and their families. Courts will not read into a statute language which is not there. See cases cited supra at 3.

In the cases that Amici cite, the intent of the legislature was clear and the courts implemented the intent. The courts did not create a new remedy but merely extended the remedy to the plaintiffs in the case.

B. The Court has the Ultimate Duty to Interpret the Law.

1. The trial court misinterpreted the child welfare statutes.

The Amici misconstrue the Department's position in this case. The Department has never stated that the courts may not interpret the law; the Department's position is that the trial court incorrectly determined the law. The case law, established by this court, supports the Department's position that the legislature did not intend chapter 74.13.031 RCW to create enforceable rights for individuals. Appellants' Brief at 15-34. The Department also maintains, based on statute and case law, that the trial court incorrectly asserted jurisdiction over the plaintiffs' chapter 13.34 RCW claims and incorrectly interpreted the relevant provisions of chapter 13.34 RCW. Appellants' Brief at 54-58; Appellants' Reply at 45-58.

2. The federal decisions cited by Amici were guided by clear legislative instructions and administrative regulations.

The federal cases that the Amici cite support the Department's position: In order to create enforceable rights there must be clear directives from the legislature. For example, in Lampkin v. District of Columbia, 879 F. Supp. 116 (D.D.C. 1995) homeless families sought to enforce rights to education and transportation. The appeals court held that the McKinney Act was enforceable because

> "[t]he obligations it (the McKinney Act) imposes on participating states are clear. The Act requires that grants provided by the secretary be used, inter alia, to prepare and carry out the state plan. . . Paragraphs 3 through 9 in turn provide highly specific instruction for meeting a variety of needs of homeless children and youths. This structure markedly contrasts with that of the Child Welfare Act, with which the Suter Court was concerned. Although both Acts describe in detail the contents of the plan a participating State must adopt, only the McKinney Act provides specific directions for the plan's execution." Lampkin v. District of Columbia, 27 F.3d 605, 610 (D.C. Cir. 1994). (emphasis added).

On remand, the district court merely required the agency to make the determinations regarding schools it was already making at an earlier point in the process, and required transportation tokens, which were already being disseminated, to be provided

more often and to parents for younger children. Lampkin, 879 F. Supp. at 124-26. In the case at bar there are no "highly specific" instructions for developing and administering a housing plan for homeless children and their families.

In Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983) the preventive dental care program for children under the state medicaid program was an entitlement program. Id. at 342, fn.7, 346, 347-48. The court determined whether the program, after the state cutbacks, met the federal medicaid requirements regarding "amount, scope, and duration" of services.[1] Id. at 348. The plaintiffs cannot claim an entitlement to any service or plan in this case.

The intent of the statutory directive in Amici's final case is equally clear: to protect threatened or endangered species. Resources Limited, Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1993). The Forest Service plan was upheld on several grounds, but found to be arbitrary and capricious regarding its

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[1] There has been a great deal of litigation in federal court about whether a medicaid service meets the federal requirement regarding amount, scope, and duration of services. See 42 C.F.R. § 440.230; Charleston Memorial Hospital v. Conrad, 693 F.2d 324, 329-30 (4th Cir. 1982), Curtis v. Taylor, 625 F.2d 645, 650-52 (5th Cir. 1980), modified 684 F.2d 946 (5th Cir. 1980).

conclusion that it did not pose a threat to the grizzly bear. The agency did not provide scientific information for a sister agency's biological opinion of the plan and the Forest Service ignored its own internal opinions which raised concerns about possible effects on the grizzly bear. Id. at 1304-5.

In this case, the Department's plans do not violate chapter 74.13.031 RCW. The child welfare plans provide services for all children, including homeless children. There is no statute or regulation which requires services or a plan solely for homeless children.

Even if the court requires a separate plan for homeless children and their families, the Department's Comprehensive Plan to Coordinate Services for Homeless Children and their Families meets statutory muster. It is a plan which focuses on referrals and networking with housing agencies. Appellants' Brief at 8, 11-12. This plan is not arbitrary and capricious given that the Department has no appropriations for housing, nor is it the State's primary agency in charge of housing. Appellants' Brief at 37-43.

C. There is no State or Federal Statute That Requires Housing Assistance for Families With Children in Foster Care.

The Department does provide services to families to prevent the out-of-home placement of children or reunify families when an out-of-home placement pursuant to chapter 13.34 RCW has taken place. The services are outlined in the Child Welfare Plans and testimony that was submitted to the trial court. See Appellants' Brief at 8-12. As appellants have already demonstrated, neither State or Federal law requires housing assistance as part of the State's child welfare plans.

1. Federal Law.

Appellants have examined the text, legislative history and regulations of the Adoption Assistance and Child Welfare Act of 1980 (AACWA) in detail and they do not require the provision of any specific service. Appellants' Reply at 28-38.

2. State Law.

The Amici quote parts of the policy statements of numerous statutes to support their contention that individual social workers and individual juvenile court judges should be allowed to decide when housing assistance should be provided to families to shorten or prevent out-of-home placements. It is, however,

well established in Washington that public policy pronouncements do not create substantive rights. Appellants' Brief at 16-17; Appellants' Reply at 5-7, 47-9.

None of the cited statutes, when read in context, support the Amici assertion that the legislature intended to provide housing assistance through the child welfare laws. Amici believe that foster care must be avoided at all costs. But that is not the standard established by the legislature. Furthermore, a substantial portion of chapter 74.13 RCW is devoted to enabling legislation regarding foster care. See e.g. RCW 74.13.031 (2), (5), (6), (7), RCW 74.13.032-.035, RCW 74.13.250 et. seq. The legislature has recognized the importance of foster care in the following legislative finding:

> The legislature finds that the foster care system plays an important role in preserving families and giving consistent and nurturing care to children placed in its care. The legislature further finds that foster parents play an integral and important role in the system and particularly in the child's chances for the earliest possible reunification with his or her family. 1990 Wash. Sess. Laws, ch. 284 § 1. (emphasis added).

It is clear that the legislature was aware of the valuable role that foster care can play in the child welfare system.

The Amici, like the plaintiffs, are unable to point to any statutory language which mandates the creation of a housing assistance program of any size.

3. Case law does not support allowing housing assistance to be ordered by juvenile court.

Case law does not support the position of Amici in this case. In In re S.A.D., 555 A.2d 123 (Pa. 1989) the court noted that a young unwed mother, who lacked financial resources and housing, turned to the state child welfare agency for help. Id. at 128. The agency placed her child in foster care but did not make efforts to find her housing or reunify her with her child. Id. The court reversed the order of dependency and ordered the child returned to the mother. Id. at 129. The court did not order any rental subsidies or other specific services. In Washington children are not placed in foster care solely on the basis that their family lacks housing. Instead, the Department makes referrals to housing and financial programs, and can offer a Home Based Service program to help families remedy their housing problems.

Similarly, in In re Burns, 519 A.2d 638 (Del. 1986) the court examined a case where the child was placed in foster care solely because of housing. Id.

at 642. The agency did not assist the mother with housing and addressed hypothetical problems in the case plan. Id. The court held that the agency did not "assist Judy in obtaining alternative, subsidized housing . . ." and reversed the order terminating her parental rights and returned her child to her. Id. at 649. Significantly, the court did not order any specific services. Other state courts have also reversed orders of termination of parental rights when the supervising agency has not made reasonable efforts to prevent or shorten placements of children; but they have not ordered specific services to be provided by the agency. See In the Matter of Jason, 498 N.Y.S. 2d 71 (App. Div. 1986); In re Victoria M., 207 Cal. App. 3d 1317, 255 Cal. Rptr. 498 (1989).

Amici cite a Rhode Island case where the court approved the payment of rental assistance as part of reasonable efforts and based on a general policy statement regarding services. In re Nicole, 577 A.2d. 248, 249 (R.I. 1990). The court recognized that any assistance had to take into account agency budgetary restraints and the ability of the families to become financially independent. Id. at 250. It noted that the subsidy is a "stopgap" measure for poor families. Id. The court also stated that cash disbursements

would be more cost effective than foster care. Id. at 250-1.

Nicole flies in the face of this court's rulings that general policy statements do not create substantive rights. In Washington, the Appellate Court correctly held that there was no statutory authority to order housing assistance for a family pursuant to child welfare laws or the "reasonable efforts" language of chapter 13.34 RCW. Appellants' Brief at 54-55. The Appellate Court recognized that the trial court ordered assistance would essentially be open-ended with no standards and would present numerous difficulties for courts to enforce and that the issue of whether "housing assistance" was more cost effective than foster care was an issue that the legislature must decide, not the courts. In re The Welfare of J.H., Wash. App. 887, 894, 880 P.2d 1030 (1994) rev. denied, 126 Wn.2d 1024 (1995).

The language in chapter 13.34 RCW regarding "reasonable efforts" and "reasonable services" provides a procedural protection for families and children. If the Department, or supervising private agency, does not meet the statutory standard, then the court should not remove the child from the home.

Also, in Washington, the legislature has funded

programs for homeless families and emergency assistance funds through the Aid to Families with Dependent Children program. The legislature has also provided funding for the Home Based Services Program and a 90-day state subsidy for families who have their children removed temporarily from their care. Appellants' Brief at 10-12, 38-39.

When faced with the question of whether the court can order specific services to be provided, the wealth of authority in other state or federal cases goes against such a ruling. Black v. Beame, 550 F.2d 815 (2nd Cir. 1977) (court rejected plaintiff's claim that agency must use "least restrictive alternatives" and provide housing for family so that the children could be returned from foster care); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (court rejected plaintiff's claim that federal and state statutes conferred rights to placement in least restrictive setting and visitation with siblings); Savage v. Aronson, 571 A.2d 696 (Conn. 1990) (no right to housing based on state or federal law); Grant v. Cuomo, 518 N.Y.S. 2d 105, 114 (App. Div. 1987) (court refused to grant system-wide declaratory relief specifying preventive services); In the Matter of Enrique, 512 N.Y.S. 2d 837 (App. Div. 1987) (court

could not order social services to institute legal proceedings against housing authority in order to allow grandmother to have children returned from foster care).

II. CONCLUSION

This case involves important questions about the role of the Department in the delivery of child welfare services and housing to the families of our State.

The legislature has clearly designated another state agency, the Department of Community Trade and Economic Development, as the lead state agency in all planning for housing. This agency has expertise in this area; it is involved in operating housing programs, including programs for homeless families; it has had money appropriated for the purpose of providing housing and planning for housing.

The Department of Social and Health Services has been designated as the agency responsible for cooperating with the federal government to provide child welfare services in the state. These services are available to all children; they focus, however, on the children most vulnerable in our society: those who are in families who, for whatever reasons, cannot care for them and who actually place them at physical

and emotional risk. Homeless children are a subset of this population, but they are not, based on their housing situation alone, automatically eligible for specific services. The Department, in dependency cases, provides services to families. The services available are those that exist by virtue of federal, state, and local funding and those that have specifically been funded through the child welfare programs of the state.

The trial court's decision regarding chapter 74.13 RCW places DSHS at the center of housing planning for homeless families in direct contradiction to other state statutes that specifically address housing. It contravenes legislative intent.

The trial court's decision allowing Juvenile Court to order the Department to pay for housing assistance in certain cases is based on an erroneous interpretation of the relevant statutes. The ordering of this type of assistance ignores legislative appropriations and legislative initiatives that have created certain programs to prevent or shorten foster care placements, such as the Family Preservation Program and Home Based Services. It is the legislature, not the Department or the

courts, which decides what programs will be funded through the child welfare system. Ordering assistance through Juvenile Court enables individuals to use the child welfare system to supplement housing, financial, or medical programs if those resources are not considered sufficient to meet their needs. This is not the intent of the child welfare system and it is an end run around legislative decisions limiting other public welfare programs.

The dependency statutes were carefully crafted to ensure judicial oversight of the process while allowing the Department to administer its programs in the best interests of all of the children of the state. Chapter 13.34 RCW does not authorize a court to order the Department to provide a specific preventive
service. If the court is not satisfied with the services provided, then the court can deny the

Department's request to place the child in care, and require that reasonable efforts be made.

RESPECTFULLY SUBMITTED this 23 day of August, 1996.

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