

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
OF SUFFOLK COUNTY
Docket No.

IMPOUNDED

E.K. and K.M., Petitioners)
)
 v.)
)
 Lawrence Juvenile Court,)
 Respondent)

In re:)
 K.M. (CHINS Petition))
_____)

MOTHER'S AND CHILD'S MEMORANDUM OF LAW IN SUPPORT OF PETITION
FOR RELIEF PURSUANT TO G.L. c. 211 § 3

On October 27, 2006, Mother filed a motion seeking to intervene in the pending CHINS case involving her daughter, K.M. and requested appointed counsel. (RA:21). Judge Newman denied this motion on that date. (RA:27). Mother subsequently filed a Motion for Reconsideration (RA:3-44) and a First Supplement to such Motion (RA:49-59). Judge Newman denied the Motion for Reconsideration on April 27, 2007 and issued a Memorandum of Decision dated April 25, 2007. (RA:60-63). Although legal custody of K.M. was returned to mother on April 27, 2007, the CHINS matter concerning K.M. is now scheduled for a CHINS review on October 27, 2007.

ARGUMENT

I. THIS COURT SHOULD INTERPRET G.L. c. 119 AND EXISTING CASE LAW TO PROVIDE PARENTS IN CHINS PROCEEDINGS WHO ARE FACING THE LOSS OF CUSTODY OF THEIR CHILD WITH PARTY STATUS AND THE RIGHT TO APPOINTED COUNSEL.

A. *The Juvenile Court's interpretation of In the Matter of Gail was error.*

The motion judge in this matter erred in interpreting the statutory CHINS scheme embodied in G.L. c. 119, §§ 39E-39I and the limited CHINS case law in this Commonwealth so as to deny parents party status, appointed counsel or any legal rights at all. The motion judge focused on language contained in In the Matter of Gail, 417 Mass. 321 (1994) to reach this result. (RA:60-61). Either the motion judge mis-read the Gail decision, or this Court should clarify that Gail does not stand for the proposition that parents have no legal rights at stake in a CHINS proceeding.¹

The Gail opinion stands for the proposition that neither parental consent nor a finding of parental unfitness are required for a CHINS petition to proceed. See id. at 328. What Gail does not say, however, is that a parent has **no** legal rights

¹ In the Gail case, the Juvenile Court did indeed appoint counsel for the mother. Gail, 417 Mass. at 322-323. The legal authority for such appointment of counsel was not specified in the opinion, nor was such appointment the subject of appellate challenge.

at stake in a CHINS proceeding. Perhaps a parent cannot single-handedly stop a CHINS proceeding, but that conclusion is a far cry from a holding that a parent has no legal rights at stake at all, no right to be heard as a party and no right to appointed counsel if indigent. The motion judge's reading of Gail simply goes too far.

If, indeed, the motion judge did not err in stretching the Gail holding to reach the conclusion that a parent has no legal rights in a CHINS case, the Court must re-visit this opinion. Although the Gail Court stated that the focus in a CHINS proceeding is "primarily" on the needs of the child rather than the unfitness of the parent, see id., this is an artificial distinction at best. Whether K.M. did not go to school because of her own failings, the failings of her mother, or whether both parties were responsible, simply cannot be compartmentalized as a "child" issue while pushing the parent's role to the side.

This view of CHINS cases as being "primarily" about sanctioning the child's wrongful conduct also does not comport with the legislative history of the CHINS statute. Justice Ireland notes that the legislative policy behind the 1973 adoption of the current CHINS law is reflected in the following excerpt from a letter from District Court Chief Justice Franklin Flaschner to the Governor's Legislative Secretary:

[the CHINS law] then provides the necessary sanctions for the Court to apply in more aggravated cases where either the child **or one or both of his parents is uncooperative**, and in this connection ample provision, heretofore not existing, is given to the Court to implement its orders. (emphasis added).

Ireland, Juvenile Law § 4.2 (Volume 44A of Mass. Practice, 2d ed. 2006). Apparently the Legislature was well aware of the potential for a parent of a CHINS child to be "uncooperative" and deserving of sanction. The only possible sanction to a parent in the CHINS law is the removal of custody of his or her child. See Commonwealth v. Florence F., 429 Mass. 523, 527 (1999) (recognizing that Juvenile Court has no CHINS enforcement powers other than a custody transfer to DSS). The Massachusetts Legislature understood when enacting the CHINS law that parent could be sanctioned by a CHINS court by way of a custody loss. It is thus well within the intent of the Legislature for this Court to provide a parent party status and appointed counsel to defend against court sanction in a CHINS case.

Lastly, the statutory policy applicable to substitute care of children in CHINS proceedings necessarily obligates a judge to take stock of the entire family before making a custody determination. See Gail, 417 Mass. at 326 quoting G.L. c. 119, § 1 ("to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure

the rights of any child to sound health and normal physical, mental, spiritual and moral development.") A parent whose care for her child is necessarily being evaluated by a CHINS judge contemplating a custody transfer must have a right to appear as a party and advocate for the parent's desired result, through appointed counsel if indigent. A parent's legal stake in a CHINS case cannot be ignored through employment of the fiction that such proceeding only or "primarily" concerns the behavior of the child.

B. The Juvenile Court erred in not recognizing a statutory right to counsel under G.L. c. 119, § 29 for parents in CHINS proceedings where custody is at issue, and in ruling that DSS is not a party to CHINS cases.

The language of G.L. c. 119, § 29 provides that a parent has a right to counsel "... in any other proceeding regarding child custody where the department of social services or a licensed child placement agency is a party ... and if said parent, guardian or custodian of such child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian." Justice Ireland interprets G.L. c. 119, § 29 as follows:

The parent or guardian of a child that is the subject of a CHINS proceeding has a right to counsel only if DSS or a licensed child placement agency is a party to the proceeding. See M.G.L.A. c. 119, § 29. See generally Matter of Gail, 417 Mass. 321 (1994)."

Ireland, Juvenile Law § 4.15 (Volume 44A of Mass. Practice, 2d ed. 2006).

The Petitioners submit that a CHINS proceeding where legal custody of the subject child has been transferred to DSS qualifies in all respects as "any other proceeding regarding child custody where the department of social services" is a party within the plain meaning of G.L. c. 119, § 29. The Juvenile Court erred in concluding that no such statutory right to counsel exists, and that DSS is not a party to CHINS proceedings within the meaning of such statute. (RA:62-63).

DSS takes the position that it does not become a party to a CHINS case and therefore no G.L. c. 119, § 29 right to counsel attaches unless DSS were to file a motion to replace the petitioner. (RA:46-48). The motion judge adopted DSS's reasoning in ruling that DSS was not a party to this CHINS action. (RA:63). This position is inconsistent with the plain language of G.L. c. 119, § 29, the statutory history of this law, and the case law informing this topic.

1. The case law regarding a parent's right to counsel when DSS takes custody of a child pursuant to G.L. c. 119, § 23(C) should be applied to recognize a parent's right to counsel in a CHINS case.

In Balboni v. Balboni, 39 Mass. App. Ct. 210 (1995), a probate court judge in a divorce case ordered DSS to take custody of the children pursuant to G.L. c. 119, § 23(C). See

Balboni, 39 Mass. App. Ct. at 210-211. The Appeals Court held that "when DSS involvement became imminent" the right to counsel under G.L. c. 119, § 29 was triggered. Id. at 211. Although this opinion specifically addressed only the children's right to counsel under G.L. c. 119, § 29, this case is notable because DSS was clearly not a "party" to a private divorce action, yet the contemplation of a transfer of custody to DSS resulted in the § 29 right to counsel being triggered. See id. Similarly, if a court in a private guardianship action contemplates granting custody of a child to DSS, a parent's right to counsel would be triggered. "Under the reasoning of the Balboni case, the court would also have to inform the parents of their right to counsel and appoint counsel for any parent on the issue of DSS custody if the parent were indigent. G.L. c. 119, § 29". Massachusetts Guardianship and Conservatorship Practice, § 8.3.5 (MCLE, Inc. 1997, & Supp. 2000, 2004).

In Custody of Lori, a probate court judge in a contested paternity case ordered the child *sua sponte* into the custody of DSS, again under G.L. c. 119, § 23(C). See Custody of Lori, 444 Mass. 316, 318 (2005) In holding that a seventy-two hour evidentiary hearing was required in this case, as would be required in a case brought by DSS under G.L. c. 119, § 24, the Supreme Judicial Court noted that chapter 119 is the

"comprehensive child welfare chapter" declaring the Commonwealth's policy "for the protection and care of children." Id. at 320. "We have long recognized that when two or more statutes relate to the same subject matter, they should be construed as a harmonious whole, consistent with the legislative purpose." Id. at 319-320. Thus, the same procedures to protect a parent's right to due process were required by the Court whether the custody transfer occurred under G.L. c. 119, § 24 or under G.L. c. 119, § 23(C).

The CHINS statute is also part of the same "comprehensive child welfare chapter." See G.L. c. 119, §§ 39E-39I. Under the reasoning of Custody of Lori, mother should receive the same right to an evidentiary hearing before losing custody to DSS and the same right to counsel as would a parent involved in custody litigation involving DSS under either G.L. c. 119, § 24 or G.L. c. 119, § 23(C). In fact, mother further argues under Balboni and Custody of Lori that her right to counsel accrued at the time the Juvenile Court first considered granting custody of K.M. to DSS, and thus Mother had a right to be represented by appointed counsel at the actual hearing after which custody of K.M. was transferred to DSS.

2. The plain language of G.L. c. 119, § 29, its statutory history and principles of statutory construction support the view that when DSS takes custody of a CHINS child pursuant to G.L. c. 119,

§ 23(D) this invokes a parent's right to counsel under the second sentence of G.L. c. 119, § 29.

The Balboni and Custody of Lori cases involved a custody transfer pursuant to G.L. c. 119, § 23(C), a section specifically referenced in the first sentence of G.L. c. 119, § 29. These cases do not directly address the question raised here: does a CHINS case qualify as "any other proceeding regarding child custody where the department of social services... is a party" which appears in the second sentence of G.L. c. 119, § 29. However, the plain language and statutory history of G.L. c. 119, § 29 suggest that (1) DSS is a "party" to the proceedings under the enumerated sections in that law, which include G.L. c. 119, § 23(C), and (2) if DSS is a party to G.L. c. 119, § 23(C) proceedings, the Legislature intended DSS to be considered a "party" within the meaning of G.L. c. 119, § 29 when it receives CHINS custody of a child pursuant to the almost identically worded G.L. c. 119, § 23(D).

The first sentence of G.L. c. 119, § 29 concerns a child's right to counsel:

Whenever a child is before any court under subsection C of section twenty-three or sections twenty-four to twenty-seven, inclusive, or section twenty-nine B, said child shall have and shall be informed of the right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child.

The second sentence of G.L. c. 119, § 29 concerns a parent's right to counsel:

The parent, guardian or custodian of such child shall have and shall be informed of the right to counsel at all hearings under **said sections** and in any **other proceeding** regarding child custody where the department of social services or a licensed child placement agency is a party, including such proceedings under sections five and fourteen of chapter two hundred and one; and if said parent, guardian or custodian of such child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian. (emphasis added).

To begin with, the words "said sections" refer to the care and protection provisions of G.L. c. 119, §§ 24-27, permanency hearings under G.L. c. 119, § 29B and proceedings where DSS receives custody of a child pursuant to G.L. c. 119, § 23(C). It cannot be denied that DSS is a "party" to the first two of these proceedings. As seen in the Balboni and Custody of Lori cases, proceedings under G.L. c. 119, § 23(C) involve private parties but the court *sua sponte* can order a child into DSS custody. In order to determine whether the phrase "and any **other proceeding** regarding child custody where [DSS]... is a party" means that the Legislature considered DSS to be a "party" in a G.L. c. 119, § 23(C) proceeding within the meaning of G.L. c. 119, § 29, the words of the statute must be given their natural and obvious meaning. See Schulman v. Attorney General, 447 Mass. 189, 191 (2006). The Appeals Court has recognized in a statutory construction context that the word "other" used in

its adjectival form focuses on "the relationship of the modified word to its antecedents: '1.a. Being the remaining one of two or more...b. Being the remaining one of several.'" Mammoet USA, Inc. v. Entergy Nuclear Generation Co., 64 Mass. App. Ct. 37, 42 n.14 (2005) quoting American Heritage Dictionary of the English Language 1282 (3d ed. 1992). The natural and obvious meaning of this entire second sentence is that the Legislature considered a G.L. c. 119, § 23(C) proceeding to be a proceeding regarding child custody to which DSS is a party.

When DSS accepts custody of a child pursuant to a Juvenile Court's order in a CHINS proceeding, it does so under G.L. c. 119, § 23(D) (DSS "shall accept on commitment from any division of the juvenile court department any child under eighteen years of age declared...to be a child in need of services under section thirty-nine G"). This wording is very similar to that of G.L. c. 119, § 23(C) (DSS "shall accept on order of a probate court the responsibility for a child..."). If DSS is a "party" in a proceeding "regarding child custody" under G.L. c. 119, § 23(C) for purposes of G.L. c. 119, § 29, DSS would also be a "party" in a proceeding under G.L. c. 119, § 23(D), given the similarity of the wording in sections 23(C) and 23(D) regarding DSS involvement in those respective cases. The other similarities between DSS taking custody of the children in the

Custody of Lori and Balboni cases pursuant to G.L. c. 119, § 23(C) and taking custody of K.M. in the instant CHINS case pursuant to G.L. c. 119, § 23(D) far outweigh any differences. DSS was not the petitioner or an active litigant in the Custody of Lori and Balboni cases. Custody of the children was foisted upon DSS by the court in both cases. In the instant case, DSS was not the CHINS petitioner and never asked for custody. There is simply no factual difference between a custody grant to DSS under G.L. c. 119, § 23(C) and a custody grant to DSS under G.L. c. 119, § 23(D) sufficient to support the denial of a parent's G.L. c. 119, § 29 right to counsel only in the latter situation.

Based upon the history of G.L. c. 119, § 29, there is no reasoned basis for this Court to conclude that the Legislature somehow meant to **exclude** parents from receiving appointed counsel in proceedings in which DSS takes custody of a child pursuant to G.L. c. 119, § 23(D), while **including** parents losing custody to DSS under G.L. c. 119, § 23(C). The Legislature has only **increased** a parent's right to appointed counsel under G.L. c. 119, § 29 over the years. In 1978, children and parents first gained the right to appointed counsel in G.L. c. 119, § 23(C) proceedings. See St.1978 c. 501. Prior to that, the right to appointed counsel had only accrued in care and protection proceedings. See St.1973, c. 1076, § 4. The current

second sentence of G.L. c. 119, § 29 was added to the statute in 1983, providing expansive rights to appointed counsel for parents "in any other proceeding regarding child custody where the department of social services...is a party." See St.1983, c. 517.2 Thus, the right to appointed counsel expanded to G.L. c. 119, § 23(C) proceedings, and then to "any other proceeding" where, like a § 23(C) proceeding, DSS could be granted custody of a parent's child. It would be perfectly consistent with the intent of the Legislature to for this Court to hold that G.L. c. 119, § 29 was intended to provide appointed counsel to parents when DSS has taken CHINS custody of their children pursuant to G.L. c. 119, § 23(D).

At bottom, this is a question of statutory construction. "The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished". Phillips v. Pembroke Real Estate, Inc., 443 Mass. 110, 114 (2004). The main object to be accomplished by G.L. c. 119, § 29 was to provide

²Lastly, the Legislature enlarged the right to appointed counsel by including G.L. c. 119, § 29B proceedings in 1984. See St.1984, c. 197, § 3.

indigent parents and children appointed counsel when custody of the children is about to be or has been lost to the Commonwealth. The plain language of the second sentence of G.L. c. 119, § 29 suggests it is designed to be a "catch-all" provision for a parent's right to counsel encompassing "any other proceeding regarding child custody" where DSS can take custody of a parent's child, necessarily including DSS custody taken pursuant to G.L. c. 119, § 23(D). Included in this second sentence is specific mention of the right to counsel in guardianship proceedings under G.L. c. 201, § 5 and temporary guardianship proceedings under G.L. c. 201, § 15. See G.L. c. 119, § 29. Clearly the "temporary" nature of the guardianship contemplated by the latter section would not deprive a parent of the right to appointed counsel if DSS was the temporary custodian. Neither should the "temporary" nature of CHINS custody defeat a right to appointed counsel under the second sentence of G.L. c. 119, § 29. Under principles of statutory construction, this Court should rule under the plain language of G.L. c. 119, § 29 that DSS becomes a "party" to a CHINS proceeding for purposes of triggering the G.L. c. 119, § 29 parental right to counsel when it receives custody of the subject child pursuant to G.L. c. 119, § 23(D).

The Petitioners note briefly that DSS has in the past appeared in CHINS cases as a party. DSS appeared as a party in In the Matter of Angela, 445 Mass. 55 (2005). The published decision reflects that "Daniel J. Hammond, Assistant Attorney General, for the Department of Social Services" appeared in Angela. Id. at 55. There is no suggestion in the Angela decision that the appearance of DSS was limited in any way. Just as in the instant case, the child in Angela was the subject of a truancy petition brought by a school district, and the child in Angela was committed to the legal custody of DSS and remained so during the pendency of that appeal. Id. at 57.

In addition, DSS appeared as a party in the G.L. c. 119, § 23(C) case of Custody of Lori. See Custody of Lori, 444 Mass. 316, 316 (2005) ("Virginia A. Peel, Special Assistant Attorney General, Lynne M. Murphy with her for Department of Social Services"). Again, there is no indication from the case that DSS's appearance was limited in any way. At the time of this appeal in a private Probate Court paternity action, the child had long since been returned to the custody of the mother. Id. at 317. Because DSS has acted as a party in previous CHINS and G.L. c. 119, § 23(C) cases, the Juvenile Court's ruling that "the Department is typically not a party to a CHINS matter", (RA:63), is factually and legally suspect, and DSS should be

estopped from taking a contrary position in this litigation.

DSS should also be estopped from arguing it is not a party to G.L. c. 119, § 23(C) cases.

The Petitioners also note that the Court has recognized that in a CHINS case the Commonwealth has a "legitimate interest in protecting the welfare of children." In the Matter of Gail, 417 Mass. 321, 327 (1994). How is DSS to fulfill its duty to protect the welfare of the children committed to its care and custody without becoming a party to the court action which imposes such a duty upon it? A non-party to a case has no standing to request that a Court make any order nor any right to have its motions heard. See e.g. Hagen v. Commonwealth, 437 Mass. 374, 379 (2002)(crime victim had no standing to bring a motion to revoke a defendant's stay of execution of sentence). This non-status certainly does not advance the interests of the children relying upon DSS for care and custody.

If DSS has custody of a child pursuant to a CHINS order, by definition the Commonwealth has an interest in the CHINS proceeding. The provisions of G.L. c. 12, § 3 therefore require the attorney general to appear for the Commonwealth.

The attorney general **shall appear** for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question.... G.L. c. 12, § 3. (emphasis added).

In addition, if DSS is not a party to a CHINS action, it can have only the standing of an amicus curiae on appeal. See In the Matter of the Receivership of Harvard Pilgrim Health Care, 434 Mass. 51, 57 (2002). An amicus curiae has no independent right to bring an appeal and can only address the issues brought forward by the actual parties. See id. at 57. Under these constraints, it will be impossible for DSS to meet its duties to protect the children in its care and custody, or to protect its own interests during the CHINS litigation.

Lastly, there is no DSS regulation prohibiting that agency from appearing as a party in a post-adjudication CHINS court proceeding. See 110 C.M.R. 4.67. In fact, this regulation could be read to infer that DSS is indeed a party to post-adjudication CHINS cases.

Members of the Department's legal staff shall attend **pre-adjudication** CHINS court proceedings, in those cases where a request is made by an Area or Regional Director.

Commentary

Traditionally, Department attorneys have not appeared at any **pre-adjudication** CHINS court proceedings because technically the Department is not a party to such actions. However, recognizing that some **pre-adjudication** CHINS matters present difficult or complex legal problems for the social work staff, the Department will make members of the legal staff available on an as-needed basis. 110 C.M.R. 4.67 (emphasis added).

Not even the Department's own regulations support its current position that DSS is not a party to **post-adjudication** CHINS

proceedings. This Court should rule that DSS becomes a party to a CHINS cases when custody of the child is transferred to it.

II. IN ORDER FOR CHAPTER 119 OF THE GENERAL LAWS TO PROVIDE PARENTS WITH DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, PARENTS MUST HAVE THE SAME OR SIMILAR LEGAL RIGHTS IN A CHINS PROCEEDING AS DO PARENTS IN A CARE AND PROTECTION OR SECTION 23(C) PROCEEDING, INCLUDING THE RIGHT TO APPOINTED COUNSEL, PARTY STATUS AND THE RIGHT TO A HEARING BEFORE LOSING CUSTODY OF THEIR CHILD.

A. *A CHINS case is comparable to a care and protection proceeding with respect to the incidents of custody lost to the state and the issues to be decided by the Juvenile Court.*

Perhaps the most notable conclusion contained in the motion judge's Memorandum of Decision is that CHINS cases are so distinctly different from care and protection cases, that neither due process nor equal protection are offended by denying CHINS parents the rights to be heard as a party and to appointed counsel afforded parents affected by care and protection proceedings. (RA:61). This conclusion is insupportable both as a matter of fact and law.

A parent can lose custody of a child to DSS in a care and protection proceeding pursuant to G.L. c. 119, § 26, a proceeding pursuant to G.L. c. 119, § 23(C), and a CHINS proceeding pursuant to G.L. c. 119, § 39G. A CHINS case is comparable to a care and protection case and a § 23(C) proceeding with respect to the incidents of custody rights lost,

and parental involvement in the issues to be adjudicated by the Juvenile Court.

A parent loses exactly the same incidents of "custody" of a child to DSS in a CHINS case and a care and protection case.

The definition of "custody" contained in G.L. c. 119, § 21 applies to both care and protection cases and CHINS cases. See G.L. c. 119, § 21 ("The following words and phrases when used in sections twenty two to fifty-one F, inclusive, shall, unless the context otherwise requires, be construed as follows:").

"Custody", shall include the following powers: (1) to determine the child's place of abode, medical care and education; (2) to control visits to the child; (3) to consent to enlistments, marriages and other contracts otherwise requiring parental consent. G.L. c. 119, § 21.

The same definition of custody appears in G.L. c. 119, § 23(C), with the addition that "consent to adoption" is only included if specified in the court's order.

Although the word "custody" does not appear in G.L. c. 119, § 39G(c) -- that section using the words "commit the child to the department of social services" -- DSS regulations make clear that custody within the meaning of the § 21 definition is indeed transferred in a CHINS commitment. See 110 Code Mass. Regs. § 2.00 ("Child in the custody of the Department means a child placed in the Department's custody through court order, including an order under a Child in Need of Services CHINS

petition, or through adoption surrender"); 110 Code Mass. Regs. § 4.65(1) ("After a trial on a CHINS petition, a child may be adjudicated to be in need of services. The court may then commit the child to the custody of the Department for a period of up to six months"); 110 Code Mass. Regs. § 4.65(2) ("Following such a commitment order, the child shall be considered to be in the temporary custody of the Department.").

The only difference, other than duration, in the nature of a parent's loss of custody in a CHINS proceeding and a parent's loss of custody in a care and protection is that in a CHINS proceeding, DSS delegates back to the parent the power to determine the child's extraordinary medical care. See 110 Code Mass. Regs. § 11.02 ("Although the Department has custody of CHINS children and therefore has the power to determine the child's medical care...the Department shall be deemed to have delegated back to the parents the power to determine the CHINS child's extraordinary medical care."). Otherwise the components of the custody loss are identical from the point of the view of both the CHINS-involved and care and protection-involved parent.

If the nature of the parent's custody loss in a CHINS case and a care and protection case is nearly identical, then the difference between the treatment of these two groups of parents must hinge upon the duration of such custody loss. Indeed, the

Juvenile Court judge focused upon the "temporary" nature of the custody loss in a CHINS case in reasoning that the infringement of a parent's relationship with her child in a CHINS case was so "minimal" as to not merit due process protection. (RA:62-63). Once again, the Juvenile Court relied for this proposition on a questionable interpretation of In the Matter of Gail, 417 Mass. 321 (1994), discussed in Section I(A) above.

Petitioners acknowledge that the Court's language in Gail provides some support for the Juvenile Court's view of CHINS custody transfers impacting only "minimally" on fundamental rights. See Gail, 417 Mass. at 327. However, the Court should re-visit its opinion in Gail in order to clarify that a CHINS out-of-home placement is not merely a "minimal" infringement on the liberty interests of families because such deprivations occur for only six-month periods at a time. The Court in a subsequent opinion characterized an out-of-home CHINS placement as a "substantial" intrusion on a child's fundamental liberty interest despite its temporary character. In the Matter of Angela, 445 Mass. 55, 62 (2005). This is the right result, because "[l]iving apart from a parent for six months is a significant portion of one's childhood". Id. In addition, there is nothing in the CHINS statute prohibiting a judge from simply renewing the out-of-home placement order and/or legal

custody order every six months indefinitely as long as the requisite finding is made that the purposes of the order have not been accomplished. See G.L. c. 119, § 39G. Thus, temporary deprivation of custody could extend to *de facto* permanent deprivation, given that a child is only a minor for a finite number of six month periods. Lastly, no one would suggest that a six month period of incarceration in prison or a six month commitment to a mental health institution are "minimal" infringements on liberty interests due to the short, temporary nature of these time periods. Neither can a six month out-of-home CHINS placement be dismissed as "minimal" from the point of view of either a parent or a child. The Court should therefore make clear that a CHINS out-of-home placement is a "substantial" and not a "minimal" intrusion on the liberty interests of parents and children, and the "temporary" nature of a CHINS custody order cannot support the Juvenile Court's conclusion that E.K. "has no legal rights at stake" in this CHINS proceeding. (RA:60).

A custody loss pursuant to a § 23(C) proceeding is frequently only temporary, yet parents involved in such proceedings have a right to appointed counsel. See Custody of Lori, 444 Mass. 316, 318-319 (2005)(child was in DSS custody pursuant to § 23(C) for only five months); Balboni v. Balboni,

39 Mass. App. Ct. 210, 211 (1995)(only "temporary custody" of the children given to DSS). If both CHINS proceedings and § 23(C) proceedings result in "temporary" custody loss, then this factor cannot be a reasoned basis upon which to deny CHINS parents party status or a right to appointed counsel while granting both such rights to the § 23(C)-involved parent.

The Juvenile Court is also in error characterizing a CHINS proceeding as one where "a parent's fitness is not at issue." (RA:62). First, as discussed in Section 1(A) above, it is an artificial distinction to separate the actions and responsibilities of parent and child when assessing blame for the difficulties that resulted in the CHINS petition. In addition, the Juvenile Court in a CHINS case is statutorily obligated to make the same determination under G.L. c. 119, § 29C that the "continuation of the child in his home is contrary to his best interests" and that DSS has made "reasonable efforts" to eliminate the need for removal of the child as is required in a care and protection case. See G.L. c. 119, § 39G ("the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C"); cf. G.L. c. 119, § 26 ("the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said

section 29C").³ Once again, there is no difference between care and protection and CHINS cases in the issues that a Juvenile Court must consider. Yet, a parent in a CHINS case will have no standing to speak to these issues, nor any right to appointed counsel to speak for her. This is an untenable and unsupportable result, and this Court should vacate the Juvenile Court's order.

B. Mother has a due process right to court-appointed counsel because her liberty interest and the risk of error outweigh the government's fiscal interests.

When the state seeks to temporarily remove a child from an indigent parent's custody during a CHINS proceeding, the procedural due process rights of the Fourteenth Amendment to the United States Constitution and Article Ten of the Declaration of Rights of the Massachusetts Constitution require that the parent be provided with court-appointed counsel. In determining whether a person has a due process right, courts consider: 1) the private interest at stake; 2) the risk the procedures used will lead to an erroneous result; and 3) the government's interests, including the fiscal and administrative burdens that the additional procedural requirements would entail. Mathews v.

³ A judge transferring custody of a child to DSS pursuant to G.L. c. 119, § 23(C) must also make the findings required by G.L. c. 119 § 29C. See G.L. c. 119, § 23(C).

Eldridge, 424 U.S. 319, 335 (1976). The Juvenile Court erred in applying the Mathews factors in this case.

It was error for the Juvenile Court to rule that E.K. had "no legal rights at stake" in this CHINS proceeding when her most precious right - the right to custody of her child - was removed, even temporarily. (RA:61-62). The infringement on Mother's and K.M.'s parent-child relationship of a custody transfer to DSS was certainly not "minimal" and Mother's interest in her relationship with her daughter necessarily outweighed the Government's fiscal interest in not providing Mother appointed counsel. (RA:61-62). The Juvenile Court's ruling directly contravened the Court's holding in In the Matter of Angela, 445 Mass. 55, 62 (2005) which stated that under the first Mathews factor, a CHINS child's interest in staying with her parent is a weighty "private interest". If a CHINS child has a compelling private interest in remaining in her parent's custody, then a parent's private interest in keeping custody of a CHINS child is just as compelling. With regard to the second Mathews factor, "the risk of an erroneous deprivation is palpable" with respect to a CHINS child. In the Matter of Angela, 445 Mass. at 63. The risk of an erroneous deprivation is no less "palpable" from the point of view of the CHINS parent. With regard to the last Mathews factor, this Court

should rule that the strong liberty interests parents have in maintaining custody of their children coupled with the risk that not having counsel will lead to an erroneous result outweigh the fiscal and administrative burden placed on the government by requiring the state to provide counsel for indigent parents in CHINS cases where custody is at issue.

Massachusetts courts have held that indigent parents are constitutionally entitled to court-appointed counsel in care and protection cases. See Adoption of Olivia, 53 Mass. App. Ct. 670, 673-74 (2002). ("Parents have a constitutionally protected fundamental interest in their relationship with their children. As a result of that interest, an indigent parent is entitled to court-appointed counsel in proceedings that terminate parental rights") (internal quotations omitted). The same reasoning applies in this case because Mother lost custody of her child for a year in this CHINS proceeding, and is subject to that same deprivation again as the CHINS proceeding is ongoing. The temporary nature of Mother's loss of custody is simply not dispositive of the due process issue. See In the Matter of Angela, 445 Mass. 55, 62 (2005).

"Parents have a fundamental liberty interest in maintaining custody of their children, which is protected by the due process clause of the Fourteenth Amendment to the United States

Constitution." Custody of Lori, 444 Mass. 316, 320 (2005); Care & Protection of Erin, 443 Mass. 567, 570 (2005), citing Care & Protection of Robert, 408 Mass. 52, 58 (1990). "Accordingly, due process rights must be honored whenever a parent is deprived of her right to raise her child." Custody of Lori, 444 Mass. at 320, citing Care & Protection of Robert, 408 Mass. at 58, 68; see also Department of Public Welfare v. J.K.B., 379 Mass. 1, 3 (1979) ("The interest of parents in their relationship with their children has been deemed fundamental, and is constitutionally protected."). This CHINS case was initiated by state action - a truancy officer - just as a care and protection petition filed by DSS is initiated by state action. (RA:19). In this CHINS case, due to state action Mother was deprived of her right to legal custody of her child for a year, she may be so deprived in future proceedings in the ongoing action, and thus she deserves basic due process rights including a right to appointed counsel. There is simply no difference between care and protection cases and CHINS cases in the process that is due when loss of custody of a child to the Government is the deprivation at issue.

Without court-appointed counsel for indigent parents in CHINS cases, there is a high risk that a *pro se* parent will not effectively present his or her case against removal of the child

to the court and that therefore the court will reach an erroneous result and remove the child from parental custody when such drastic steps are unnecessary. That is why basic due process rights include the right of indigent parents to court-appointed counsel when the state is seeking to deprive them of custody of their children. See J.K.B., 379 Mass. at 3-4 (holding that basic due process includes "the right to be heard 'at a meaningful time and *in a meaningful manner*'" and that therefore indigent parent is constitutionally entitled to court-appointed counsel in proceedings brought to dispense with parental consent to adoption by both Fourteenth Amendment to United States Constitution and Article 10 of Massachusetts Declaration of Rights).⁴

While the State has an interest in protecting children, denying court-appointed counsel to indigent parents does not help further this interest. Court-appointed counsel simply

⁴ Since J.K.B., the Supreme Court has held that indigent parents do not have a federal Constitutional right to appointed counsel in all parental termination proceedings but that the decision of whether due process calls for court-appointed counsel must be made on a case by case basis by the trial court, using the Eldridge factors. Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 31-32 (1981). Nonetheless, a Massachusetts appellate court recently has reaffirmed J.K.B.. See Olivia, 53 Mass. App. Ct. at 674 n.3 (noting that right to counsel for indigent parents is derived from statute, G. L. c. 210, § 3, and has been identified by Supreme Judicial Court as a procedural due process right of Fourteenth Amendment and Art. 10 of the Declaration of Rights of the Massachusetts Constitution).

ensures that the parent's voice is effectively heard in the matter, which in turn helps ensure that the child is not unnecessarily removed from parental custody. The State also has an interest in conserving resources. Admittedly, it will cost the state to provide counsel for indigent parents in CHINS matters. Nonetheless, Mother only asks that counsel be provided when custody is at issue. This deprivation of a fundamental liberty interest outweighs the financial burden imposed on the State.

C. Equal protection requires that Mother receive court-appointed counsel because indigent parents receive court-appointed counsel in care and protection matters and Section 23(C) proceedings.

Massachusetts guarantees indigent parents the right to counsel when they are parties to care and protection matters and G.L. c. 119, § 23(C) proceedings. G.L. c 119, § 29. Because care and protection matters, G.L. c. 119, § 23(C) proceedings and CHINS matters deal with the same subject matter - loss of custody of a child to DSS -- equal protection demands that the same protection given to indigent parents in care and protection and G.L. c. 119, § 23(C) matters be given to indigent parents in CHINS matters. U.S. CONST. amend. XIV.

However, unless the group being treated differently is a suspect or quasi-suspect class, the classification is valid if it is rationally related to a proper (constitutionally

permissible or legitimate) governmental interest. McGowan v. Maryland, 366 U.S. 420 (1961). Rational basis analysis requires that an impartial lawmaker could reasonably believe that the classification would serve a legitimate public purpose that transcends the harm to the disadvantaged class. See Cote-Whitacre v. Dept. of Public Health, 446 Mass. 350, 367 (2006)(Spina, J. concurring)(citations and quotations omitted). Under this standard, there is no legitimate reason for giving indigent parents court-appointed counsel in care and protection matters and proceedings pursuant to G.L. c. 119, § 23(C) and not in CHINS matters when custody is at issue. The potential for an erroneous deprivation of a CHINS parent's right to his or her child is great and there is no legitimate public purpose to be served in denying the indigent CHINS parent appointed counsel when the indigent parent in a care and protection case or G.L. c. 119, § 23(C) proceeding is guaranteed counsel.

Parents face the same substantive due process deprivations in CHINS matters as in care and protection and G.L. c. 119, § 23(C) matters. Thus, they should have the same due process protections. The reason that indigent parents have a right to counsel in care and protection matters is that there is a chance that they could lose custody of their children. See Olivia, 53 Mass. App. Ct. at 673-74. Similarly, in a CHINS case, a parent

can lose custody of her child to DSS for successive six month periods without limitation as to the number of six month periods allowed. See G.L. c. 119, § 39G. Thus, the only difference between care and protection proceedings and CHINS proceedings in which custody has been transferred to DSS is that the loss of custody is nominally "temporary" in the CHINS proceeding. However, as already discussed, the temporary deprivation of custody can become *de facto* permanent, thus rendering this difference immaterial. Also, parents involved in temporary custody proceedings pursuant to G.L. c. 119, § 23(C) receive appointed counsel, so a distinction based upon the temporary nature of CHINS custody orders is an insupportable argument. Further, the Supreme Judicial Court has recognized that even a temporary out-of-home placement is a fundamental intrusion on liberty interests of children. See In the Matter of Angela, 445 Mass. 55, 62 (2005).

Living apart from a parent for six months is a significant portion of one's childhood. Although the out-of-home placement is not permanent, the time away from one's parent cannot be recovered. Id. at 62.

If a temporary out-of-home placement is a major deprivation for a CHINS child, a temporary loss of custody is also a major deprivation to the parent of a CHINS child.

Massachusetts courts have hinted that equal protection requires that care and protection matters and CHINS cases in

which custody is transferred to DSS be treated the same, stating that Massachusetts courts "have long recognized that when two or more statutes relate to the same subject matter, they should be construed as a harmonious whole, consistent with the legislative purpose." Custody of Lori, 444 Mass. at 319-20 (holding that when removing child from parent's custody before hearing evidence on issue of custody or allowing parent to defend against charge of unfitness, G. L. c. 119, § 23(C), requires the same protection of a 72-hour evidentiary hearing as is afforded under G. L. c. 119, § 24). All of the ways by which a parent can lose custody of his or her child to DSS under Chapter 119 of the General Laws should be construed as a whole with respect to a parent's right to appointed counsel. Because indigent parents who are parties to a care and protection cases are afforded court-appointed counsel, so too should indigent parents in CHINS cases when custody is at issue.

III. IF THIS COURT HOLDS THAT CHAPTER 119 OF THE GENERAL LAWS DOES NOT PROVIDE A PARENT WITH PARTY STATUS NOR THE RIGHT TO APPOINTED COUNSEL IN A CHINS PROCEEDING, THEN THIS COURT MUST HOLD THIS STATUTORY SCHEME TO BE UNCONSTITUTIONAL AS A VIOLATION OF THE RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

If the Court rules that CHINS provisions of G.L. c. 119, § 39E-39I, and the provisions of G.L. c. 119, § 29 do not provide for the party status of a parent and the right to appointed

counsel for an indigent parent in a CHINS proceeding, this Court should rule that these statutes deny Mother her procedural and substantive due process rights, as well as equal protection of the laws, under the State and Federal Constitutions and that these statutes are unconstitutional.

A. *The statutory scheme unconstitutionally denies Mother Procedural Due Process.*

The Petitioners acknowledge that the Government has the right to remove children from their parent's custody under the provisions of the CHINS statute in furtherance of the Commonwealth's "legitimate interest in protecting the welfare of children". See G.L. c. 119, § 39G; In the Matter of Gail, 417 Mass 321, 327 (1994). However, the CHINS statutory scheme and the provisions of G.L. c. 119, § 29 cannot survive a procedural due process challenge if such a removal can take place under circumstances where the deprivation of a parent's liberty interest in raising her child without state interference is altogether ignored, and no provision is made for a parent to be heard about this deprivation "at a meaningful time and in a meaningful manner". See Querubin v. Commonwealth, 440 Mass. 108, 117 (2003) quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Although Petitioners understand that this Court will begin this analysis with a presumption that the challenged statutes are constitutional, the Petitioners can meet their

"heavy burden" of demonstrating, beyond a reasonable doubt, that there are no conceivable grounds to support this legislation.

Cote-Whitacre v. Dept. of Public Health, 446 Mass. 350, 367 (2006) (Spina, J. concurring).

The concept of procedural due process is "flexible" and the features of the required hearing will be determined by the "nature of the case". See Roe v. Attorney General, 434 Mass. 418, 427 (2001); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). However, there is simply no conceivable way that "due process" in this Commonwealth and in this country can mean the taking away of a parent's custody of her child, even for a temporary period of time, without even acknowledging that the parent is suffering a substantial deprivation, without allowing that parent any right to be heard at all, and without giving an indigent parent appointed counsel. See Section II(B) above.

The only possible legislative objective in choosing not to provide appointed counsel for parents in CHINS cases is to save state resources in paying for this service. Such a consideration, when balanced against the fundamental right of a parent to custody of her child, can not conceivably be a legitimate ground to prop up the constitutionality of a G.L. c. 119 statutory scheme which shuts out parents in CHINS cases from

participation in court proceedings which result in the removal of their child into the custody of the Government. This Court must strike down a statutory scheme which allows such a result as unconstitutional.

B. The statutory scheme unconstitutionally denies Mother Substantive Due Process.

Substantive due process prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty," Aime v. Commonwealth, 414 Mass. 667, 673 (1993)(citations to federal authority omitted). Where a right deemed to be fundamental is involved, a court will engage in a "strict scrutiny" analysis and uphold only those statutes that are narrowly tailored to further a legitimate and compelling government interest. See Blixt v. Blixt, 437 Mass. 649, 655-656 (2002).

As discussed in Section II above, the right to custody of one's child is a fundamental and basic tenet of both our Federal and State Constitutions. See also M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). A CHINS proceeding implicates fundamental liberty interests. In the Matter of Angela, 445 Mass. 55, 65 (2005). A statutory scheme, such as the CHINS statutes at issue here, which allows a parent to lose custody of her child, even temporarily, without being afforded party status or appointed counsel to dispute such a custody transfer, offends the

conscience and any concept of ordered liberty. There is no legitimate or compelling government interest in refusing to provide appointed counsel for or confer party status on parents faced with losing custody of their children in a CHINS proceeding. Should a parent be afforded these rights, this will not impede the Commonwealth's legitimate interest in protecting the welfare of children. In fact, such parental participation would only aid the Juvenile Court in reaching a correct and fair custody determination. The CHINS statutes at issue which fail to provide for the party status of a parent, her right to be heard, and her right to be appointed counsel if she is indigent cannot survive this Court's strict scrutiny.

C. The statutes are unconstitutional because they do not provide for equal protection of the laws.

The Fourteenth Amendment to the Constitution of the United States provides for equal protection of the laws. See United States Constitution, Fourteenth Amendment. In addition, "absolute equality before the law" and the assurance that laws will apply equally to persons in similar situations are fundamental principles of the Massachusetts state constitution. See Goodridge v. Dept. of Public Health, 440 Mass. 309, 329 (2003); arts. 1, as amended by art. 106 of the Amendments, 6, 7, and 10 of the Massachusetts Declaration of Rights. Although

review of an equal protection claim under the Massachusetts Constitution is generally the same as a review of a Federal equal protection claim, the Massachusetts constitution is more protective of individual liberty and equality than the federal Constitution. See Cote-Whitacre v. Dept. of Public Health, 446 Mass. 350, 376 (2004)(Spina, J. concurring).

If the provisions of G.L. c. 119 provide party status and appointed counsel for indigent parents in care and protection cases and cases where DSS receives custody of a child pursuant to G.L. c. 119, § 23(C), but provides neither of these protections for parents in CHINS cases, such a classification must serve a legitimate public purpose that transcends the harm to the disadvantaged class in order to survive equal protection review. See Cote-Whitacre, 446 Mass. at 367. There is no conceivable public purpose that would support such a distinction. The loss of custody in a CHINS case is nominally temporary, although there is no such limitation in the statute; successive six-month periods of custody transfer without end are possible. See G.L. c. 119, § 39G; Section II(C) above. The CHINS judge, just as a judge in a care and protection proceeding or G.L. c. 119, § 23(C) case must evaluate the parent's and family's resources in order to make a custody decision. See Section II(A) above. A parent's participation as a party and

with appointed counsel in a CHINS case will not impede that proceeding; in fact such participation can only aid the Juvenile Court judge in making the right decision. The bottom line here is, if the Government is willing to pay for a parent's appointed counsel in a care and protection or G.L. c. 119, § 23(C) case, it must equally be willing to pay for it in a CHINS proceeding before taking custody of a child. There is no conceivable reason to treat parents so similarly situated, so differently. These statutes cannot survive equal protection rational basis scrutiny.

CONCLUSION

Because Mother has a statutory and constitutional right to appointed counsel and party status in this CHINS case, this Honorable Court should vacate the Juvenile Court's denial of Mother's motion to intervene and for appointed counsel and should enter an order appointing counsel for the mother.

Respectfully submitted,

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