

FILED
SUPREME COURT
STATE OF WASHINGTON
2/16/2023 8:00 AM
BY ERIN L. LENNON
CLERK

NO. 101643-3

SUPREME COURT OF THE STATE OF WASHINGTON

In re Guardianship of G.M.O.

**RESPONSE TO PETITION FOR DISCRETIONARY
REVIEW**

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I. INTRODUCTION

G.M.O. was removed from his parents' care due to their substance abuse, ongoing domestic violence, lack of parenting skills, and lack of safe and stable housing. Despite approximately two years of services, the parents failed to remedy their parental deficiencies and reunify with G.M.O. The trial court found the Department of Children, Youth, and Families (DCYF) met its burden under RCW 13.36.040 to establish a guardianship and appointed G.M.O.'s long-time relative placement as guardian.

The Court of Appeals affirmed the guardianship order in an unpublished decision, holding that DCYF met its burden to provide housing assistance where the father, F.O., received housing assistance from other agencies and secured housing by the end of trial. Even with additional housing assistance, there was little likelihood F.O.'s deficiencies would improve and conditions would change in the near future.

After balancing the *Mathews* factors and considering cultural bias issues raised by F.O., the Court determined there

was no procedural due process violation when the trial court did not sua sponte appoint counsel to G.M.O. The Court determined that neither the guardian ad litem (GAL) statutes nor Rules of Professional Conduct (RPCs) prohibited a GAL from serving as a witness and advocate. The guardianship proceeding was fair, impartial, and neutral.

F.O. presents no constitutional questions or issues of substantial public interest requiring this Court's review. The trial court and Court of Appeals applied this Court's clear precedent regarding the appointment of counsel for children. F.O. failed to remedy his ongoing substance abuse and domestic violence issues, necessitating a guardianship for the child. This Court should deny review.

II. STATEMENT OF THE ISSUES

1. Whether DCYF met its obligations to provide all necessary services where it informed the father of housing resources, the father actually obtained housing, and, at the time of trial, resolving the father's housing issue alone would not have rendered reunification with G.M.O. in the near future likely?

2. Where the GAL advocated for the child’s best interest and advised the court of the child’s expressed wishes, whether procedural due process and a balancing of the *Mathews* factors required the trial court to sua sponte appoint an attorney for G.M.O.?
3. Whether the RPCs and GAL statutes should be construed to prohibit a court-appointed special advocate or GAL from serving as a witness and legal advocate in a dependency proceeding?

III. STATEMENT OF THE CASE

F.O. and H.B. are the parents of G.M.O. CP 39 (Finding of Fact (FF) 2.5, 2.6).¹ G.M.O was born in February 2011. CP 38 (FF 2.4). F.O. and H.B. were together for almost 14 years, but their relationship was a “rocky road,” frequently requiring intervention by law enforcement. 7/8/21RP 245-252.²

F.O. began using methamphetamine in 2018, ultimately leading to a daily habit. 7/8/21RP 254-255. His longest period of sobriety was four months, and his attempts to stop using were

¹ Unless otherwise noted, the father has not assigned error to the findings of fact cited herein. They must be accepted as verities for purposes of this appeal. *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).

² The RP citations include the date and volume for clarity.

unsuccessful. 7/8/21RP 256-257. Prior to G.M.O. coming into care, the family had been evicted three times for failure to pay rent. 7/8/21RP 221-222.

In February 2019, law enforcement arrested F.O. after he kicked in the door to his residence, yelled at, and threatened H.B. 7/8/21RP 247-248; Ex 57. A few months later, with G.M.O. in the vehicle, F.O. was pulled over, and arrested for possession of drug paraphernalia and methamphetamine. 7/8/21RP 126-128. F.O. admitted using methamphetamine three hours prior and had a warrant for his arrest related to the February incident. 7/8/21RP 125-128. Law enforcement made a referral to DCYF. 7/8/21RP 126.

In June 2019, DCYF filed a dependency petition and the court ordered that then eight-year-old G.M.O. be removed from his parents' care based on his parents' domestic violence issues, untreated, ongoing substance abuse, G.M.O.'s inconsistent school attendance, and unsafe and unstable housing. CP 39, 40 (FF 2.8.6); 7/8/21RP 136. The parents agreed to out-of-home

placement for G.M.O. Ex 2. Later that month, F.O. pleaded guilty to domestic violence assault against H.B., and a court entered a no contact order (NCO) protecting H.B. from F.O. 7/8/21RP 212; Ex 57, 58. F.O. violated the NCO three times and served over 60 days in jail. Ex 53-56, 59, 60.

In August 2019, F.O. stipulated to dependency. Ex 4. The court placed G.M.O. with his maternal great uncle, Lonnie (“Uncle Lonnie”). Ex 4 at 6; 7/8/21RP 138. The court ordered F.O. to engage in a domestic violence (DV) assessment, parenting classes, a substance use evaluation, random urinalysis (UA) testing, and to follow evaluation recommendations. CP 40 (FF 2.8.9(v)). F.O. agreed that the services were necessary and appropriate. Ex 4 at 2.

DCYF caseworker Victoria Metcalf made repeated attempts to engage F.O.; however, he infrequently responded and missed scheduled meetings. 7/8/21RP 142. When they met, Metcalf offered services and discussed housing resources and visitation. 7/8/21RP 142-144, 170-172. In September 2019,

Metcalf referred F.O. for a substance use evaluation, which he completed. Ex 29. The provider recommended intensive outpatient treatment (IOP). 7/7/21RP 46; Ex 41. F.O. never fully engaged or made progress in IOP. 7/7/21RP 41, 60, 61. In the spring and summer of 2020, Metcalf referred F.O. to parenting classes and to two DV assessments. 7/8/21RP 161, 170; Ex 32, 34. F.O. never engaged in these services. CP 41 (FF 2.8.9(x)); CP 42 (FF 2.8.9(xxii-xxiii)).

In October 2020, DCYF filed a Guardianship Petition, proposing Uncle Lonnie as guardian. CP 434-437. That month, F.O. completed another substance use evaluation, which recommended inpatient treatment. Ex 43, 44. F.O. did not enter treatment. 7/8/21RP 268.

In January 2021, F.O. completed a fourth drug and alcohol evaluation. Ex 48. He admitted to daily methamphetamine use. Ex 48 at 3. The evaluator diagnosed F.O. with moderate to severe substance use disorder and recommended inpatient treatment. CP 41 (FF 2.8.9(xi)), 43 (FF 2.8.9(xix)).

In February 2021, 20 months after G.M.O.'s removal, F.O. entered 30-day inpatient treatment. Ex 50 at 1. He completed inpatient treatment, transferred to IOP, and secured housing with the help of his Snohomish County Sheriff's Office caseworker. CP 42 (FF 2.8.9 (xiv)); 7/8/21RP 225-229. However, F.O. lost his housing when he did not follow the sober house rules. CP 42 (FF 2.8.9 (xiv)). F.O. traveled to California for a time and did not engage in any services. 7/8/21RP 230-231; CP 41 (FF 2.8.9 (xx-xxiii)).

DCYF referred F.O. to a DV assessment in March 2021, but he did not attend. Ex 37; CP 42 (FF 2.8.9(xxiii)). Caseworker Renee Boyd unsuccessfully attempted to engage F.O. in case planning and services. Ex 61, 62, 69; 9/16/21RP 128-130. In June, F.O. told Boyd he was not willing to work with DCYF, denied the need for DV courses, and did not want to participate in substance abuse treatment or provide a UA. Ex 61 at 4.

The guardianship fact-finding began in July 2021, was heard over four months, and the court entered final orders in November 2021. CP 37-48; RP 108-223.

At the start of trial, F.O. stated he knew he was not a viable option to provide care, but sought more time. 7/8/21RP 210-211. F.O. acknowledged substance use two to three weeks prior to the trial. 7/8/21RP 256. The mother, H.B., agreed to the guardianship. CP 39 (FF 2.8.7).

Metcalf testified she discussed housing resources with F.O., including contacting a housing navigator through 211,³ Homeward House,⁴ Housing Hope,⁵ and sober housing, and she offered mental health counseling, transportation assistance, and other services. 7/8/21RP 144, 169-171, 180, 187, 193, 223.

³ 211 is a centralized intake line for accessing public resources in Washington. *See* <https://wa211.org/about-2-1-1/> (last visited Feb. 9, 2023).

⁴ Homeward House helps connect parents to community resources such as housing resources. 7/8/21RP 171.

⁵ Housing Hope is a housing assistance program. *See* <https://www.housinghope.org/about> (last visited Feb. 9, 2023).

Metcalf testified that during the 15 months she was assigned the case, F.O. failed to address his parental deficiencies. 7/8/21RP 188. Metcalf testified guardianship was in G.M.O.'s best interest as it would provide stability, while allowing G.M.O. to maintain contact with his parents. 7/8/21RP 184-185.

F.O. confirmed DCYF had provided him with housing resources that he contacted. 7/8/21RP 223. F.O. testified he signed up with the Housing and Essential Needs (HEN)⁶ program, 211, Homeward House, and Housing Hope, and used them regularly. 7/8/21RP 223-224, 233-234. F.O. described the application process as "really simple," he was referred other housing resources, and Homeward House provided him a mentor. 7/8/21RP 232-234. Section 8 housing had over a year waitlist and F.O. had difficulty finding housing because of his

⁶ The HEN program provides temporary rental assistance and essential needs to individuals through Department of Social and Health Services. *See* <https://snohomishcountywa.gov/5247/Direct-Services-Programs> (last visited Feb. 9, 2023).

previous evictions. 7/8/21RP 234. Although Homeward House told F.O. to maintain contact and keep up with his housing application, he failed to contact them for several months. 7/8/21RP 233-234.

During the four months of trial, DCYF continued to offer services. Boyd referred F.O. to another DV assessment and multiple UAs. Ex 69 at 10-14; Ex 71, 73. F.O. did not attend either. CP 43 (FF 2.8.9(xxi), (xxiii)). F.O. failed to engage in DV classes ordered in his criminal case and was found to have violated probation in August 2021. Ex 76.

Mid-trial, F.O. testified he now had housing, secured through an informal agreement with the owner, where G.M.O. could reside, although the house was not yet ready for G.M.O. 9/16/21RP 62, 64, 72, 96, 103-105, 113. At the time, F.O. was neither engaged in substance abuse treatment, nor did he believe he needed any. 9/16/21RP 38, 41. F.O. started a weekly, six-month DV program required in his criminal matter, but only

completed two classes and was found in violation of probation. 9/16/21RP 35, 101; Ex 77.

By the end of trial, F.O. showed he was looking for housing again and was working with the YWCA Shelter Plus Care housing program⁷ and reconnected with Homeward House. 10/29/21 Vol. 1 RP 48-49, 58. He was expected to receive a housing voucher and housing within the next 90 days. Ex 78; 10/29/21 Vol. 1 RP 53.

Boyd assessed that F.O.'s primary issues were substance abuse and domestic violence. 10/29/21 Vol. 3 RP 183-184. She estimated that it would take nine months to a year for F.O. to make sufficient progress before DCYF could recommend returning G.M.O. to his care. 10/29/21 Vol. 3 RP 184. Boyd testified it was not in G.M.O.'s best interest to wait considering F.O.'s lack of service engagement during the 28-month

⁷ Shelter Plus Care is a housing voucher program run by the YWCA that houses almost 400 disabled individuals experiencing chronic homelessness. 10/29/21 Vol. 1 RP 48, 54

dependency. 10/29/31 Vol. 3 RP 184-185. A guardianship was in G.M.O.'s best interest as it would provide much-needed permanency, while allowing him to maintain a relationship with his parents. 10/29/21 Vol. 3 RP 178.

The GAL provided a written report containing the results of her investigation and her recommendation. Ex 67. F.O.'s counsel cross-examined the GAL regarding her report and investigation without objection. 10/29/21 Vol. 1 RP 33.

For her investigation, the GAL reviewed DCYF's file, reached out to the parties, G.M.O., and the placement, and participated in meetings and hearings. 10/29/21 Vol. 1 RP 34-35. She met with F.O. at jail to discuss services and community resources, including Homeward House, YWCA programs, and parent allies, to help F.O. navigate the dependency process. 10/29/21 Vol. 1 RP 42-43. The GAL worked on facilitating video visits and finding a visit monitor. 10/29/21 Vol 1. RP 39-40. She continued to reach out to F.O., through his attorney, to request

updates and to see the residence F.O. secured in September 2021.
10/29/21 Vol. 1 RP 35.

The GAL concluded it was in G.M.O.'s best interest to establish a guardianship. 10/29/21 Vol. 1 RP 36. The GAL reported G.M.O. wanted to return to his parents. Ex 67 at 2. She testified that the case had substantially impacted G.M.O. and he needed support through counseling to process his parents' failure to engage in services. 10/29/21 Vol. 1 RP 37. The GAL stated G.M.O. was prepared to reside with Uncle Lonnie long-term, but needed to have a relationship with his parents. 10/29/21 Vol. 1 RP 38.

The GAL agreed with DCYF's assessment that F.O. was still nine months to one year away from a possible reunification, based on F.O.'s inconsistent engagement in services. 10/29/21 Vol. 1 RP 46.

The trial court found that DCYF had exceeded its burden to establish a Title 13 guardianship for G.M.O. CP 39 (FF 2.8.2)(challenged) CP 45 (FF 2.8.11) (challenged); 11/3/21RP

219. F.O.'s ongoing parenting deficiencies included substance abuse issues, parenting, domestic violence, and lack of safe and stable housing. CP 44 (FF 2.8.9(xxix)) (challenged). There was little likelihood conditions would change in the near future for G.M.O. CP 44 (FF 2.8.9(xxviii)). The court found it was in G.M.O.'s best interest to appoint Uncle Lonnie as G.M.O.'s guardian. CP 39 (FF 2.7), 46.

F.O. appealed, and the Court of Appeals affirmed in an unpublished opinion. This motion followed.

IV. ARGUMENT

F.O. seeks discretionary review under RAP 13.4(b)(3) and (4). He has not set forth a valid basis for review and his motion should be denied.

A. DCYF Met Its Statutory Burden To Offer All Necessary Services Capable Of Correcting F.O.'S Deficiencies Within The Foreseeable Future

Guardianship is considered a statutory alternative to the termination of parental rights. *In re Welfare of A.W.*, 182 Wn.2d 689, 700, 344 P.3d 1186 (2015). Unlike with termination, parents

retain important rights following entry of a guardianship order, including visitation and the right to terminate the guardianship. *A.W.*, 182 Wn.2d at 700, 705, 710. To establish a guardianship, the court must find by a preponderance of the evidence that guardianship is in the child's best. RCW 13.36.040(1); *A.W.*, 182 Wn.2d at 698–700, 710-711. In addition, DCYF must satisfy the elements in RCW 13.36.040(2)(c)(i)-(vi), including establishing that all necessary services capable of remedying the parental deficiencies within the foreseeable future were offered or provided. DCYF met this requirement.

First, F.O. received housing assistance. F.O. obtained housing during the dependency, made no progress towards reunification notwithstanding that housing, and lost the housing he had based on his own actions entirely unrelated to poverty. Second, the record demonstrates at the conclusion of trial F.O. was expected to obtain housing within 90 days, but he nonetheless would not be reunified with G.M.O. within the foreseeable future, due to F.O.'s active substance use and

unresolved domestic violence issues. Finally, to the extent F.O. argues that DCYF should expend more resources towards housing, this is an argument best addressed to the Legislature, which has yet to fund the related statutory provision.

1. F.O. received housing assistance

At a hearing on a guardianship petition, DCYF has to prove that all court-ordered and necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided. RCW 13.36.040(2)(c)(iv). In determining if a particular service has been offered or provided, “the court may consider any service received, from whatever source, bearing on the potential correction of parental deficiencies.” *In re Dependency of D.A.*, 124 Wn. App. 644, 651, 652, 102 P.3d 847 (2004). Where housing assistance is a necessary service, DCYF must “[a]t minimum ... provide a parent with a list of referral agencies that provide those services.” *Id.* at 651. Here, DCYF met its statutory obligation.

DCYF discussed housing resources with F.O., which he contacted. 7/8/21RP 144, 171, 193, 223. F.O. accessed multiple housing resources including HEN, 211, Homeward House, and Housing Hope. 7/8/21RP 223-224; 232-234. F.O. found securing housing difficult because of the evictions on his record, not because of the application process, which he describe as “really simple.” 7/8/21RP 232-234. F.O. worked with a Snohomish County Sheriff’s Office caseworker to secure housing. 7/8/21RP 225-229. The GAL provided F.O. with a list of community resources. 10/29/21RP 42-43.

It is uncontested F.O. had secured sober housing when he completed inpatient treatment in March 2021, but lost the housing when he did not follow house rules. CP 42 (FF 2.8.9(xiv)). At trial, F.O. established he would obtain housing within 90 days. 10/29/21 Vol. 1 RP 53; Ex 78. F.O. argued that housing was no longer a barrier for him at the end of the trial. Ex 78; 10/29/21 Vol. 1 RP 81-82; 87. F.O. was offered adequate

housing assistance, and DCYF met its burden under RCW 13.36.140.

2. Housing assistance was not capable of reunifying G.M.O. with F.O. in the foreseeable future

The Court of Appeals correctly held that even if DCYF had provided F.O. with additional housing services, F.O.’s other parental deficiencies remained, and there was little likelihood that conditions would change in the near future. *In re Guardianship of G.M.O.*, No. 83506-8-I, 2022 WL 17829981 at *3 (Wash. Ct. App. Dec. 19, 2022) (unpublished). “Even in instances where the Department inexcusably fails to offer all necessary services, termination may still be appropriate if the service would not remedy the parent’s deficiencies within the foreseeable future.” *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 486, 379 P.3d 75 (2016).

F.O. did not assign error to the court’s finding that there was little likelihood that conditions would change in the near future despite showing he was about to obtain housing. Unchallenged findings must be accepted as verities for purposes

of this appeal. *A.W.*, 182 Wn.2d at 711. F.O. concedes that housing assistance was not capable of remedying his parental deficiencies in G.M.O.'s foreseeable future. This Court should decline review.

3. The need for additional housing assistance should be directed at the Legislature

DCYF has an obligation to provide all services ordered by the permanency plan as well as all necessary services capable of correcting the parental deficiencies within the foreseeable future. *K.M.M.*, 186 Wn.2d at 479. For the purposes of RCW 13.34, housing assistance is not considered a remedial service or family reunification service. RCW 13.34.030(15). However, if homelessness is a primary factor in a child's out-of-home placement, the dependency court may order DCYF to provide housing assistance. RCW 13.34.138(2)(c)(i); *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 925, 949 P.2d 1291 (1997). Housing assistance is subject to the availability of funds. RCW 13.34.138(4). "Nothing in this chapter shall be construed ... to create judicial authority

to order the provision of such assistance to any person ... if the assistance or funding are unavailable or the child or family are not eligible for such assistance.” *Id.* The Legislature has yet to fund this provision.

Even if funds were available, F.O. never progressed in his remedial services so that the dependency court could find housing was a primary factor preventing reunification. CP 43 (FF 2.8.9(xx-xxiv)); Ex 6-10. Nonetheless, the Court of Appeals held that housing was a necessary service because F.O.’s homelessness was a parental deficiency that could have precluded reunification. *G.M.O.*, 2022 WL 17829981, at *2. The Court concluded housing resources were provided to F.O. *Id.* at *3. To the extent F.O. argues DCYF should expend more resources on providing housing assistance, this argument is best addressed to the Legislature. As such, this Court should decline review.

B. Procedural Due Process Does Not Require the Automatic Appointment of Counsel to Children When

Their Stated Wishes Conflict With The GAL's Best Interest Assessment

Neither this Court's precedent, nor procedural due process, requires that children automatically be appointed attorneys when the GAL's best interest assessment conflicts with the child's stated wishes. The Court does not need to address these settled legal issues. Review should be denied.

1. G.M.O. was appointed a GAL consistent with statutory requirements

RCW 13.34.100(1) requires appointment of a GAL for each child who is the subject of a dependency action, unless certain exceptions apply. GALs can either be compensated guardians ad litem or volunteer court-appointed special advocates (CASA). RCW 13.34.030(12); RCW 13.34.102. Snohomish County utilizes both. Attorney Guardians ad Litem (AGALs) are appointed by the court. SCLGALR 5. CASAs are

recruited and overseen by the Snohomish County CASA Program.⁸

Both AGALs and CASAs are appointed to investigate and represent the best interest of a child, but representation of best interest may be inconsistent with the child's stated wishes, and courts may consider and weigh the recommendations with all of the parties' recommendations. RCW 13.34.030(12); RCW 13.34.105(1); GALR 2(a). The GAL must also report the child's expressed views or positions. RCW 13.34.105(1)(b). Here,, the CASA Program appointed Ann Brice, an attorney, as a volunteer CASA on the dependency matter in September 2019. CP 419-420.

2. G.M.O.'s procedural due process rights were not violated when trial court did not sua sponte appoint him counsel

Neither article I, section 3 of the Washington Constitution nor the Fourteenth Amendment to the United States Constitution

⁸ See CASA Program, <https://snohomishcountywa.gov/881/CASA-Program> (last visited February 2, 2023).

compel the appointment of counsel for all children in dependency proceedings. *In re Dependency of E.H.*, 191 Wn.2d 872, 887, 894, 427 P.3d 587 (2018); *In re Dependency of M.S.R.*, 174 Wn.2d 1, 14-15, 21, 271 P.3d 234 (2012). Rather, determination of whether there is a constitutional right to court-appointed counsel in dependency and termination matters should be determined on a case-by-case basis by applying the test identified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *E.H.*, 191 Wn.2d at 894; *M.S.R.*, 174 Wn.2d at 22. Under *Mathews*, the court considers “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” 424 U.S. at 335. The trial judge should apply the *Mathews* factors to each child’s individual circumstances to determine if the statute and due process require appointment of counsel. *E.H.*, 191 Wn.2d at 894; *M.S.R.*, 174 Wn.2d at 22.

Here, the private interest at stake includes the parents’ fundamental liberty interest in the care and custody of their child.

A.W., 182 Wn.2d at 702. A guardianship does not infringe on that right as significantly as a termination of parental rights *Id.* at 704-05. Children similarly have a strong private interest not only in an accurate decision, but also in speedy and timely permanency. RCW 13.34.020; *In re Welfare of M.B.*, 195 Wn.2d 859, 869, 467 P.3d 969 (2020). The age of the child and the child’s ability to express a position are relevant considerations. *M.S.R.*, 174 Wn.2d at 21.

The second *Mathews* factor considers the government interest. 424 U.S. at 335. The State’s primary interest is providing for the health and safety of children. *A.W.*, 182 Wn.2d at 709. “The state has a compelling interest in both the welfare of the child, and ‘in an accurate and just decision’ in the dependency and termination proceedings.” *M.S.R.*, 174 Wn.2d at 19 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)).

The third *Mathews* factor considers whether appointment of counsel is needed to reduce the risk of erroneous deprivation.

424 U.S. at 335. This factor depends on the legal and factual complexity of the situation and on the parties' ability to present their case. *M.S.R.*, 174 Wn.2d at 19. Guardianships are an inherently temporary intrusion into the parent and child relationship and are reviewable, modifiable, and terminable, as compared to termination of parental rights. *A.W.*, 182 Wn.2d at 705.

Here, the risk of erroneous deprivation is mitigated by several other procedural safeguards. Parents are entitled to notice, to counsel, to discovery, to present and cross-examine witnesses, and cases are heard by an unbiased fact finder. RCW 13.36.040(1); RCW 13.34.090(1). A guardianship is established only if the child has been found dependent, a dispositional order has been entered, the child has been out of the home for at least six consecutive months, parents have been offered or provided all necessary services, and the guardianship is judicially determined to be in the child's best interest. *A.W.*, 182 Wn.2d at 708-709; RCW 13.36.040(2).

The only matter in dispute in the guardianship trial is whether to grant the guardianship petition. F.O. was represented by court-appointed counsel. F.O. had the opportunity to conduct discovery, martial evidence, present witnesses, cross-examine witnesses, call experts, and present the opinion of the child. The GAL shared G.M.O.'s stated interest in both her report and testimony. Ex 67 at 2; 10/29/21 Vol. 1 RP 45. As the Court of Appeals correctly determined, no complex issues were raised at the trial by either DCYF or F.O. *G.M.O.*, 2022 WL 17829981, at *6. F.O.'s attorney's advocacy for reunification was consistent with G.M.O.'s stated interest, mitigating against a risk of error here.

F.O. contends the GAL's involvement increased the risk of error because she did not share the same cultural background as F.O. and G.M.O. Mot. at 25. Certainly it is important for the fact-finder to take into account whether any cultural competency issues impaired a GAL's ability to discern a child's best interest. "We know that like all human beings, judges and social workers

hold biases, and we know that families of Color are disproportionately impacted by child welfare proceedings. Therefore, actors in child welfare proceedings must be vigilant in preventing bias from interfering in their decisionmaking.” *In re Dependency of K.W.*, 199 Wn.2d 131, 156, 504 P.3d 207 (2022).

Here, the risk of error was mitigated by the other safeguards in place and the court’s ability to weigh cultural differences in determining what weight to give the GAL’s opinion. The trial court is not bound by the GAL’s report or recommendation, but “instead must make its own assessment of the child’s best interest.” *In re Marriage of Swanson*, 88 Wn. App. 128, 138, 944 P.2d 6 (1997).

On appeal F.O. points to the GAL’s written report that included the anglicized nickname for G.M.O. to demonstrate possible cultural bias. He did not raise the issue of the GAL’s written anglicization of G.M.O.’s nickname at trial, and when asked at trial if the child went by the nickname "Joe" the father

confirmed that he did, but clarified that it was spelled "G-I-O." 7/8/21RP 119. F.O. never raised the issue of the GAL's cultural competence in either the dependency or guardianship matter. He did not ask to have the GAL removed from either matter. The GAL conducted an independent investigation and strongly advocated for F.O.'s rights not be terminated so that G.M.O. could maintain a relationship with F.O. and stay with Uncle Lonnie. Ex 67; 10/29/21 Vol 1 RP 36, 38. The GAL also advised the court of G.M.O.'s expressed wish to return to his parents. Ex 67 at 2.

The court heard from G.M.O.'s mother and DCYF caseworkers that establishing guardianship served G.M.O.'s best interest. 7/7/21RP 9; 7/8/21RP 184-185; 10/29/21 Vol. 3 RP 178-179. After weighing the evidence, the court agreed.

The balancing of the *Mathews* factors supports the Court of Appeals' determination that the procedures used were adequate to comport with due process. This Court should deny review.

C. The Rules of Professional Conduct Do Not Prohibit GALs From Serving As Both Advocate and Witness

Neither the RPCs nor the statutes governing GALs prevent a GAL from both serving as a factual representative and acting as their own legal counsel. This dual role is plainly authorized by RCW 13.34.100(5) and 13.34.105(1). F.O. fails to show the guardianship proceeding was not fair, impartial, or neutral. F.O. presents no basis for this Court's review.

Federal law requires that a GAL be appointed to a dependency case in order to make recommendations to the court concerning the best interests of the child. 42 U.S.C. § 5106a(b)(2)(A)(xiii)(I) , (II). The GAL's role and duties are clearly outlined in RCW 13.34.105 and Guardian Ad Litem Rules (GALR). The RPCs serve as safeguards to uphold the appearance of fairness and to avoid any conflicts of interest.

F.O. cannot point to any duty listed in RCW 13.34.105 or GALRs that the GAL violated during the dependency or guardianship proceedings. A GAL is required to make recommendations regarding the best interest of the child.

RCW 13.34.105(1)(e). The GAL must report to the court any views or positions expressed by the child. RCW 13.34.105(b). GALs may file pleadings, engage in and respond to discovery, note and request hearings, introduce exhibits, examine witnesses, bring motions or take positions on other parties' motions. GALR 4(h)(1)-(3); RCW 13.34.100(5). GALs are to represent and advocate for the best interests of the child. RCW 13.34.105(f).

F.O.'s reliance on RPC 3.7 is misplaced. The rule provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. RPC 3.7. The purpose of RPC 3.7 is to avoid the trier of fact from being confused or misled by a lawyer serving as both advocate and witness. *See* RPC 3.7 Comment [1]. F.O. cannot point to anything in the record or the court's findings that show the trial judge was confused or misled by the GAL's role in the case.

F.O. also fails to show a basis for reversal. If an RPC is violated, there is only a public disciplinary remedy and not a private remedy. *See Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830

P.2d 646 (1992). F.O.'s remedy for any RPC violations would be through a conduct grievance, not reversal of the guardianship order.

Finally, F.O. received a fair guardianship trial. A basic requirement of due process is the right to a fair trial in a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). As the Court of Appeals correctly held, F.O. must show actual or potential bias when asserting a violation of the appearance of fairness, which F.O. cannot do. *G.M.O.*, 2022 WL 17829981, at *8. Therefore, this Court should decline review.

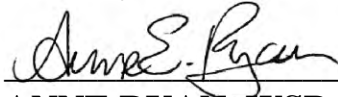
V. CONCLUSION

F.O. fails to satisfy his burden under RAP 13.4(b). This Court should deny review.

This document contains 4,994 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of
February, 2023.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Anne E. Ryan", written over a horizontal line.

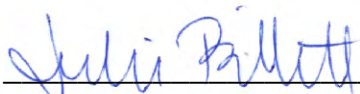
ANNE RYAN, WSBA #46882
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the State of Washington that on the below date the original Response to Petition for Discretionary Review to which this Declaration is attached, was filed with the Supreme Court of Washington through the Court's online filing system. An electronic copy was delivered to all parties of record through the filing portal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of February, 2023, at Everett,
Washington.



Julie Billett
Paralegal

ATTORNEY GENERAL'S OFFICE - EVERETT

February 16, 2023 - 5:09 AM

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