Supreme Court No. 101643-3
Court of Appeals No. 83506-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

The Matter of the Guardianship of G.M.O.

Motion for Discretionary Review

treated as a Petition for Review

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Pursuant to RAP 18.13A, 13.3(e) and 13.5A, Mr. O., the father of G.M.O., requests review by this Court of the Court of Appeals decision affirming the order of guardianship, a copy of which is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Poverty, and particularly homelessness, are the result of larger systems of social and economic inequality that individual parents have difficulty surmounting on their own. Yet the Court of Appeals requires the Department do nothing to address a parent's homelessness other than provide a list of overburdened housing resources, even when homelessness is a main reason for government intervention. This Court should accept review and

require the Department do more to assist parents overcome economic barriers to reunification. RAP 13.4(b)(3)-(4).

2. The guardian ad item (GAL) advocated for her belief about ten-year-old G.M.O.'s best interests, but this did not reflect G.M.O.'s stated desire to return to his father. Instead, the GAL advocated against reunification by aligning herself with the Department. This Court should accept review and hold that due process and a balancing of the *Mathews*[1] factors require the appointment of counsel when a child's expressed wishes are counteracted by the GAL's

[1] *Mathews v. Eldridge*, 424 U.S. 319, 320, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

advocacy for the child's purported best interests. RAP 13.4(b)(3)-(4).

3. The guardian ad litem statutes allow a GAL to both investigate, present evidence and advocate for a child's best interest. When the GAL is also an attorney, these statutes must be construed to prevent the GAL from serving as both witness and legal advocate in the dependency trial because this creates a conflict under the Rules of Professional Conduct (RPC) and violates the appearance of fairness and due process. RAP 13.4(b)(3)-(4).

C. STATEMENT OF THE CASE

Mr. O. raised G.M.O. as a loving father. 9/16/21 RP 60. But in June 2019, Mr. O. was stopped by law enforcement for driving under the influence. 10/29/21 RP 7. His eight-year-old son G.M.O. was unrestrained in the car. 10/29/21 RP 7. The Department became

involved based on its concerns about the parents' substance abuse, "unsafe and unstable housing," G.M.O.'s lack of regular school attendance, and "allegations of domestic violence between the mother and the father." RP 7/8/21 RP 136.

Mr. O. and G.M.O.'s mother separated. 9/16/21 RP 83. The Department placed G.M.O. in foster care. Ex. 67, p.4/8. Later, he was placed with his maternal great-uncle. He stayed in this family placement for the remainder of the dependency. *Id.*

The court found G.M.O. dependent on the basis there was no parent capable of adequately caring for him under RCW 13.34.030(6)(c). Ex. 4, p. 3. The Department required Mr. O. complete a drug and alcohol evaluation, random urinalysis testing, parenting classes, and a domestic violence assessment. 7/8/21 RP 147.

1. Mr. O. lives in his car throughout the dependency but the Department does not assist him to obtain housing.

Mr. O. was evicted around the time the Department removed G.M.O. from his care. 9/16/21 RP 60. Mr. O. slept in his car the entire two and a half years of the dependency. 9/16/21 RP 111. He had a sedan, so he could not lay down and sleep comfortably. 9/16/21 RP 111.

Mr. O. was exhausted from sleeping in his car; anytime he got into a "comfortable couch or a chair," he would "dose [sic] off for a second." 9/16/21 RP 111. The treatment provider at Mr. O.'s in-patient program noted that "he was excessively tired from fatigue when he entered." 7/7/21 RP 107. It was also observed that Mr. O. dozed off during an intake for MRT, though not during the class. RP 10/29/21 RP 67. The social worker and the GAL faulted Mr. O. for dozing off at times

during visits with his son. 10/29/21 RP 178; 9/16/21 RP 111-12.

By trial, Mr. O.'s homelessness was identified as the primary barrier to Mr. O. reunifying with his son. 7/8/21 RP 171; 10/29/21 RP 183. The Department was negligent in this critical area. One social worker, Ms. Metcalf, claimed the housing "service" she offered was telling Mr. O. about sober housing for parents and informing him of other generic resources such as the "211 line." 7/8/21 RP 171, 192-93. The Department offered no direct assistance to Mr. O. in filing forms or attempting to connect him to housing resources. 7/8/21 RP 193. Ms. Metcalf was unaware if Mr. O. reached out to any housing services. 7/8/21 RP 171.

Another social worker, Ms. Boyd, did not deem Mr. O.'s lack of housing to be a deficiency which required her to offer a service. 9/16/21 RP 131. She was

unaware of the Department ever providing Mr. O. with a list of housing resources. 10/29/21 RP 172. None of the Department's service letters contained any housing referrals. *See* ex. 28, 31. 33.

Mr. O. "signed up for at least three or four" housing programs on his own. 7/8/21 RP 223. But he was told he would have to wait over a year to receive housing assistance. 7/8/21 RP 224. Ms. Boyd learned Mr. O. was finally receiving housing assistance when Homeward House contacted her around the time of trial to inform her they were providing Mr. O. housing. 10/29/21 RP 172.

The Department required Mr. O. complete a number of other services while he was living out of his car, but he was not able to engage. He attended an in-patient treatment program but did not follow up. FF 2.8.9(xii)-(xiii).

Mr. O. disputed that the invited no-contact order violations he had with G.M.O.'s mother meant he was a domestic violence abuser. 9/16/21 RP 37, 114. But the Department required Mr. O. complete a domestic violence assessment and treatment even though they were no longer together, which he did not complete. FF 2.8.9(ix).

Mr. O. and his son enjoyed each other's company and talked easily with each other. Ex. 67, p.5/8. Yet the Department also required Mr. O. complete a parenting class to "learn about age appropriate conversations surrounding the Department's involvement in their lives, as well as age appropriate milestones." Ex. 65. Mr. O. did not take these classes. FF 2.8.9(x).

The Department and GAL insisted it would take Mr. O. at least nine months to engage in the required services, and that G.M.O. could not be reunited with

Mr. O. until he completed all of them. 10/29/21 RP 46, 184.

2. G.M.O.'s court-appointed GAL advocates contrary to his stated wishes about visits with his father and reunification.

G.M.O. is "okay" staying with his great-uncle, but wanted to be returned to his parents. 10/29/21 RP 178. G.M.O. continued to enjoy visits with both his parents during the dependency. *Id*. When Mr. O. and G.M.O. visited together, they "easily fill[ed] an hour of just talking," joking with each other and reminiscing about the past. Ex. 67, p.5/8.

But G.M.O. was distraught about being separated from his dad. He would cry after visits, and expressed frustration and sorrow about the dependency process. 7/8/21 RP 183. G.M.O. was also devastated when Mr. O. missed a few visits due to his misdemeanor incarceration and transportation issues. 9/16/21 RP 50.

During visits G.M.O. would ask his dad questions "regarding 'what's going on,' 'when am I going home,' 'what is mom and dad doing,' 'what's expected.'" 7/8/21 RP 183. The social worker recognized "it can be difficult to have those conversations." 7/8/21 RP 183. But the Department believed that Mr. O. improperly spoke with his son about the case, and insisted their visits be monitored during the entire dependency. 7/8/21 RP 183. This made arranging visits far more difficult. 7/8/21 RP 198.

The Department claimed they were unable to find a visit monitor for Mr. O. and G.M.O. to meet in person with G.M.O. after March 2021. 10/29/21 RP 190. The Department knew G.M.O. was "frustrated" when he did not get in-person visit his dad. 10/29/21 RP 195. The Department specifically knew in-person visits were far more meaningful for G.M.O. than phone and

video contact. RP 10/29/2021 RP 194-95. The Department finally resumed Mr. O.'s visits after G.M.O.'s great-uncle volunteered to supervise visits nearly four months later. 10/29/21 RP 191.

By the time of trial, G.M.O. was ten years old. Ex. 67, p. 2/8. G.M.O.'s great-uncle was willing to be his guardian. 10/29/21 RP 186. But G.M.O. loves his parents and wanted to be returned to them. Ex. 67, p. 2/8. G.M.O. was too young to be informed about his right to an attorney. *Id.* Instead he was appointed a GAL who was supposed to advocate for G.M.O.'s best interests. *Id.*

The Department and GAL faulted Mr. O. for not completing the Department's required services and advocated for a guardianship, even though all parties agreed reunification of Mr. O. and G.M.O. was the ideal outcome. 10/29/21 RP 36, 184; FF 2.8.3, 2.8.4. The

court found the Department met its burden to appoint G.M.O.'s great-uncle as his guardian. CP 17.

The Court of Appeals affirmed the guardianship order, finding the Department was absolved from having to assist Mr. O. with housing because he eventually found housing resources on his own. Op. at 7-8. The Court of Appeals also found there was no due process violation in not appointing G.M.O. counsel to advocate for his stated interests that diverged from the GAL's assessment of his best wishes, and that the GAL's outsized role as fact witness, advocate, and attorney did not violate the Rules of Professional Conduct or due process. Op. at 11-20.

D. ARGUMENT

1. This Court should accept review and require the Department to assist parents experiencing homelessness when this is a primary barrier to reunification.

Mr. O.'s homelessness remained a barrier to reunification with his son throughout the dependency, but the Department social workers did not address this barrier to reunification other than tell Mr. O. about the existence of housing resources in the community. The Court Appeals found "under controlling case law," the fact that Mr. O. eventually received assistance he found on his own through other agencies satisfied the Department's burden to provide all necessary services. Op. at 7-8. The Court of Appeals also excused the Department's failing by reasoning that even if the Department had helped him to meet his family's basic needs, Mr. O. would not have remedied his deficiencies in the foreseeable future. Op. at 7-8. This Court should

accept review because it is a matter of constitutional import and substantial public interest that Mr. O. and other parents experiencing homelessness are denied the right to parent their children due to systemic problems of homelessness and poverty. RAP 13.4(b)(3)-(4).

Before a court enters an order establishing a guardianship, the Department must show all court-ordered services "have been offered or provided and all 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). This statutory requirement protects a parent's "fundamental liberty interest in the care and custody of their children …" *In re Welfare of M.B.*, 195 Wn.2d 859, 867, 467 P.3d 969 (2020) (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L.

Ed. 2d 599 (1982)); U.S. Const. amend. XIV, §1; Const. art. I, § 3.

Courts may not rely on poverty or homelessness to find a parent neglects a child. RCW 26.44.020(19). Yet "poverty is the single greatest predictor of a child welfare case." Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer Casa Programs*, 20 CUNY L. Rev. 23, 27 (2016). Housing is a basic need, and those without it struggle the hardest to make use of other services. Taylor A.F. Wolff, *Housing Is Healthcare: The Tax Implications of Homelessness and Addiction*, 21 Quinnipiac Health L.J. 259, 265 (2018); Ezra Rosser, *Laying the Foundation: The Private Rental Market and Affordable Housing*, 44 Fordham Urb. L.J. 499, 526-27 (2017).

Studies have shown that nearly a third of children in foster care could be reunited with their

families if the families had safe, affordable housing. Elenore Wade, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 Geo. Wash. L. Rev. 869, 873 (2018).

If a parent's homelessness prevents reunification, it is a "necessary service" that the Department must provide. RCW 13.34.065(4)(d). When a parent is "forced to search out services independently," they "may have greater difficulty complying with court orders," which undermines reunification. *In re Dependency of D.A.,* 124 Wn. App. 644, 652, 102 P.3d 847 (2004).

Even though poverty and homelessness are systemic barriers for impoverished parents, the Court of Appeals held the Department is required to do almost nothing to address a parent's need for housing. The Department is only required to provide parents with a list of referral agencies. Op. at 6 (citing *D.A.,*

124 Wn. App. at 651). And as long as the parent receives this list from any source, this will meet the Department's obligation to address this underlying, structural barrier for parents experiencing homelessness. *Id.*

The Court of Appeals thus found in Mr. O.'s case since at the time of trial he was working with a housing agency and he expected to obtain housing within 90 days, the Department met its "statutory burden to provide housing assistance." Op. at 8.

The Court of Appeals also found that because Mr. O. was unable to progress in his other services while living out of his car, the guardianship order should be affirmed because "there was little likelihood that the conditions would change in the near future." Op. at 9.

The Department should not be relieved of having to offer housing simply because a parent struggles to

comply with their other services while homeless. This ignores the structural, central role that housing plays in a parent's ability to address any alleged deficiencies.

Even though Mr. O. remained homeless for the entire dependency, the trial court saw "no barriers" Mr. O. could not overcome, and "no explanation as to why" Mr. O. did not engage in services. FF 2.8.5. The "explanation" was sitting in plain view for both the Department and court to see. Mr. O. lived in his car for the entire two years of the dependency, which left him exhausted and unable to move forward in any service or with his life. 9/16/21 RP 111. He required housing assistance, which the Department did not offer.

Aleis Maxim, Mr. O.'s treatment provider, explained that people experiencing homelessness face more barriers in achieving sobriety and maintaining it. 7/7/21 RP 80–81. That is why remedying a person's

lack of housing is critical to their success in drug and alcohol treatment. *Id.*

Mr. O. was evicted for being unable to pay rent around the time G.M.O. was removed from his care. 7/8/21 RP 220. Previous evictions are a barrier to obtaining housing. 10/29/21 RP 52. Still, throughout the dependency, neither the court nor Department identified this as a "significant factor" that delayed reunification.

This Court should accept review and require the Department provide necessary services to address a family's basic human needs such as housing before the court assesses whether a parent's deficiencies can be remedied in the foreseeable future. RAP 13.4(b)(3)-(4).

2. Ten-year old G.M.O. was entitled to the appointment of counsel to pursue his goal of reunification, regardless of the GAL's personal assessment of his best interests.

G.M.O. and Mr. O. loved each other and wanted to live together. The GAL appointed to represent G.M.O. did not advocate for G.M.O.'s expressed desire for reunification, which left G.M.O. without a voice during the dependency or in the courtroom. Because G.M.O. expressed his wishes for an outcome different from what the GAL believed was in his best interest, he should have been appointed an attorney. This Court should accept review and require courts to appoint counsel to children when their stated interests diverge from the GAL's belief about their stated interests. RAP 13.4(b)(3)-(4).

a. Appointment of the GAL rather than an attorney promotes the individual GAL's opinions, values and beliefs over those of the child's in dependency proceedings.

"[C]hildren have fundamental liberty interests at stake in termination of parental rights proceedings." *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012). But children are only entitled to the appointment of a guardian-ad-litem, not an attorney, in dependency proceedings. *Dependency of A.E.T.H.*, 9 Wn. App. 2d 502, 525-26, 446 P.3d 667 (2019) (quoting RCW 13.34.100(1)).

"The court may appoint an attorney to represent the child's position in any dependency action on its own initiative or upon request by any party." RCW 13.34.212(2)(a). However, only children over twelve years old must be informed of their right to counsel. RCW 13.34.212(2)(c). Here, because G.M.O. was only

10 years old, he was not informed he had a right to counsel. Ex. 67.

Under a "best interest" model of advocacy, the GAL is given authority to voice "the child's" position, based on the GAL's personal assessment of what she believes is best for the child." Mulzer & Urs, *supra,* at 24. The "best interests of the child' standard is susceptible to class- and race-based biases[.]" *Matter of K.W.*, 199 Wn.2d 131, 155, 504 P.3d 207 (2022). This is because an assessment of another person's "best interests" will "often and inevitably" be "based upon the legal representative's values and life experiences," not that of the child's or family's. Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 Loy. U. Chi. L.J. 1, 34 (2000).

"[P]oor families and families of Color are disproportionately impacted by child welfare proceedings." *K.W.*, 199 Wn.2d at 155 (citing *Santosky*, 455 U.S. at 763). GAL volunteers are predominantly white, middle-class women. Mulzer & Urs, *supra,* at 24. Inserting a white, middle class voice to mediate a poor child of color's best interests has deep roots in some of the most critiqued aspects of the child welfare system: it was "founded on notions of superiority among a charitable class of white women, who used their presumed authority over the domestic sphere as a basis to intervene and protect poor children of color." *Id*. at 58.

The appointment of GAL volunteers is found to *reduce* the likelihood of a successful reunification between children and their parents. Mulzer & Urs, *supra,* at 44. By contrast, "[q]uality legal

representation is associated with shorter times in care and better outcomes." Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 Mitchell Hamline L. Rev. 728, 748–49 (2021).

Lack of competent, legal representation can create "barriers to engagement," affecting a child's "procedural and substantive rights." *Id.* If a child is not engaged in the process, the court will be deprived of relevant information, and the child is likely to view the process as unfair. *Id*. An attorney can assist the child to understand their rights, and "can facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders." *M.S.R.*, 174 Wn.2d at 21.

b. The GAL's advocacy for her belief in G.M.O.'s best interests undermined his desire for reunification with his father.

G.M.O. wanted to be reunited with his father, but the GAL was not required to support G.M.O.'s wishes or take active steps to pursue G.M.O.'s objective during the dependency if she did not agree this was in his best interests. RCW 13.34.105(1)(f) (GALs must "represent and be an advocate for the best interests of the child.").

G.M.O. and his father are Latino, of Puerto-Rican descent. Ex. 74. It can be fairly inferred here, as in the majority of dependency cases, the GAL did not share the child or parent's cultural background. On the first day of trial, Mr. O. had to clarify the pronunciation and spelling of his son's name. 7/8/21 RP 119. The GAL repeatedly misnamed G.M.O., and her report used the anglicized version of G.M.O.'s name. This reveals a cultural gap between the GAL and G.M.O. and his

father's heritage. Ex. 67.[2] This gap made it more likely the GAL's perception of G.M.O.'s best interests reflect her own particular culture and value systems, not G.M.O.'s and his father's. Mulzer & Urs, *supra,* at 45-46.

G.M.O.'s desire for reunification required an advocate who was ethically obliged to advance G.M.O.'s interest in reunification. But the GAL's position against Mr. O. and in favor of the Department was apparent at trial.

The GAL's cross-examination of Mr. O. was focused on showing his failures and exposing reasons he should not be reunited with his son, including ancillary issues, like not having obtained his driver's license. *See, e.g.*, 9/16/21 RP 61-66. Rather than

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[2] G.'s mother does not share the same Latino surname and this record does not reveal her ethnicity.

question witnesses in a way that promoted G.M.O.'s need for visits with Mr. O., the GAL questioned Mr. O. about how he would ensure G.M.O. maintained visits with his great-uncle were G.M.O. returned to his care. 9/16/21 RP 76. The GAL repeatedly objected to Mr. O. providing the court with his perspective and knowledge about his family. 9/16/21 RP 67, 82, 107, 114. The GAL also sought to fill in the Department's case in those instances where the social worker's testimony was lacking. 7/8/21 RP 188-89.

G.M.O. did not need another attorney to defend the Department's actions. An advocate for G.M.O. would have pushed the Department to do all it could to move Mr. O. closer to reunification and place emphasis on the Department's failures, not Mr. O's. Without this advocate for G.M.O.'s interests, the court was deprived

of critical information and evidence in making its assessment of his best interests.

A due process violation that creates "an intolerable risk of error" requires reversal. *M.B.,* 195 Wn.2d at 877. This Court should remedy the problem of entrenching white, middle class conceptions about what a poor child of color needs by holding juvenile courts should appoint counsel to represent the child's stated interests when they diverge from the GAL's assessment of their best interest. RAP 13.4(b)(3)-(4).

3. Allowing a guardian ad litem to both present evidence and serve as a legal advocate violates the guardian ad litem statutes and the appearance of fairness.

The GAL wore three hats in her quest to prevent G.M.O. from reunifying with his father. She acted as a fact witness, expert witness, and a legal advocate. Her actions conflict with the guardian ad litem statutes,

the Rules of Professional Responsibility, and the appearance of fairness.

Congress conditioned federal funding on the mandatory appointment of a CASA or GAL for a child "in every case involving an abused or neglected child which results in a judicial proceeding." 42 U.S.C. § 5106a(b)(2)(B)(xiii); *see also* 42 U.S.C. §§ 5101–5107 (Child Abuse Prevention and Treatment and Adoption Reform Act). In 1996, Congress added the court could appoint an attorney, special advocate, or both. *M.S.R.*, 174 Wn.2d at 15, n. 7.

Accordingly, Washington has enacted a statute requiring the court to "appoint a guardian ad litem for a child who is the subject of an action under this chapter." RCW 13.34.100. A "Guardian ad litem" is a "person, appointed by the court to represent the best

interests of a child in a proceeding under this chapter." RCW 13.34.030(12).

RCW 13.34.105 provides the duties of a guardian ad litem, which are largely limited to serving as an investigator and fact witness for the court, regardless of if they are an attorney or community volunteer. RCW 13.34.105(1)(a), (b). The GAL must inform the court of any "views or positions expressed by the child on issues pending before the court" and to "represent and be an advocate for the best interests of the child." RCW 13.34.105(1)(b), (f). This statute does not define what it means to "advocate" for the child's best interests.

But RCW 13.34.100 contemplates a separation between advocating as a witness and legal advocacy in the courtroom: "A guardian ad litem through an attorney, or as otherwise authorized by the court, shall

have the right to present evidence, examine and cross-examine witnesses, and to be present at all hearings." RCW 13.34.100(5). This separation accords with federal law, which says the guardian ad litem "shall not be the attorney responsible for presenting the evidence alleging child abuse or neglect." 45 C.F.R. § 1340.14(g).

The guardian ad litem program is administered by the court. RCW 13.34.100. Lack of separation in the GAL's role also raises questions about the fairness of the tribunal when court employees directly participate in the litigation. *A.E.T.H.*, 9 Wn. App. 2d at 507.

Indeed, courts limit the GAL's participation as a legal advocate. They are not authorized "to summarize or paraphrase pleadings and court orders, explain the legal implications of these documents, or give legal advice, because a GAL does not represent the child as

an attorney represents a client." *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 110, 401 P.3d 442, 455 (2017), *aff'd sub nom. Matter of Dependency of E.H.*, 191 Wn.2d 872, 427 P.3d 587 (2018).

The distinction between the GAL as a witness and legal advocate is critical. If the GAL acts as both an attorney and witness, this would violate the Rules of Professional Conduct (RPC). RPC 3.7(a) limits the attorney from being an advocate at a trial in which the lawyer will also be a witness (subject to narrow exceptions). Washington State Court Rules: Rules of Prof'l Conduct R. 3.7. Allowing an attorney to act as both a "witness trying to persuade the jury as to a particular set of factual events and also an advocate for this set of factual events," is precisely what RPC 3.7 "is designed to avoid." *State v. Sanchez*, 171 Wn. App. 518, 556, 288 P.3d 351 (2012) (internal citations omitted).

When a lawyer is appointed as a guardian ad litem, "the lawyer's role is often unclear and conflicts can arise between the duty to the child client and the duty to the court." Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 Fordham L. Rev. 1999, 2001 (1996).

The GAL's advocacy for admission of her report made her a fact witness, expert witness, and legal advocate for its contents, which blurred the lines between the role of litigants and witnesses in the courtroom. The GAL's report contained numerous out-of-court statements by G.M.O. and others, which the GAL argued was nevertheless admissible "as a basis for my opinions that I will be providing to the Court in my testimony; not necessarily for the truth of the

matter asserted," over Mr. O.'s objection. 10/29/21 RP 32.

The GAL used her role as legal advocate to object to Mr. O.'s testimony on various topics. For instance, she cross-examined him about his eldest daughter's role in contacting DCYFS, but limited Mr. O. from explaining these circumstances to the court. 9/16/21 RP 110. The same was true when Mr. O. tried to explain the domestic violence allegations. The GAL objected to Mr. O. explaining that Ms. B.'s allegations of domestic violence were because she had other "issues" with him. 9/16/21 RP 114. This ability to present evidence as a fact and expert witness, while also controlling the evidence the court heard as a legal advocate gave the GAL an outsized role at trial that the GAL wielded to support the Department's case against Mr. O.

The GAL also cross-examined the witnesses to show Mr. O. was to blame for the Department's failure to provide a visit monitor for months and to excuse them from their obligation to assist him with housing. 7/8/21 RP 189; 10/29/21 RP 29.

This Court has the inherent authority and duty to safeguard the ethical practice of law. *In re Marriage of Wixom*, 182 Wn. App. 881, 904-05, 332 P.3d 1063 (2014). Allowing a guardian ad litem to act as both an advocate and fact and expert witness conflicts with the guardian ad litem statutes, which separate the roles of a fact witness, expert witness, and attorney advocate, a distinction that is required under RPC 3.7. The blurring of these lines would cause "a reasonably prudent, disinterested observer" to question whether Mr. O. "received a fair, impartial, and neutral hearing." *A.E.T.H.*, 9 Wn. App. at 517. Mr. O. is entitled to a new

trial in compliance with the GAL statutes and due process. This Court should accept review. RAP 13.4(b)(3)-(4).

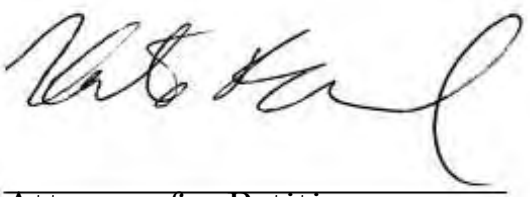
E. CONCLUSION

Ensuring parents are not separated from their children due to poverty and homelessness, a child's right to counsel, and the role of a GAL in dependency proceedings are matters of constitutional concern and substantial public interest. This Court should accept review. RAP 13.4(b)(3)-(4).

This brief contains 4,726 words in compliance with RAP 18.17(b).

DATED this 18th day of January 2023.

Respectfully submitted,



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of: G.M.O., a Minor Child.	No. 83506-8-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Mr. O appeals an order granting a guardianship over his son, G.M.O. He argues that the Department of Children, Youth, and Families did not provide all necessary services and that G should have been appointed independent counsel rather than a Guardian Ad Litem. Based on Washington case law and the plain language of chapter 13.34 RCW, we affirm.

FACTS

In June 2019, the Department of Children, Youth, and Families (Department) filed a dependency petition over G.M.O.[1] G was found dependent two months later and placed with his maternal great uncle. The court identified Mr. O's parental deficiencies as substance abuse, lack of safe and stable housing, insufficient parenting skills, and domestic violence concerns. He was ordered to complete a domestic violence (DV) assessment and follow any treatment recommendations, take parenting classes, complete a drug and alcohol evaluation and comply with recommended treatment, and participate in random urinalysis (UA) testing. Throughout the dependency, Mr. O struggled to access and maintain housing, primarily living in his car. The court found Mr. O was not in compliance with its orders and had not made "[p]rogress toward correcting the problems that necessitated the child's placement in out-of-home care" at all but one of the dependency review and permanency planning hearings. At the May 2021 dependency review hearing, the court found Mr. O was in partial compliance with the court's orders because he "completed inpatient treatment in March, but has not participated in outpatient treatment after completing inpatient treatment or engaged in his other services." Mr. O worked with numerous Department staff members during the dependency. Department case worker Victoria Metcalf was assigned to Mr. O from June 2019 until September 2020. Liz Zambrano was assigned to Mr. O from September 2020 until March 2021, but she was subsequently removed from all her assigned cases and did not testify at trial.

[1] G's mother agreed to the entry of the guardianship order and is not a party to this appeal.

Department case worker Renee Boyd was assigned to Mr. O from March 25, 2021 through the guardianship trial. Ann Brice served as Court Appointed Special Advocate/Guardian ad Litem (GAL) for G throughout the dependency and appeared at trial.

In July 2021, the fact-finding trial on the Department's petition for guardianship began. Due to continuances, the trial did not resume until September, and then again in October. On November 10, 2021, the court granted the petition for a guardianship and issued findings and conclusions. The court found that the Department had referred Mr. O to a domestic violence assessment three times, but it was never completed. Mr. O did complete two Domestic Violence — Moral Reconation Therapy classes, but the court found this was not sufficient to constitute any progress. The court also found Mr. O did not engage in any parenting courses the Department offered. Mr. O did complete several substance use evaluations. He completed inpatient substance abuse treatment in March 2021 with a discharge recommendation to transition to intensive outpatient treatment. However, the court found Mr. O did not complete intensive outpatient treatment and, by the time of trial, had "completely stopped all of his substance abuse treatment services." Mr. O was also ordered to participate in UA testing, but he failed to attend any UA offered by the Department. He "was not able to provide a sober date," and had "admitted to using methamphetamine two to three weeks prior to the start of trial." Finally, the court found there was "little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future." Based on these findings, the court concluded that a guardianship

would provide G "with stability and permanency," and that each element of RCW 13.36.040(2)(c) had been met. It ordered a guardianship and dismissed the dependency. Mr. O timely appeals.

ANALYSIS

A guardianship provides a path to permanency for a dependent child, and is an alternative to termination of parental rights. In re Guardianship of D.S., 178 Wn. App. 681, 687, 317 P.3d 489 (2013). While "[a] guardian maintains physical and legal custody of a child," "[t]he parent retains a right of contact with the child as determined by the court." Id. at 688. Once the guardianship is ordered, the dependency is dismissed. Id. at 687.

A court may establish a guardianship over a dependent child if six elements are met: (1) the child is dependent under RCW 13.34.030, (2) a dispositional order is entered, (3) the child has been out of the parent's custody for at least six months, (4) all services are ordered under a dispositional order or permanency plan and all necessary services have been offered or provided, (5) "[t]here is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future," and (6) a proposed guardian has signed a statement accepting rights and responsibilities. RCW 13.36.040(c). Unlike a proceeding for termination of parental rights, the court need only find each element "by a preponderance of the evidence." RCW 13.36.040(2)(a).

I. All Necessary Services

A. Housing Assistance

Mr. O contends that the Department failed to offer housing assistance and therefore finding of fact 2.8.9(iv), that all necessary services were provided, is not supported by substantial evidence.

Under RCW 13.36.040(c)(iv), the Department must demonstrate that "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided." See also In re Parental Rights to I.M.-M., 196 Wn. App. 914, 921, 385 P.3d 268 (2016). This court reviews factual findings for substantial evidence, which "exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence." In re Welfare of A.W., 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). Unchallenged findings are verities on appeal. Id.

The Department argues "the dependency court never found Mr. O's homelessness or lack of suitable housing to be a significant factor preventing G.M.O.'s return to Mr. O" and thus housing was not a necessary service. This argument is not well taken. The court below explicitly found "the father's parental deficiencies are the following: substance abuse, parenting, domestic violence, and lack of safe and stable housing." (Emphasis added.) In the case In re Dependency of G.L.L., this court stated in a published opinion, that, where the "[l]ack of safe and stable housing was explicitly identified as a parenting deficiency," and thus "certainly could have precluded reunification," housing was "a necessary service." 20 Wn. App. 2d 425, 433, 499 P.3d 984 (2021). As such, even though Mr. O's

lack of housing was not a "significant factor that delayed permanency," and "the dependency court never ordered DCYF to provide housing assistance," because it was identified as a parenting deficiency, it could have precluded reunification and was therefore a necessary service.

When a service is necessary, "At a minimum, [the Department] must provide a parent with a list of referral agencies that provide" the service. In re Dependency of D.A., 124 Wn. App. 644, 651, 102 P.3d 847 (2004). However, "the court may consider any service received, from whatever source, bearing on the potential correction of parental deficiencies." Id. at 651-52. Here, Department case worker Metcalf testified that she "offered opportunities for safe and stable housing through sobriety housing," and she "encouraged Mr. [O] to contact housing navigation, 211, as well as reach out to Homeward House, which was a nonprofit that helped facilitate parents to resources such as housing opportunities." On cross-examination by Mr. O, Metcalf agreed "it would be fair to say that in effect [she] told Mr. [O] about housing programs that he would need to then undertake on his own."

Lisa Willms, one of Mr. O's substance use treatment providers, testified that Mr. O "secured housing through the Office of Neighborhoods" after being discharged from inpatient treatment. Department case worker Boyd testified that, to her knowledge, the Department never "provided Mr. [O] with any list of housing resources." She also testified she only "briefly . . . discussed housing with" Mr. O, and that, "There was no mention of him needing assistance in getting housing at that time" because, "He didn't request any assistance," despite her knowledge that

Mr. O was "living in his car or that he was couch-surfing." Boyd did "mention[] . . . the men's shelter" to Mr. O. Metcalf testified that she made two referrals and offered "sobriety housing," though how or when she did so is unclear from the record. While the Department characterizes this as Metcalf "provid[ing] Mr. O with a list of housing resources on multiple occasions," there is no testimony to support such a finding. Metcalf never testified she made referrals on multiple occasions, she never testified when she made referrals, and she never testified to providing a list of resources. Boyd testified only that she "mentioned . . . the men's shelter" to Mr. O.

There is no documentation in the record confirming Metcalf's or Boyd's purported mentions of housing resources. Metcalf testified she would "provide [information about services] to him verbally, over text messages, as well as in person with service letters." She did not clarify how she communicated information about housing resources. Boyd did not explain how she "mentioned the men's shelter" to Mr. O. The Department submitted two service letters by Metcalf; neither mentioned housing. The parties agree that Metcalf did inform Mr. O about 211 and Homeward House and we accept their agreement. Rather, Mr. O contends these efforts were insufficient and that the Department must provide an actual list of referrals, rather than "merely discuss[ing]" resources.

However, this court may "consider any service received, from whatever source, bearing on the potential correction of parental deficiencies," though "the responsibility for offering or providing services belongs to the Department, and the Department cannot just point to the efforts of others if its own efforts might have

succeeded where others did not." D.A., 124 Wn. App. at 651-52, 656. Here, Willms testified that Mr. O "secured housing through the Office of Neighborhoods" after being discharged from inpatient treatment. Mr. O testified he "contacted and signed up with the HEN program, 211, the housing that's through 211, Homeward House." He also worked with a program offered by the Snohomish County Sheriff's Department and was assigned a caseworker to assist with housing. Brice also discussed Homeward House with Mr. O, though it was unclear if this was before or after Metcalf mentioned the program to Mr. O. Through the Homeward House program, Mr. O was assigned a case manager who assisted him with applying for a housing voucher. By the end of trial, Mr. O was in the process of receiving a housing voucher and his Homeward House case worker expected he would have housing between 90 days and about 6 months from trial. While Mr. O's argument is both logical and compelling, it is one perhaps best directed at the legislature.

Under controlling case law, the Department met its statutory burden to provide housing assistance, though only because Mr. O received services from other sources.

B. Whether Services Would Cure Deficiencies

"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). The foreseeable future is based on the age of the child. In re Welfare of M.R.H., 146 Wn. App. 10, 25, 188 P.3d 510 (2008). "Because of the highly fact-specific nature of termination

proceedings, deference to the trial court is 'particularly important.'" K.M.M., 186 Wn.2d at 477 (quoting In re Welfare of Hall, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983)).

Here, Mr. O's identified parental deficiencies were "substance abuse, parenting, domestic violence, and lack of safe and stable housing." He had found housing services and secured a housing voucher by the end of the guardianship trial. While the court noted Mr. O had made steps in housing, it stated, "Mr. [O]'s housing situation is not at the point the court would want to see for it to be considered a showing of progress on this case." The court found that the "near future for [G] is six months or less." More critically, the court found Mr. O did not make "sufficient progress" in addressing any of his parental deficiencies, he "ha[d] not fully engaged in his substance abuse treatment services and [wa]s not currently engaged in any substance abuse treatment service," had not provided UAs, had not participated in parenting classes, and did not complete a DV assessment after being referred to one by the Department. The court also found, "There is little likelihood that the conditions will change in the near future." Mr. O did not assign error to this finding. "Unchallenged findings of fact are verities on appeal." A.W., 182 Wn.2d at 711. Even if the Department had provided Mr. O with housing services, the court concluded that none of his other parental deficiencies were sufficiently progressing by the end of trial. Because the unchallenged findings that Mr. O had not fully engaged in services to address his identified deficiencies, and that there was little likelihood conditions would change

in the near future are verities, the guardianship order was proper on these other bases.[2]

II. Appointment of Counsel for G

Mr. O next contends the guardianship proceeding did not comport with procedural due process because the court failed to appoint an attorney for G. A child may be appointed an attorney in a dependency proceeding on the court's "own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department." RCW 13.34.212(2)(a). If the child is 12 years or older, "The department and the child's guardian ad litem shall each notify a child of the child's right to request an attorney and shall ask the child whether the child wishes to have an attorney." RCW 13.34.212(2)(c). "Washington is one of only 18 states that does not provide children a categorical right to court-appointed counsel in dependency proceedings," instead "juvenile courts have discretion to appoint independent counsel." In re Dependency of Lee, 200 Wn. App. 414, 449, 404 P.3d 575 (2017).

To determine whether the government has comported with procedural due process in a decision that impacts "an individual's liberty or property interests," this court applies the Mathews[3] test. A.W., 182 Wn.2d at 701. "[F]or the purposes of Mathews, the child's liberty interest in a dependency proceeding is very different

[2] At oral argument, Mr. O argued that the Department failed to tailor services to his particular needs, namely his previous evictions and criminal record. Unless a party makes a motion requesting otherwise, this "court will decide a case only on the basis of issues set forth by the parties in their briefs." RAP 12.1. As this argument was not raised in briefing, we do not reach it.

[3] Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

from, but at least as great as, the parent's." In re Dependency of M.S.R., 174 Wn.2d 1, 17-18, 271 P.3d 234 (2012).

A. Risk of Cultural Bias

Mr. O first argues appointing a GAL, rather than an attorney, is insufficient to protect a child's constitutional interests because the GAL advocates for the best interests of the child, rather than the child's wishes. GALR 2(a) explicitly states, "Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents." This is problematic, Mr. O contends, because the best interests assessment is based on the personal experiences of the GAL, and "is susceptible to class- and race-based biases." In re Dependency of K.W., 199 Wn.2d 131, 155, 504 P.3d 207 (2022) ("the 'best interests of the child' standard is susceptible to class- and race-based biases"). Mr. O notes that he and G are of Puerto Rican descent, and Mr. O is indigent, while "GAL volunteers are predominantly white, middle-class women."[4] As our state Supreme Court's opinion in K.W. notes:

> 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 decision-making.

199 Wn.2d at 156. The Supreme Court also noted the history of disparate separation in child welfare proceedings and continued racial disproportionality. Id. "For example, in King County, the Black population is approximately 14 percent of

[4] Appellant's Br. at 37 (citing Amy Mulzer & Tara Urs, However Kindly Intentioned: Structural Racism and Volunteer CASA Programs, 20 CUNY L. REV. 23, 24 (2016)).

the overall population but made up 36 percent of the dependency caseload in 2020." Id. (citing WASH. STATE CTR. FOR COURT RESEARCH, DEPENDENT CHILDREN IN WASHINGTON STATE: CASE TIMELINESS AND OUTCOMES 2020 ANNUAL REPORT 21 (2020), apps. B, C-71). All actors in a child welfare proceeding, including GALs as officers of the court,[5] hold biases which may interfere with their decisions, and each must be vigilant to ensure these biases do not impact the manner by which they carry out their duties.

Mr. O notes that he had to correct the Department's incorrect pronunciation of G's name at trial. He further states Brice used an "anglicized[6] version of G's name" in her report. Names not only create a sense of identity and self, but "frequently carry cultural and family significance," connecting "children to their ancestors, country of origin or ethnic group." Rita Kohli & Daniel G. Solórzano, Teachers, please learn our names!: racial microaggressions and the K-12 classroom, 15:4 RACE ETHNICITY AND EDUCATION 441, 444 (2012). The State goes to great lengths in its briefing to defend the training and experience of G's appointed GAL, noting her "vigilance" in both her investigation and advocating against the termination of Mr. O's parental rights. While both of those assertions may be true, the fact remains that the child's name was anglicized in the official report submitted to the court.

[5] GALR 4 ("As an officer of the court, a guardian ad litem . . . ").

[6] "Anglicize" is "to make English in quality or characteristics : cause to become adapted in customs, manners, speech, or outlook to the culture of English-speaking world and often esp. to the culture distinctive of England" or "to change to an English equivalent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 83 (2002).

Regardless of intentions, the practice of anglicizing names is a form of cultural erasure with deep roots in our nation's history of colonization and forced assimilation of communities of color. It has no place within our modern legal system.

> Naming issues have a long history in North America, dating to at least colonial times. Enslaved Africans routinely were renamed by those who bought them, while Native American names quickly came to be shortened, mispronounced or translated into English or French. With the dominance of Anglo-Saxon culture well established from the beginning of the republic, European immigrants from other traditions had similar experiences of renaming, particularly if they hailed from Southern or Eastern Europe. What all of the victims of these practices had in common was their relative powerlessness, on the one hand, and the desire of those representing the dominant culture to force them to conform, on the other.

Yvonne M. Cherena Pacheco, Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname, 18 T. MARSHALL L. REV. 1, 3 (1992); see also Liliana Elliott, Names Tell a Story: The Alteration of Student Names at Carlisle Indian Industrial School, 1879-1890 at 53-74 (April 3, 2019) (unpublished B.A. thesis, University of Colorado, Boulder) (on file with the University of Colorado library system) (discussing the forced alteration of Indigenous names at Carlisle Indian Industrial School, "The federal government's deliberate, purposeful eradication of Indigenous names was one tactic in a broader strategy of cultural genocide in the industrial-school era"); see also George A. Martínez, Latinos, Assimilation and the Law: A Philosophical Perspective, 20 CHICANO-LATINO L. REV. 1, 11-13 (1999) (discussing the expectation that immigrant groups "assimilate into the dominant Anglo-Saxon culture" and the devaluation of Latino culture through programs such as the official

Americanization programs). Vigilance by a GAL with "extensive training" and experience could reasonably be expected to result in recognition of such history and active avoidance of its perpetuation. Even where clear information exists in the record as to a preferred nickname of the child, best practices may be to use the proper legal name in reports, given the gravity of the proceedings.

The risk for cultural bias in child welfare matters is a severe one, and trial courts and attorneys should endeavor to educate themselves to better identify and directly address it within such proceedings. However, we are confined by appellate standards of review in our consideration of such a challenge, and while Mr. O properly identifies these issues in briefing and provides secondary sources in support, he fails to tie the Department's mispronunciation and Brice's written anglicization of G's name to a specific error or alleged bias that affected the outcome of the guardianship proceedings. Without more, his claim fails.

B. Mathews Analysis

Mr. O next argues the Mathews factors weigh in favor of appointing counsel for G. Counsel is not required for every child in a dependency proceeding, instead "'courts are to apply the Mathews factors on a case-by-case basis.'" In re Dependency of A.E.T.H., 9 Wn. App. 2d 502, 526, 446 P.3d 667 (2019) (quoting In re Dependency of E.H., 191 Wn.2d 872, 894, 427 P.3d 587 (2018)). The factors to be considered under Mathews are: (1) the private interest implicated, (2) "the risk of an erroneous deprivation of such interest through the procedures used" and the potential value of other additional safeguards, and (3) the government's

interest. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In dependency proceedings, courts should also consider:

> the age of the child, whether the child is in legal or physical custody of the State, whether the child's stated interests are aligned with the GAL's assessment of the child's best interests . . . or with another represented party's desires, whether the child disputes the facts . . . whether the child presents a complex argument against the State's proposed action . . . and the issues . . . are actually disputed.

E.H., 191 Wn.2d at 894.

First, our state Supreme Court has noted "the potential impact on a parent's right to the care and custody of [their] child is significantly less in a guardianship proceeding than in a termination proceeding," because the "guardianship is not permanent and does not completely sever the parent's rights." A.W., 182 Wn.2d at 704, 702 (holding Mathews factors do not require a higher burden of proof than preponderance of the evidence). A parent can move for modification or termination of the guardianship and can move for visitation (or modification of visitation). Id. at 705. While G has a private interest in remaining with his father, he also has an interest in "a safe, stable, and permanent home and a speedy resolution of any proceeding." RCW 13.34.020. Because of the nature of guardianships, this factor weighs against appointing counsel for G.

Second, the risk of error created by the State's chosen procedure is not high. Again, guardianships may be modified or terminated by petition. A.W., 182 Wn.2d at 705. Additionally, Mr. O's case was not particularly complex, legally or factually. The Department focused on Mr. O's failure to remedy his parental deficiencies and engage in services, while Mr. O highlighted the difficulty he had engaging in services due to his homelessness and the progress he was able to

make during the dependency. G did have an opportunity to voice his wishes as the GAL's report explicitly notes, "[G] would love nothing more than to return to his parents' care." In M.S.R., our state Supreme Court previously rejected the argument that children were not adequately protected because a GAL does not have an obligation to advocate for a child's "expressed desires," or to protect a child's legal rights. 174 Wn.2d at 19, 21.

Mr. O also argues G was entitled to an attorney who would advocate for reunification throughout the dependency (for example, by advocating for more visitation[7]) and during trial, citing Brice's cross examination questions "emphasiz[ing] Mr. O's lack of engagement." However, G's desire to reunify with his father was shared by Mr. O, who was represented by counsel and conveyed that common goal to the court. For example, during closing argument, Mr. O emphasized Brice's testimony that G wanted reunification. Mr. O does not argue that G's age (ten years old), or any other characteristic, prevented him from being able to communicate his wishes. However, the court in M.S.R. noted that older children, such as those aged "10, 12, or 14" would benefit more from counsel compared to infants who are unable to "express a position." 174 Wn.2d at 21. Finally, similar to the M.S.R. case, there was never a motion made to appoint counsel, and Mr. O must demonstrate "evidence in the record that would have

[7] We decline to consider Mr. O's argument concerning visitation during the course of the dependency, as he appeals only the guardianship order. The Department correctly notes that Mr. O never sought unsupervised visitation, never moved to compel visitation, and agreed to the order requiring monitored visitation. We consider the visitation argument only in the context of the Mathews analysis to exemplify how an attorney for the child would advocate for the child's wishes throughout the dependency proceeding, in contrast to a GAL, who reports the child's wishes in their investigation report and at trial, but may ultimately recommend something to the court that differs from the child's preference.

compelled the court to" appoint counsel "on its own motion." See 174 Wn.2d at 22. While G's age weighs in favor of counsel, because the legal and factual issues were straightforward, and G's wishes were presented to the court both in Brice's report and by Mr. O's counsel, the risk of erroneous deprivation here is relatively low.

Concluding the Mathews analysis, this court considers the third factor, the State's interest, which is "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 18 (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)). This factor does not weigh in favor of or against appointing counsel for G. Based on the Mathews factors, and Washington case law applying them to dependencies and guardianships, there was no procedural due process violation when the court did not sua sponte appoint counsel for G.

III. Role of Guardian ad Litem

Finally, Mr. O argues allowing a GAL to serve as a witness and legal advocate conflicts with GAL statutes, the Rules of Professional Conduct (RPCs), and the appearance of fairness. Under RCW 13.34.100(1), a "court shall appoint a guardian ad litem for a child who is the subject of an action under this chapter." A GAL is "a person, appointed by the court to represent the best interests of a child." RCW 13.34.030(12). The duties of a GAL are statutory, including to: (1) investigate and report factual information to the court, (2) meet with the child and report the child's positions or wishes (if any), (3) monitor court orders, (4) report

any information regarding tribal membership, (5) make recommendations "regarding the best interests of the child," (6) "represent" and "advocate for the best interests of the child," (7) inform a child 12 or older about their right to counsel, and (8) understand and advocate for the best interests of an "Indian child." RCW 13.34.105(1). The GAL also has "the right to present evidence, examine and cross-examine witnesses, and to be present at all hearings" either "through an attorney, or as otherwise authorized by the court." RCW 13.34.100(5). Mr. O argues this language creates "a separation between advocating as a witness and legal advocacy in the courtroom." However, this interpretation conflicts with the plain language of the statute, which expressly permits the court to authorize a GAL to both investigate and present evidence. It is also inconsistent with RCW 13.34.105(1)(f), which imposes a duty on the GAL to advocate for the child's best interests.

Mr. O cites to In re Dependency of S.K-P., where Division Two of this court analyzed the role of a GAL, compared to an attorney for a child, stating "it is not a GAL's role to summarize or paraphrase pleadings and court orders, explain the legal implications of these documents, or give legal advice, because a GAL does not represent the child as an attorney represents a client." 200 Wn. App. 86, 110, 401 P.3d 442 (2017) (emphasis added), aff'd sub. nom. In re Dep. of E.H., 191 Wn.2d 872 (2018). This language does not prohibit a GAL from performing any duties that an attorney might perform, it simply clarifies that the role of a GAL is not the same as an attorney representing a client, and notes limitations on the

GAL's duties. Mr. O does not argue that Brice performed any of these prohibited duties. As such, Brice's actions were not inconsistent with GAL statutes.

Mr. O next argues Brice's alleged role as advocate and witness violates RPC 3.7(a), which prohibits a lawyer from acting as both an advocate and a necessary witness. While Brice is a licensed attorney, her role here was distinct as a GAL. Our court addressed this issue in a 2017 unpublished opinion and we adopt the reasoning here.[8] In the case In re Dependency of D.A.S., this court rejected the argument on two bases, first, that the parent "did not seek to discharge or disqualify the GAL," and second, because "GAL representation is distinct from legal representation."[9] The RPCs "make clear that the rules of professional responsibility apply to lawyers providing legal representation to clients." Id. (emphasis added). Similarly, Mr. O did not move to disqualify or limit Brice's participation as GAL based on RPC 3.7. Because Brice's role in this proceeding was as a GAL rather than an advocate representing a client, RPC 3.7 does not mandate her disqualification.

Mr. O further asserts that "the blurring of these lines" between witness and advocate "would cause 'a reasonably prudent, disinterested observer' to question whether Mr. O. 'received a fair, impartial, and neutral hearing.'" A judicial proceeding is only "'valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.'" A.E.T.H., 9 Wn. App. 2d at 517 (quoting State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d

[8] Unpublished opinions from this court are not binding, but we adopt the reasoning herein as it has persuasive value. GR 14.1.

[9] In re Dependency of D.A.S, No. 75065-8-I, slip op. at 7 (Wash. Ct. App. April 17, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/750658.pdf.

703 (2017)). "'The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias.'" Id. (quoting Solis-Diaz, 187 Wn.2d at 540). For example, in A.E.T.H., the proceeding "was biased because of the involvement of superior court employees working against the parents in this case," as the attorney GAL was instructed by the Head Superior Court Administrator to make blanket objections to every discovery request, "refuse to produce any discovery ever," and "avoid the requirement to provide free discovery to indigent parents." 9 Wn. App. 2d at 517-18. Here, Mr. O argues Brice's status as an attorney allowed her to play an outsized role at the guardianship trial, purportedly aligning herself with the Department. For example, Brice was able to cross-examine witnesses, object to hearsay testimony, and argue for the inclusion of out-of-court statements from her report under the hearsay exception. However, Mr. O fails to cite to anything in the record demonstrating that his proceeding was not fair, impartial, or neutral. He does not argue the judge displayed actual or potential bias, or that Brice's roles presenting evidence and as a witness caused bias that would not have been present had Brice only served as a fact witness. Under RCW 13.34.100, Brice was permitted to present evidence and cross-examine witnesses. Brice was also permitted to advocate for G's best interests, even if that interest aligned with the Department's position. See RCW 13.34.105(1)(f); see also GALR 2(a) (best interests of the child may not always align with the child's expressed wishes).

As our state case law has held, the duties of a GAL are distinct from those of an attorney representing a client, even where the GAL is an attorney, and

therefore RPC 3.7 is not implicated. A plain reading of the GAL statutes supports Brice's role in submitting a factual report and recommendation to the court, as well as presenting evidence and examining witnesses. Without more, Mr. O has failed to demonstrate that the guardianship proceeding was not fair, impartial, or neutral.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Motion for Discretionary Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **COA Case No. 83506-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: January 18, 2023

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Filing Motion for Discretionary Review of Court of Appeals

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	In Re the Guardianship of: G.M.O. (835068)

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