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NO. 84132-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of D.R. & A.R.,

BRIEF OF RESPONDENT DEPARTMENT
OF SOCIAL AND HEALTH SERVICES

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NATURE OF THE PROCEEDING

The Department of Social and Health Services (Department) filed a petition to terminate the Mother's parental rights to D.R. and A.R. The Mother requested that counsel be appointed to represent her daughter, D.R., pursuant to RCW 13.34.100(6), but the court declined to make the appointment. The question presented is whether RCW 13.34.100(6) violates the due process clauses of the United States and Washington Constitutions because it permits—but does not require—counsel to be appointed for children in a termination proceeding.

ISSUES

1. Does RCW 13.34.100(6) violate a child's right under the due process clause of the Fourteenth Amendment of the United States Constitution because it permits—but does not require—a trial court to appoint an attorney to represent a child in a proceeding to terminate parental rights?

2. Does RCW 13.34.100(6) violate a child's right under the due process clause of the Washington Constitution, article I, section 3, because it permits—but does not require—a trial court to appoint an attorney to represent a child in a proceeding to terminate parental rights?

3. Does RCW 13.34.100(6) violate a parent's rights under the due process clause of the Fourteenth Amendment of the United States Consti-

tution because it permits—but does not require—a trial court to appoint an attorney to represent a child in a proceeding to terminate parental rights?

STATEMENT

A. Procedure For Terminating Parental Rights

Review in this case is “limited to the issue of appointment of counsel in termination cases only.”¹ A parental rights termination case is a discrete proceeding focused exclusively on whether the legal right of a parent to the care, custody, and control of his or her child should be terminated. *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). Although dependency is a prerequisite of termination, dependency and termination are separate proceedings.

A termination proceeding is an evidentiary hearing, limited to the sole purpose of determining whether the criteria for terminating the parent’s legal rights to a relationship with the child have, or have not, been met. When the court reaches a decision on the merits of the termination petition, the termination proceeding is over.

By contrast, a dependency proceeding concerns the child’s ongoing welfare and encompasses all matters associated with the child’s care and well-being during the dependency. Unlike a termination

¹ Order, *In re Dependency of D.R. & A.R.*, No. 84132-2 (Wash. June 2, 2010).

proceeding, a dependency is a “preliminary, remedial, nonadversarial proceeding.” *In re Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). The majority of dependency proceedings filed in this state do not lead to termination of parental rights.

Chronologically, the dependency proceeding begins well prior to the termination proceeding. If a termination petition is filed, the dependency continues in parallel with the termination proceeding, and continues after the termination proceeding ends, regardless of the outcome.

1. Dependency Proceedings

The legislature’s over-arching policy with regard to child welfare is that “the family unit should remain intact unless a child’s right to conditions of basic nurture, health, or safety is jeopardized.” RCW 13.34.020. When the rights of the child and the legal rights of the parents are in conflict, “the rights and safety of the child should prevail.” RCW 13.34.020. The “child’s health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” RCW 13.34.020.

A dependency proceeding begins with a petition alleging that a child’s right to basic nurture, health, or safety is in jeopardy, and, therefore, the child should be deemed dependant. RCW 13.34.040(1). A

dependant child is one who “[h]as been abandoned . . . [i]s abused or neglected . . . or [h]as no parent, guardian, or custodian capable of adequately caring for the child” RCW 13.34.030(6)

A fact-finding hearing is held on the petition, subject to the rules of evidence. RCW 13.34.110(1). The parents or legal guardian of the child have the “right to be represented by an attorney in all [dependency] proceedings” RCW 13.34.090(1); *see also* RCW 13.34.110(1). An indigent parent has the right “to have counsel appointed for him or her by the court.” RCW 13.34.090(2).

The law also directs that the court shall appoint a guardian ad litem for a child who is the subject of a dependency action, unless the court, for good cause, finds the appointment unnecessary. RCW 13.34.100(1). The role of the guardian ad litem is “[t]o represent and be an advocate for the best interests of the child.” RCW 13.34.105(1)(f).

If the court determines that the child is dependant, it enters an order of disposition. RCW 13.34.130. The disposition may leave the child in the home with services to “alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future.” RCW 13.34.130(1)(a). Alternatively, the disposition can order the child “removed from his or her home and into the custody, control, and care of a

relative or other suitable person, the department, or a supervising agency for supervision of the child's placement." RCW 13.34.130(1)(b)(i).

Whenever a child is removed from the home, a permanency plan must be developed that identifies as a primary goal: "Return of the child to the home . . . ; adoption; guardianship; permanent legal custody; [or] long-term relative or foster care." RCW 13.34.136(1), (2)(a). The plan may identify additional outcomes as alternative goals. RCW 13.34.136(2)(a). The planning process must include "reasonable efforts to return the child to the parent's home." RCW 13.34.136(1). The permanency planning process continues until a permanency planning goal is achieved and the dependency is dismissed. RCW 13.34.136(1).

A child's status as dependant is reviewed by the court at least every six months "to review the progress of the parties and determine whether court supervision should continue." RCW 13.34.138(1). "A child shall not be returned home at the review hearing unless the court finds that a reason for removal . . . no longer exists." RCW 13.34.138(2)(a). If a child has been out of his or her home for 15 months, and the court determines in a review that reunification is not a viable prospect, the court should then order the Department to file a termination petition, unless the court makes a good cause finding that it is not appropriate. RCW 13.34.145(3)(b)(vi).

2. Termination Proceedings

Unlike dependency proceedings that must include reasonable efforts to return the child to the parent's home (RCW 13.34.136(1)), termination proceedings focus exclusively on whether to sever the parent's legal relationship with the child. Washington courts use a two-step process when deciding whether to terminate parental rights. Step one focuses on the adequacy of the parents; step two focuses on the child's best interests. *In re Welfare of A.B.*, 168 Wn.2d at 911.

The termination proceeding begins when a petition seeking termination of a parent and child relationship is filed in juvenile court. A petition may be filed "by any party, including the supervising agency, to the dependency proceedings concerning that child." RCW 13.34.180(1). The petition must allege six elements. The elements include the allegation that "the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided;" that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future;" and that the "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(d)-(f). The court must also find that the parent is currently unfit. *In re Welfare of A.B.*, 168 Wn.2d at 921.

As with a dependency proceeding, indigent parents have a right to counsel appointed by the court. RCW 13.34.090(1), (2). In addition, the appointment of the guardian ad litem appointed during the dependency “remain[s] in effect until the court discharges the appointment or no longer has jurisdiction, whichever comes first.” RCW 13.34.100(4). Thus, the guardian ad litem also represents and advocates for the best interest of the child in the termination proceeding. RCW 13.34.105(1)(f).

After the hearing, the court may enter an order terminating all parental rights to a child only if, first, it finds that the allegations contained in the termination petition and the parent’s current unfitness are established by clear, cogent, and convincing evidence. RCW 13.34.190(1); *see also In re Welfare of A.B.*, 168 Wn.2d at 920. If the first step is satisfied, the court then moves on to the second step of determining whether the termination “order is in the best interests of the child.” RCW 13.34.190(1)(b). The best interest of the child “need be proved by only a preponderance of the evidence.” *In re Welfare of A.B.*, 168 Wn.2d at 911.

Because dependency and termination are separate proceedings, the completion of the termination proceeding does not mark the end of the dependency. If parental rights are terminated, the child’s dependency continues until a permanent placement solution is achieved. If the petitioner fails to prove that the parent is unfit, and parental rights are not

terminated, the child is still dependant. This is because a “child shall not be returned home . . . unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists.” RCW 13.34.138(2)(a).

3. The Trial Court May Appoint An Attorney To Represent The Child

In either a dependency or termination proceeding, the court may appoint counsel to represent a child. RCW 13.34.100(6)(f) provides: “If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child’s position.” The Department and the child’s guardian ad litem are required to “notify a child of his or her right to request counsel and shall ask the child whether he or she wishes to have counsel.” RCW 13.34.100(6)(a). The requirement to ask the child whether he or she wishes to have counsel applies to children who are twelve or older. RCW 13.34.100(6)(a)(i)–(iii).² The court is required to “inquire whether the child has received notice of his or her right to request legal counsel from the department or supervising agency and the child’s guardian ad litem.” RCW 13.34.100(6).

The guardian ad litem is responsible for “report[ing] to the

² The requirement to ask children twelve or over whether they wish to have counsel was added to the law in 2010. Laws of 2010, ch. 180, § 2.

court that the child was notified of this right[,] the child's position regarding appointment of counsel[, and the guardian's] independent recommendation as to whether appointment of counsel is in the best interest of the child." RCW 13.34.105(1)(g).

B. Proceedings In The Lower Court

The Department filed a petition to terminate the Mother's parental rights to D.R. and A.R. CP at 1-8. On day one of trial, the Mother informed the court that D.R. would soon be twelve and asked to have the guardian ad litem discuss with D.R. that "she could now have an attorney." RP at 165 ll. 17-18. The Mother renewed the request on day two. RP at 410 ll. 13-18. The guardian ad litem said she wanted to consult with D.R.'s therapist, Dr. Estelle, before talking to D.R. RP at 410 l. 22 to 411 l. 4. The court agreed, saying it was hesitant about such a disruption "[u]nless [D.R.] is actually requesting [an attorney], or saying something different than the GAL." RP at 411 ll. 6-7.

On day three, the Mother moved the court to appoint an attorney for D.R., and the court heard argument from all parties. RP at 417-27. The guardian ad litem explained that she and D.R.'s foster parent agreed that D.R. "really wouldn't understand the ramifications of having a lawyer." RP at 419 ll. 5-6. Dr. Estelle, in a statement read by the guardian ad litem, expressed concern "that a lawyer for [D.R.] . . . would

only add to her anxiety and contribute to getting her hopes up and later being disappointed again. . . . [D.R.] is a 12-year-old who is significantly limited in cognitive skills, language, comprehension and insight.” RP at 419 ll. 9–17. The Department stated that, given the appealable issue, D.R. should be consulted. RP at 423–24.

The court denied the motion. RP at 426–27. It acknowledged that D.R.’s “position is that she wants a relationship with her mother and would be opposed to anything that would interfere with that.” RP at 426 ll. 16–18. It then explained it did not “think that at this late date the court can interrupt the trial and get another attorney on board in this process.” RP at 426 ll. 19–21. The court concluded “the overriding issue is that it will not be of any real assistance to [D.R.], and—or to the court, to have an attorney representing this particular 12-year-old.” RP at 427 ll. 10–13.

The court terminated the Mother’s parental rights to D.R. and A.R. in August 2008. CP at 88–94.³

On appeal, the Mother argued *inter alia* that the termination was in error due to the failure to appoint counsel for D.R. Counsel appointed for D.R. and A.R. by the Court of Appeals argued error based on failure to appoint trial counsel for both children. After initial opposition, the

³ The Children’s assertion that the finding that termination was in the Children’s best interests “was based, in part, on the State’s failure to provide services to the Children” (Children’s Br. at 6), is not supported by the record.

Department asked the court to reverse and remand the termination, conceding that failure to appoint counsel for D.R. and A.R. constituted reversible error. The Children joined the Department's motion, but asked the court to retain the constitutional issue of a child's right to counsel in dependency and termination proceedings.

The commissioner granted the motion to reverse and remand, and denied the Children's request for a written opinion on the constitutional issue. The Court of Appeals affirmed the commissioner's disposition.

This Court granted discretionary review "limited to the issue of whether children in parental-rights termination proceedings have a constitutional right to counsel."⁴

SUMMARY OF ARGUMENT

1. The Court granted the Children's petition for discretionary review to determine whether due process requires appointment of counsel for a child in every proceeding to terminate parental rights. The Court should dismiss the petition as improvidently granted. The Children have received complete relief—just not on their preferred constitutional theory. And it is well settled that the court will not decide an issue on constitutional grounds if it can be resolved on other grounds.

⁴ Order, *In re Dependency of D.R. & A.R.*, No. 84132-2 (Wash., May 7, 2010).

2. RCW 13.34.100(6) authorizes the trial court to appoint counsel for the children of indigent parents in a termination proceeding. However, the statute does not require the appointment of counsel in every case. The appointment of counsel on a case-by-case basis satisfies the due process clause of the Fourteenth Amendment of the United States Constitution. In *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), the Court held that indigent parents have a right under the due process clause to have counsel appointed in a proceeding to terminate parental rights. However, the Court held this due process right was vindicated by having the trial court determine whether counsel should be appointed on a case-by-case basis, subject to appellate review. This is exactly what RCW 13.34.100(6) provides for.

Lassiter cannot be distinguished on the basis that it involved the rights of parents and this case involves the rights of children. First, parents have a fundamental liberty interest in the care, custody, and control of their children. But the constitutional rights of children are not equivalent to these of adults. A child's vulnerability, lack of experience, perspective, and judgment, and the role of parents in raising their children, all limit a child's constitutional rights. Given that children have lesser constitutional rights than their parents, the due process clause does not

require children to have counsel appointed in every termination case when due process does not confer this right on parents.

Second, there is no basis for the Children's contrary claim that counsel must be appointed in every case because children lack the experience to effectively assert their rights. This ignores the fact that the parents and the Department each have counsel to protect the child's interest. Therefore, a child is not in the same position as the pro se parents in *Lassiter*. Also, unlike in *Lassiter*, a child has a guardian ad litem to represent his or her best interest. It is possible that a child's interest may be in conflict with the parents or the State. But, in that instance, RCW 13.34.100(6) authorizes the appointment of counsel to represent the child.

3. There is a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. To overcome the presumption, a court must evaluate and weigh the factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). When the factors are weighed here, they support the conclusion that RCW 13.34.100(6) satisfies due process.

The first *Mathews* factor is the private interest at stake. The Children argue that they have a fundamental liberty interest in maintaining the integrity of the family unit and in having a relationship with their biological parents. But this asserted liberty interest does not reasonably

support appointment of counsel when a lawyer representing a child might advocate that the child's relationship with his or her biological parents be terminated. In any event, children do not have a greater interest in the parent and child relationship than their parents.

The second *Mathews* factor is the risk of error and the value of additional procedural safeguards. The Children argue that there is a risk of error, because the best interest of the child standard is subjective and imprecise. However, the Children ignore the substantial protection in the two-step termination process. First, the State must prove the six factors set out in RCW 13.34.180(1), and that the parent is currently unfit, by clear, cogent, and convincing evidence. Second, if the State meets this burden, it must prove that termination is in the best interest of the child. Termination is not based solely on the best interest standard.

The Children assume that appointing a lawyer for the child will always reduce error in the proceeding. But this may not always be true. A lawyer who represents a child in a termination proceeding might advocate for the child's stated interest *or* for the child's best interest. In either case, the result may be more error, not less. A child may want to stay with his or her parents even though they are unfit, or to terminate parental rights because he or she has grown close to the foster parents. Having a lawyer aggressively advocate for either position may result in an erroneous result.

Similarly, having a lawyer advocate the best interest of the child may increase error because the lawyer's view of what is in the child's best interest may be very broad and reflect the institutional concerns of the lawyer rather than the child. This case is a good example. It is difficult to see how resolving the constitutional question in this case is in the best interest of D.R. and A.R., since they currently have lawyers representing them in the remanded termination proceeding.

The third *Mathews* factor is the State's interest. The State has two important interests. The first is the State's interest in protecting the physical, mental, and emotional health of children. In some cases, the appointment of counsel may actually be harmful to a child. In this case, D.R.'s therapist felt that appointing a lawyer would only add to D.R.'s anxiety and contribute to getting her hopes up and later being disappointed again. The State also has a financial and administrative interest. The State is already paying for counsel for the parents. Even if we assume that counsel for a child will improve the process, in many cases the improvement will be marginal. Moreover, lawyers who represent children require special training and skill. Both of these interests weigh in favor of appointing counsel on a case-by-case basis under RCW 13.34.100(6).

When the three *Mathews* factors are weighed and balanced, they support the conclusion that the case-by-case approach of

RCW 13.34.100(6) is fully consistent with due process.

4. RCW 13.34.100(6) does not violate the due process clause of the Washington Constitution, article I, section 3. Contrary to the Children's claim, this Court has not adopted broader protections for family integrity under the state due process clause than its federal counterpart. The decisions of this Court consistently treat the two constitutional provisions as being equivalent.

The *Gunwall* factors also do not point to a different and broader interpretation of the Washington due process clause. The court has said there is no textual difference between the two clauses (Factors 1 and 2) and that the history of article I, section 3 does not reflect an intention to confer greater protection than the federal due process clause (Factor 3). Historically, the concept of protecting children from their parents was foreign, much less that children would receive representation in such an action (Factor 4). The Court has said that structural differences between the constitutions support an independent analysis (Factor 5). Finally, issues of family relations are matters of state or local concern (Factor 6).

This Court has traditionally practiced great restraint in expanding state due process beyond federal perimeters. Here, only Factors 5 and 6 provide any support for an independent analysis. Thus, the *Gunwall* factors offer no reason to abandon that restraint in the context of

appointing counsel to represent children in a termination proceeding.

ARGUMENT

A. **This Case Should Be Dismissed, Because It Is Not Properly Before The Court**

The Court granted the Children's petition for discretionary review to resolve the constitutional question presented. However, the Court should dismiss the petition as improvidently granted for four reasons. First, the Mother and the Children received complete relief from the Court of Appeals. The termination of the Mother's parental rights was reversed, and the case was remanded for a new trial, at which counsel will be appointed for the Children.

Second, it is well-settled in Washington that "court[s] will not decide an issue on constitutional grounds when that issue can be resolved on other grounds." *Tommy P. v. Bd. of Cnty. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); see also *In re Dependency of Grove*, 127 Wn.2d 221, 229, 234, 897 P.2d 1252 (1995) (refusing to consider parent's constitutional right to counsel in dependency action because the right to counsel issue was resolved on statutory grounds). This case was resolved on the ground that the trial court abused its discretion by failing to appoint counsel. There is no need to address the constitutional question.

Third, because the Mother and the Children were granted complete

relief, the mootness doctrine does not apply. A case is moot if the appellate court is not able to provide effective relief. *See In re Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). In a moot case, the appellate court has no opportunity to review and decide the issue. By contrast, here the issue was fully resolved by the appellate court granting the relief the Mother and the Children requested—just not on their preferred constitutional theory.

Fourth, the Court should not reach out to decide this issue when it is not required to. Work is being done by various advocacy groups—including the Supreme Court’s Commission On Children In Foster Care and the Office of Civil Legal Aid—relating to representation of children involved in termination proceedings, as well as the dependency process. Ultimately, the issue of appointment of counsel for children in termination proceedings is most appropriately addressed as a policy question through advocacy and legislative action. It is not an issue that should be decided as a constitutional matter by this Court in this case.

B. RCW 13.34.100 Does Not Violate The Due Process Clause Of The United States Constitution

Although the Children barely refer to RCW 13.34.100(6), their claim is that the statute violates the due process clause of the Fourteenth Amendment of the United States Constitution, because it does not require

a court-appointed lawyer for children of indigent parents in all proceedings to terminate parental rights. This claim is not well taken.

1. Preliminary Points

Before considering the constitutional analysis, there are two preliminary points that the Court should bear in mind. First, the Court granted discretionary review “limited to the issue of whether children in parental-rights *termination proceedings* have a constitutional right to counsel.”⁵ In response to the Children’s motion to clarify that review included dependency proceedings, the Court confirmed “that *review is limited* to the issue of appointment of counsel in *termination cases only*.”⁶

Despite the fact that review is limited to termination cases, not dependency cases, the Children’s brief contains extensive argument critical of the foster care system in general, and how that system ill-served D.R. and A.R. Children’s Br. at 3–6, 21–23, 27–28. The Children argue at length that counsel for children would improve the dependency proceeding. But this case is not about dependency proceedings. Accordingly, the Court should disregard the Children’s arguments regarding the potential value of counsel in dependency proceedings.

The second preliminary point concerns the role of counsel for

⁵ Order (May 7, 2010) (emphasis added).

⁶ Order (June 2, 2010) (emphasis added).

children in a termination proceeding. The Children argue that counsel is vital, but never explain the nature of the representation. There appear to be two views of the role of counsel. The first is that counsel would represent the child's stated interest. The American Bar Association adopted *Standards Of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases* (approved Feb. 5, 1996).⁷ According to the standards: "The term 'child's attorney' means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." Standard A-1. The comment to this standard explains that "[t]o ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position."

The second view is that counsel must advocate for the best interest of the child. The Children rely on decisions from Oklahoma that describe the lawyer's role as advocating for the child's best interest. *In re Adoption of K.D.K.*, 1997 OK 69, 1997 OK 113, 940 P.2d 216, 218 (1997) ("In contrast, an attorney representing the child can present testimony and cross-examine *as an independent advocate for the best interests of the child.*" (Emphasis added.)); see also *In re Guardianship of S.A.W.*, 1993 OK 95, 856 P.2d 286, 290 (1993).

⁷ <http://www.abanet.org/child/repstandwhole.pdf> (last visited Oct. 11, 2010).

This appeal provides a good example of the significance of these two different views. If counsel for the Children in this case represent D.R. and A.R.'s stated interest, one would expect that the Children's counsel explained the constitutional question presented in this appeal, and D.R. and A.R. instructed them to proceed. If D.R. and A.R. expressed no interest in the appeal, one would expect that their counsel would no longer pursue it. On the other hand, it may be that the Children's counsel have determined that it would be in D.R. and A.R.'s best interest to resolve the constitutional question. This would seem to be a very broad view of the best interests of D.R. and A.R., since they both have appointed counsel representing them in the termination proceeding, and the outcome of this appeal will have no impact on them. However, this illustrates the potential breadth of the advocacy when a child's counsel is charged with advocating for what *counsel* determines is in the child's best interest. This point is important, because the role of a child's counsel impacts the constitutional analysis. *See infra* pp. 29, 36–38.

2. RCW 13.34.100(6) Satisfies Due Process, Because It Authorizes Appointment Of Counsel For Children

a. In *Lassiter*, The United States Supreme Court Held That Appointment Of Counsel On A Case-By-Case Basis Satisfies Due Process

This case is governed by *Lassiter v. Department of Social Services*

of Durham County, N.C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). The question in *Lassiter* was whether the due process clause required the state to appoint counsel for indigent parents in a proceeding to terminate parental rights. The Court explained that there is a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Lassiter*, 424 U.S. at 26–27. According to the Court, the “case of *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 [1976], propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Id.* at 27. The court “must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.” *Id.*

In *Lassiter*, the Court balanced the *Mathews* factors and concluded that, although in some cases due process would require counsel to be appointed, the Constitution did not require the appointment of counsel in every termination proceeding. *Id.* at 31. Accordingly, the Court held that “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings [is] to be answered in the first

instance by the trial court, subject, of course, to appellate review.”
Lassiter, 452 U.S. at 32.

Thus, due process requires the trial court to determine in each case whether counsel should be appointed. This is exactly what RCW 13.34.100(6) provides. The Department and the child’s guardian ad litem must “notify a child [twelve or older] of his or her right to request counsel and shall ask the child whether he or she wishes to have counsel.” RCW 13.34.100(6)(a). The guardian ad litem must also inform the court of “the child’s position regarding appointment of counsel” and “whether appointment of counsel is in the best interest of the child.” RCW 13.34.105(1)(g). Even for children younger than twelve, the court is authorized to appoint counsel “if the guardian ad litem or the court determines that the child needs to be independently represented” RCW 13.34.100(6)(f).

Courts in other states have concluded that a child’s due process rights in a termination proceeding are satisfied by statutes like RCW 13.34.100(6) that authorize, but do not require, the trial court to appoint counsel for a child. In *In the Matter of D.*, an Oregon court explained that the “trial court, directed by statute to exercise its authority for the benefit of the child would appear to be peculiarly well suited to make the determination of whether independent counsel might produce [additional]

relevant evidence” *In the Matter of D.*, 24 Or. App. 601, 609, 547 P.2d 175 (1976). Accordingly, the court held that “[t]he ‘due process’ to which a child is entitled is not enhanced . . . where ‘independent’ counsel does not—and cannot—serve an identifiable purpose.” *Id.* at 609–10. The court concluded that due process was best satisfied “by a more flexible approach which permits the trial court to determine on a case-by-case basis whether separate counsel for the child is required in any given termination or adoption proceeding.” *Id.* at 610; *see also In the Matter of M.D.Y.R.*, 177 Mont. 521, 535, 582 P.2d 758 (1978) (“[W]e hold that the requirements of due process and equal protection of the laws do not require us to interpret [the statute] as to require in every case the appointment of counsel for the youth or child in dependency-neglect cases. In the same manner as for the parent, the rights of the child can be fully safeguarded if, on a case-to-case basis” the trial court makes the determination, subject to appellate review.).

b. *Lassiter* Cannot Be Distinguished Just Because This Case Involves Counsel For Children

Of course, this case involves counsel for children, not their parents. But, *Lassiter* cannot be distinguished on this basis. As the Court explained in *Lassiter*, “as a litigant’s interest in personal liberty diminishes, so does his right to appointed counsel.” *Lassiter*, 452 U.S. at 26. Since

parents have a greater liberty interest in the parent and child relationship than their children, it makes no sense that children would have a due process right to counsel in every case, when their parents do not.

The United States Supreme Court has frequently described the fundamental nature of the parent's liberty interest in the parent and child relationship. In *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the Court explained that the parent's liberty interest "in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. It "includes the right of parents to establish a home and bring up children and to control the education of their own." *Id.* (internal quotation marks omitted). Thus, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 65–66.

In contrast, the Court has explained that a child's constitutional rights are more limited. "The Court long has recognized that the status of minors under the law is unique in many respects." *Bellotti v. Baird*, 443 U.S. 622, 633, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). The Court has "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of

adults” *Bellotti*, 443 U.S. at 634.

First is the “Court’s concern for the vulnerability of children” *Id.* “[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for concern . . . sympathy, and . . . paternal attention.” *Id.* at 635 (internal quotation marks omitted).

“Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.” *Id.* The Court recognizes “that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Id.*

“Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.” *Id.* at 637. Thus, the “State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.” *Id.*

Given that children have lesser constitutional rights than their parents, the due process clause does not require children to have counsel appointed in every termination case when due process does not confer this

right on parents.

The Children argue that *Lassiter* is distinguishable. *Lassiter* adopted the case-by-case approach because some parents would need appointed counsel to protect their rights, but other parents would not. Children's Br. at 32. In contrast, the Children argue that the risk of erroneous deprivation will always be high with children, because children lack the experience and judgment to effectively assert their rights. Children's Br. at 33.

This argument is incorrect for three reasons. First, in a proceeding to terminate parental rights, children are not in the same position as the parents. "In a deprivation hearing, a parent without the assistance of counsel does not confront pro se a similarly situated party litigant, but the highly skilled representatives of the State." *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974). This is not the case with a child, because the parents and the state each have counsel to protect the child's interest. As the court explained in *In re Involuntary Termination of Parental Rights of Kapcsos*, 468 Pa. 50, 58, 360 A.2d 174 (1976), "[i]n termination proceedings, unlike delinquency proceedings, the child's interest is usually represented by the contending parties." On one hand, the child has an interest in "adequate parental care and subsistence [and] a right to remain with a natural parent who is providing that care and who

wishes to continue the parent-child relationship. In such a case, the parent represents the child.” *In re Kapcsos*, 468 Pa. at 58. On the other hand, a “child has a right to the state’s intervention to provide alternative care if the natural parent abandons him. In such a case, the party opposing the natural parent represents the child.” *Id.* The Department does not claim that there will never be a conflict between a child and the parents, or the child and the state. But if there is such a conflict, RCW 13.34.100(6) authorizes the trial court to appoint counsel. In this respect, the case-by-case approach applies as much to the child as it did to the parent in *Lassiter*.

Second, unlike the parents in a termination proceeding, the child will have a guardian ad litem. RCW 13.34.100(1) requires the court to “appoint a guardian ad litem for a child who is the subject of [a termination proceeding], unless a court for good cause finds the appointment unnecessary.” The guardian ad litem is “[t]o represent and be an advocate for the best interests of the child.” RCW 13.34.105(1)(f). Again, there may be times when the appointment of a guardian ad litem will not be enough to protect a child’s rights, but in those cases, RCW 13.34.100(6) authorizes appointment of counsel.

Third, a child’s lack of experience and judgment is actually a reason not to appoint counsel in every case—at least if the lawyer’s role is

to advocate for the child's stated interest. As the Court recognized in *Bellotti*, "States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences [because,] during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635. Without experience and judgment, the child's stated interest may well not be in his or her best interest. Yet the duty of the child's lawyer would be to advocate for a result that may actually be harmful to the child.

In sum, *Lassiter* controls this case, and RCW 13.34.100(6) does not violate the due process clause because it authorizes the trial court to appoint counsel for children in a termination proceeding when it is necessary.

3. Under The *Mathews* Balancing Test, RCW 13.34.100(6) Does Not Violate The Due Process Clause

The Children argue the balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), requires counsel to be appointed for children in all termination cases. Children's Br. at 15-31.

This is not correct.

a. Factor 1: The Private Interest That Will Be Affected By The Official Action

The first *Mathews* factor is “the private interest that will be affected by the official action.” *Mathews*, 424 U.S. at 335. Based on *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1357 (N.D. Ga. 2005), the Children claim that they have a “fundamental liberty interest in ‘maintaining the integrity of the family unit and in having a relationship with [their] biological parents.’” Children’s Br. at 19 (alteration in original). This liberty interest claimed by the Children does not make sense in this respect. They claim a liberty interest in maintaining family integrity and biological relationships, yet, based on this liberty interest, counsel for a child may argue that the child’s stated interest or best interest is to terminate parental rights. In any event, the Department agrees that children have an important interest in seeing that the parent and child relationship is not terminated without due process protections. However, the child’s liberty interest is not equivalent to the parent’s liberty interest in the family unit. *See supra* pp. 24–26.

The Children also argue that this Court has recognized their stated liberty interest in “holding that children in paternity actions have a fundamental interest in knowing their parentage and thus a right to independent representation” Children’s Br. at 19. The Children rely

on *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985), to support this point. Children's Br. at 19–20.

Although *Santos* “recognized that due process protects a child’s interest in a paternity proceeding,” the Court did not require that counsel be appointed for a child in a paternity case. *Santos*, 104 Wn.2d at 147. Rather, the Court explained that, “[b]ecause a child cannot represent his or her own interests, RCW 26.26.090 requires that a child be represented by a guardian or a guardian ad litem, who in fact protects the child’s interests.” *Id.* (citation omitted). Indeed, when the State brings a paternity action on behalf of a child, it can act as the guardian ad litem and, “[w]hen the State acts as the child’s guardian ad litem under RCW 74.20.310, it satisfies its duty to protect the child’s right by evaluating the paternity of possible fathers, as we articulated in *Santos*.” *State ex rel. McMichael v. Fox*, 132 Wn.2d 346, 359, 937 P.2d 1075 (1997).

Thus, to the extent this Court has recognized a due process right to representation for children, under *Santos* it would be satisfied by the appointment of a guardian ad litem pursuant to RCW 13.34.100(1). The trial court’s additional authority to appoint counsel for children under RCW 13.34.100(6) provides more protection than *Santos* requires.

The Children also claim two other liberty interests which are inapposite. The Children claim a threat to their physical liberty, because

they are in the custody of the State and are subject to a wide variety of placements. Children's Br. at 17. Again, the Children rely on *Kenny A.* to support this claim. There are two problems with this argument. First, this case is limited to a child's right to counsel in a termination proceeding. *Kenny A.* involved both "deprivation and termination-of-parental-rights (TPR) proceedings." *Kenny A.*, 356 F. Supp. 2d at 1355. A termination proceeding does not determine where a child will be placed. That is a function of the dependency proceeding. This Court has held that the "State does not have to prove that a stable and permanent home is available at the time of termination." *In re Dependency of K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113 (1999). And, even if the State fails to prove that the parents are unfit and parental rights are not terminated, a "child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists." RCW 13.34.138(2)(a).

The second problem is that a child does not have a liberty interest in avoiding foster care. As the Court explained in *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), a juvenile's "interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in

some form of custody.” *Schall*, 467 U.S. at 265 (citation omitted). “Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.” *Id.* Thus, “the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child.” *Id.*

The Children also argue that they have a liberty interest in being free from an unreasonable risk of harm, including that caused by lack of basic services, in addition to rights under federal and state law. Children’s Br. at 21–22. The Children rely on *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). But *Braam* has nothing to do with the termination of parental rights, and a dependant child may be in the foster care system regardless of whether parental rights are terminated.

b. Factor 2: The Risk Of An Erroneous Deprivation And The Probable Value Of Additional Procedural Safeguards

The second *Mathews* factor is “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” *Mathews*, 424 U.S. at 335. The Children make two arguments that there is a risk of erroneous deprivation in the termination proceeding. First, the Children

argue that the best interest of the child standard is subjective and imprecise. Children’s Br. at 24. The problem with this argument is that it does not accurately reflect termination proceedings.

“Termination of parental rights is a two-step process. First, the State must show that the six statutory requirements under RCW 13.34.180(1) are established” *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010) (citation omitted). This includes proving that “the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided;” that “there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future;” and that the “continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home.” RCW 13.34.180(1)(d)–(f). Moreover, the trial court must also find that the parent is currently unfit. *In re Welfare of A.B.*, 168 Wn.2d at 921.

The State must prove parental unfitness “by clear, cogent, and convincing evidence. This means the State must show that the ultimate fact in issue is highly probable.” *In re Welfare of A.G.*, 155 Wn. App. at 589 (citation omitted) (internal quotation marks omitted). And, parents have the right to be represented by counsel. RCW 13.34.090(1)–(2). If the State fails in its burden of proof, there can be no termination of

parental rights.

The Children completely ignore this first step in the termination proceeding. But it is only “if the six termination factors are established, [that] the State must show by a preponderance of the evidence that termination is in the best interests of the child.” *In re Welfare of A.G.*, 155 Wn. App. at 590. Thus, even if the State proves by clear and convincing evidence that the parents are currently unfit, parental rights will not be terminated if it is not in the child’s best interest. The termination process has substantial procedural protection built into it.

The Children’s second argument that there is a risk of error, is based on a claim that no one represents a child’s interest in the proceeding, and the Children argue that the appointment of a guardian ad litem is insufficient. Children’s Br. at 24–25. This ignores the fact that, “[i]n termination proceedings, unlike delinquency proceedings, the child’s interest is usually represented by the contending parties.” *In re Kapcsos*, 468 Pa. at 58. A child has an interest in “adequate parental care and subsistence [and] a right to remain with a natural parent who is providing that care and who wishes to continue the parent-child relationship. In such a case, the parent represents the child.” *Id.* The child also “has a right to the state’s intervention to provide alternative care if the natural parent abandons him. In such a case, the party opposing the natural parent

represents the child.” *In re Kapcsos*, 468 Pa. at 58. This is not to say that a child’s interest will always be represented by the parents or the State. However, the risk of error is small, because the court can appoint counsel for the child under RCW 13.34.100(6).

The Children argue that appointing counsel for a child in every case will reduce error. Children’s Br. at 26–30. This boils down to a claim that adding additional lawyers always improves the process. But this is not necessarily true.

Children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Bellotti*, 443 U.S. at 635. Yet, one view of the lawyer’s role is to advocate for the child’s stated interest. But, a child’s stated interest is not the same as a child’s best interest. “[P]roviding children with aggressive lawyers who will attempt to tilt the outcome of the case in the direction of the child’s wishes will make it less likely, not more likely, that the ‘correct’ legal result be reached.” Martin Guggenheim, *Reconsidering The Need For Counsel For Children In Custody, Visitation And Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998). A child may want to stay with his or her parents even though they are unfit, or a child may want to terminate parental rights because he or she has grown close to the foster parents. Having a lawyer aggressively advocate for either of

these positions may result in an erroneous result.

The chance of increased error also may exist even if the lawyer advocates for what the lawyer believes is in the best interest of the child. “[M]any lawyers are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own.” 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, 36 (Fall 2000). Thus, “there [is] a significant chance that these decisions and ensuing positions may be against the best interests of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative” *Id.* It “also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child.” *Id.*

This case is a good example. It is difficult to see how resolving the constitutional question in this case is in the best interest of D.R. and A.R. since they currently have lawyers representing them in the termination proceeding. But, it may be that counsel believes that it is in the best interest of children involved in termination proceedings generally,

if the court rules that all children have a constitutional right to the appointment of counsel in every case.

c. Factor 3: The Government's Interest

The third *Mathews* factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335.

The State has two important interests. First, “the State has an interest in protecting the physical, mental, and emotional health of children. It is well established that when a child’s physical or mental health is seriously jeopardized by parental deficiencies, the State has a *parens patriae* right and responsibility to intervene to protect the child.” *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007) (citation omitted) (internal quotation marks omitted). The Children argue that the State’s *parens patriae* responsibility for children can only be satisfied by appointing counsel for every child in every termination case. Children’s Br. at 31. But, as previously explained, in some cases, appointing counsel for a child may increase the risk of erroneous results. *See supra* pp. 36–37.

In fact, sometimes the appointment of counsel might actually be harmful to a child. For example, in this case, the guardian ad litem

explained that she and D.R.'s foster parent agreed that D.R. "really wouldn't understand the ramifications of having a lawyer." RP at 419 ll. 5-6. And, Dr. Estelle was "concerned that a lawyer for [D.R.] . . . would only add to her anxiety and contribute to getting her hopes up and later being disappointed again." RP at 419 ll. 10-13.

The State's second interest is financial and administrative. The Children rely on *Lassiter* to discount the State's financial interest. Children's Br. at 30. In *Lassiter*, the Court stated that, although "the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here" *Lassiter*, 452 U.S. at 28. Even though *Lassiter* concluded that the State's pecuniary interest did not overcome the parent's private interest, the parent's interest was vindicated by the trial court appointing counsel on a case-by-case basis. That is what RCW 13.34.100(6) authorizes.

The State's financial interest is entitled to greater weight than it received in *Lassiter*. In *Lassiter*, the appointment of counsel was very significant. Parents went from being pro se to being represented. The State's financial interest was not as significant, in light of the importance of counsel to the parents. Appointment of counsel for a child is not as significant, because the child has a guardian ad litem, and both the parents and the State are represented by counsel. Even if we assume that counsel

for a child will improve the process, in many cases, the improvement will be marginal. For this reason, the State's financial interest weighs more heavily.

There is also an administrative concern. The Children assume that there is a cadre of experienced, well-trained lawyers available to represent children in termination proceedings. Lawyers who represent children require specialized training. In addition to knowing the relevant law, they "need to know how to communicate with children; must be knowledgeable about children's developmental needs and abilities at different ages; and must know how to prepare and present a child's viewpoints, including child testimony and alternatives to direct testimony." Linda D. Elrod, *Raising The Bar For Lawyers Who Represent Children: ABA Standards Of Practice For Custody Cases*, 37 Fam. L.Q. 105, 119 (Summer 2003). Lawyers must also be able to "recognize, evaluate and understand evidence of child abuse and neglect; be cognizant of the impact of family dynamics and dysfunction, domestic violence and substance abuse; and know the value of the multi-disciplinary input that may be required in child-related cases" *Id.* This need for specialized training, again, weighs against appointing counsel in every case.

When the three *Mathews* factors are weighed and balanced, they support the conclusion that the case-by-case approach of

RCW 13.34.100(6) is fully consistent with due process.

C. RCW 13.34.100 Does Not Violate The Due Process Clause Of The Washington Constitution

1. Washington Case Law Does Not Establish That The Washington Due Process Clause Is More Protective Than Its Federal Counterpart

The Children argue that the due process clause of the Washington Constitution, article I, section 3, is more protective of family integrity than its federal counterpart. Children's Br. at 37-39. This is based on the Children's analysis of *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975). In *Luscier*, the Court held that the federal and Washington due process clauses required the court to appoint counsel for indigent parents in all termination cases. A year later, in *Myricks*, the Court extended *Luscier* to require appointed counsel for parents in all dependency cases. In 1977, the legislature codified these rulings in RCW 13.34.090. Laws of 1977, 1st Ex. Sess., ch. 291, § 37. In 1981, *Lassiter* held that the due process clause of the Fourteenth Amendment required the appointment of counsel in termination proceedings on a case-by-case basis.

The Children point out that, after *Lassiter*, Washington courts continue to cite *Luscier* and *Myricks* to support due process claims in dependency and termination cases. Children's Br. at 38-39. The

substance of the Children's argument appears to be that *Luscier* and *Myricks* must have been decided on state constitutional grounds, otherwise *Lassiter* would have overruled the two decisions. There are two problems with this argument.

First, *Luscier* and *Myricks* treat the Washington and federal due process clauses as being equivalent. There is no suggestion in either case that the due process clause of the Washington Constitution offers broader protection than its federal counterpart. *Luscier* was expressly based on both the federal and state constitutions. *In re Welfare of Luscier*, 84 Wn.2d at 139 (“It cannot be gainsaid, however, that the right to one’s children is a ‘liberty’ protected by the due process requirements of the Fourteenth Amendment and [Wash.] Const. Art. [I], § 3.”). It is difficult to know which constitutional provision *Myricks* relied upon. The Court refers generally to “due process,” but does not cite to a particular constitutional provision. *In re Welfare of Myricks*, 85 Wn.2d at 254. However, *Myricks* relies almost exclusively on due process decisions of the United States Supreme Court. *Id.* at 253–54. Thus, there is no basis for concluding that either case stands for the proposition that article I, section 3 offers broader protection than the Fourteenth Amendment.

The second problem with the Children's argument is that, even after *Lassiter*, Washington courts have cited *Luscier* and *Myricks* as

treating the two constitutional provisions as being equivalent. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006) (“Parents have a fundamental liberty interest in the care and custody of their children, protected by the Fourteenth Amendment and article I, section 3 of the Washington State Constitution. U.S. Const. amend. XIV; Const. art. I, § 3; *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975); *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974).”).⁸

This Court has never considered the relationship between *Lassiter* and *Luscier* or *Myricks* to determine whether article I, section 3 provides broader protection in the area of family integrity. The Court has never been required to confront this question, because the holdings of *Luscier* and *Myricks* were codified in RCW 13.34.090. As the Court explained in *In re Marriage of King*, 162 Wn.2d 378, 383 n.3, 174 P.3d 659 (2007): “While the federal due process underpinnings of these decisions may have been eroded by the United States Supreme Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981),

⁸ See also *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (same); *In re Custody of Brown*, 77 Wn. App. 350, 353, 890 P.2d 1080 (1995) (same); *In re Adoption of J.D.*, 42 Wn. App. 345, 347–48, 711 P.2d 368 (1985) (same); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102–03, 708 P.2d 1220 (1985) (same); *In re Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983) (same).

since our holdings have been legislatively codified under RCW 13.34.090, we need not address the continuing validity of our cases.”

The Children’s argument is mistaken for another reason. Even if *Luscier* was based solely on state constitutional grounds, it dealt with the constitutional rights of the parents. It is clear that the *Luscier* Court would not have extended its constitutional ruling to the children. The Court explained that, “[w]hile this court has always treated the rights of a parent to its child as fundamental, the welfare of the child is to be given paramount consideration.” *In re Welfare of Luscier*, 84 Wn.2d at 139 n.1. Thus, the Court “assume[d] that, in instances where the interests of the parents and the children diverge, the court will appoint a guardian ad litem to assure adequate protection of the child.” *Id.* Thus, *Luscier* held that the fundamental right of the parent required the appointment of counsel, but that the interest of the child could be satisfied with the appointment of a guardian ad litem.

2. The *Gunwall* Factors Do Not Compel Finding Broader Due Process Protections For Children In Termination Proceedings Under The State Constitution

The six *Gunwall* factors govern whether a state constitutional provision extends broader rights than its federal analog. *In re Marriage of King*, 162 Wn.2d at 392 (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

a. The Text And Textual Differences Between State And Federal Provisions (Factors 1 & 2) Do Not Support More Extensive Protection

This Court has repeatedly recognized that the first and second *Gunwall* factors do not support a more extensive interpretation of the state due process clause. “[T]here are no material differences between the ‘nearly identical’ federal and state provisions. This disposes of the first two *Gunwall* factors.” *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (footnote omitted) (quoting *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992)); *In re Marriage of King*, 162 Wn.2d at 392 (the language of the state and federal provisions is identical).

b. State Constitutional History Of The Due Process Clause (Factor 3) Does Not Support A More Extensive Interpretation

Factor 3 considers whether the history of a particular state constitutional provision “may reflect an intention to confer greater protection” than its federal analog. *Gunwall*, 106 Wn.2d at 61. The history of the state due process clause reveals no such intent.

Washington’s State Constitutional Convention adopted the due process clause as proposed, without modification or debate. *Journal of the Washington State Constitutional Convention, 1889*, at 495–96 (Beverly Paulik Rosenow ed. 1962). Thus, no legislative history “provide[s] a

justification for interpreting the identical provisions differently.” *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (considering *Journal of the Washington State Constitutional Convention, 1889*, at 495–96 (Beverly Paulik Rosenow ed. 1962)).⁹

c. Preexisting State Law (Factor 4) Establishes No Analytical Foundation To Expand State Due Process Protections For Children

Factor 4 “examine[s] preexisting state law to determine what kind of protection this state has historically accorded the subject at issue.” *State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994). The Children argue that, in the last 30 years, the state due process clause has provided broader protection for family integrity than its federal counterpart. Children’s Br. at 42. The Department disagrees. *See supra* pp. 41–43. However, Factor 4 “requires [the court] to consider the degree of protection that Washington State has historically given in similar situations.” *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004). In *Grant County*, the Court focused on the law around the time the constitution was adopted, not the last 30

⁹ Notably, the Children’s suggestion that Factor 3 supports broader due process protections mistakenly confuses Factor 3 with Factor 5, which considers structural differences between state and federal constitutions. The Children argue that the framers of various state constitutions generally intended them to be the primary devices to protect individual rights, while viewing the federal Bill of Rights as a secondary layer of protection against the federal government. Children’s Br. at 41. This structural difference between state and federal constitutions—which the Children again emphasize in their Factor 5 analysis (Children’s Br. at 42–44)—is properly considered there.

years. Nineteenth century law and society provided little or no protection when a problem concerned a child's safety from his or her family. Marvin R. Ventrell, *Rights & Duties: An Overview Of The Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259, 264 (Winter 1995). Indeed, "[a]lthough numerous private agencies dedicated to protecting children from harm existed throughout the world by the end of the nineteenth century, children still had no established legal right to this protection." *Id.* (footnotes omitted). Thus, at the time the constitution was adopted, the concept of a lawyer representing a child in a parental rights termination action was completely foreign.

d. Structural Differences And Matters Of Local Concern (Factors 5 And 6) Support Independent, But Not Necessarily Broader, Analysis

This Court has consistently concluded that Factor 5, structural differences between the state and federal constitutions, supports an independent analysis. *In re the Marriage of King*, 162 Wn.2d at 393. Regarding Factor 6, issues of family relations are generally matters of state or local concern. *In re Custody of R.R.B.*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) (citing *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)).

e. *Gunwall* Analysis

This Court "traditionally has practiced great restraint in expanding

state due process beyond federal perimeters.” *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002) (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991)). Critical consideration of the *Gunwall* factors offers no reason to abandon that restraint in the context of appointment of counsel for children in termination proceedings. The due process clause of the Washington Constitution does not mandate appointment of counsel for children in termination proceedings.

D. RCW 13.34.100(6) Does Not Violate The Mother’s Rights Under The Due Process Clause Of The United States Constitution

The Mother argues that she has a right under the due process clause of the Fourteenth Amendment to have counsel appointed for her children to ensure the accuracy of the proceedings. Mother’s Br. at 9–13. The Mother claims that “all three of the *Mathews* factors weigh in favor of providing legal counsel for children during parental rights termination trials.” Mother’s Br. at 11. But the Mother barely discusses the *Mathews* factors, and, as the Department has explained, the factors weigh in favor of the case-by-case approach of RCW 13.34.100(6). *See supra* pp. 30–41.

The Mother argues that lack of counsel for the Children “harms parents by limiting truth-seeking opportunities.” Mother’s Br. at 12. This claim is wrong for two reasons. First, a child’s counsel in a termination

proceeding *may or may not* oppose termination. If the child's counsel supports termination, arguably the parent's risk of erroneous deprivation would only be increased. Indeed, in this case, the Mother states that D.R. "wanted a relationship with [her Mother]" and that the guardian ad litem "advocated a position contrary to [D.R.'s] wishes" Mother's Br. at 5. A lawyer representing D.R.'s best interest may also advocate terminating the Mother's parental rights. It is difficult to see how this would advance the Mother's due process right to the parent and child relationship. Only in situations where the child's counsel opposes termination would the risk vis-à-vis the parent be (theoretically) reduced. And, due process concerns regarding the parent's risk in that regard are fully satisfied by appointing counsel directly for the parent.¹⁰

The second problem with the Mother's claim is that it assumes that appointing counsel for a child will always increase the accuracy of a termination proceeding. However, as the Department has explained, a lawyer advocating for a child's stated interest, or best interest, may

¹⁰ The Mother also appears to argue that the Department's concession that failure to appoint counsel was "not harmless" in this case leads to the inescapable conclusion that such a high risk of error exists in all termination proceedings that counsel must necessarily be appointed for all children in all such cases. Mother's Br. at 11. This conclusion is unfounded. Recognizing the error in not appointing counsel for the children in this case, and acknowledging that such errors will periodically occur, does not establish a pervasive risk of error across all termination proceedings. Much less does that recognition dictate the remedy of requiring counsel to be appointed for all children in all proceedings.

increase rather than decrease the chance of error in a termination proceeding. *See supra* pp. 36–37.

CONCLUSION

The Department respectfully requests that the Court dismiss the petition as improvidently granted, or, in the alternative, rule that RCW 13.34.100(6) does not violate the due process clauses of the United States and Washington Constitutions.

RESPECTFULLY SUBMITTED this 11th day of October 2010.

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Attached for filing are (1) Brief Of Respondent Department Of Social And Health Services and (2) Affidavit Of Electronic Filing.

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Wendy R. Scharber

Legal Assistant

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**SUPREME COURT
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In re the Dependency of: D.R. and A.R.

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I, Wendy R. Scharber, on October 11, 2010, sent an electronic copy
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I certify, under penalty of perjury under the laws of the state of
Washington, that the foregoing is true and correct.

DATED this 11th day of October 2010.


WENDY R. SCHARBER
Office of the Attorney General

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