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SUPREME COURT OF THE STATE OF WASHINGTON

In Re Dependency of
M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B. 10/10/00)

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

NYAKAT LUAK,

Appellant.

**SUPPLEMENTAL BRIEF OF RESPONDENT
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

RCW 13.34.100(6) permits, but does not require, a trial court to appoint counsel for children in a parental rights termination proceeding. This case-by-case approach satisfies due process. As the United States Supreme Court held in a proceeding to terminate parental rights, due process entitles indigent parents to a case-by-case determination of whether appointment of counsel is required. *Lassiter v. Dep't of Soc. Servs of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). This is exactly what RCW 13.34.100(6) provides.

Lassiter cannot be distinguished because it involved the rights of parents. Parents' fundamental liberty interest in the care, custody, and control of their children is not exceeded by children's corollary interest in the care and affection of their parents. As children's protected interests are no greater than their parents' interests, due process does not require appointment of counsel for children in every termination case when it does not confer this same right on parents.

The *Mathews* balancing test supports the conclusion that the case-by-case approach of RCW 13.34.100(6) is consistent with due process. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Finally, RCW 13.34.100(6) complies with article I, section 3 of the Washington Constitution. This Court appropriately has practiced great

restraint in expanding state due process beyond federal perimeters. The *Gunwall* factors offer no reason to abandon that restraint in this context.

II. ISSUES

For parental rights to be terminated, a parent must be proven unfit by clear, cogent, and convincing evidence and termination found to be in the child's best interest, in a proceeding in which the parents and the Department are represented by attorneys, and a guardian ad litem conveys the child's stated interest and protects the child's best interest. Is RCW 13.34.100(6), which permits—but does not require—appointment of an attorney to represent the child, consistent with the due process clauses of the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution?¹

III. SUPPLEMENTAL STATEMENT OF THE CASE

A. Factual and Procedural History Below

Ms. Luak's children, M.S.R. and T.S.R., were initially removed from her care in December 2004, when they were four years old. CP 180. Over the next three years, the Department attempted to reunify the family, returning the children to Ms. Luak's care three times, only to have them

¹ Ms. Luak also raises the issue of whether there was sufficient evidence in the record to support the trial court's decision to terminate her parental rights. This issue is fully addressed in the Department's Court of Appeals briefing. *See* Resp. Br. 1-21. With regard to this issue, the Department rests on that briefing.

removed each time by court order. *Id.* They were removed the final time in December 2007, and have been out of Ms. Luak's care since then. *Id.*

In September 2008, the Department petitioned to terminate Ms. Luak's parental rights to M.S.R. and T.S.R. CP 1-9. In October 2009, following a 13-day trial at which 22 witnesses testified and 56 exhibits were admitted, Ms. Luak's parental rights were terminated. CP 179-80.

Prior to trial, Ms. Luak subpoenaed the children to testify, which the Department and the children's guardian ad litem opposed. 1RP 1-7, CP 330-38. Ms. Luak clarified that she "was not asking the children to necessarily testify," but wanted the judge to ask the children "directly what their opinions are" as part of its best interests determination. 1RP 5-6, CP 374-80. The judge deferred Ms. Luak's request to the close of trial, when he would be able to evaluate "whether the merits of interviewing the children in chambers outweigh the detriments." 1RP 7-8.

On the twelfth day of trial, Ms. Luak reiterated she felt it was "important for [the children] to express their feelings about their mom and contact with her." 7A-RP 987. The guardian ad litem objected, saying that asking the children to express an opinion about termination could be harmful, as they could "blame themselves for the rest of their lives that they caused the action the Court had to take." 7A-RP 988-89. She offered, as an alternative, to stipulate that "the boys would say that they don't want

to lose their mom.” *Id.* The judge declined to interview the children, explaining the purpose would be to help Ms. Luak present her emotional attachment to them and she had successfully established that, so “I don’t see the purpose and there’s a big downside.” 7A-RP 990-91. At the close of trial, the judge terminated Ms. Luak’s parental rights. CP 421.

Ms. Luak appealed, asserting insufficiency of the evidence and claiming, for the first time on appeal, that the children had been denied a constitutional right to counsel in the termination proceeding. Appellant’s Opening Br. 3-4. After briefing was complete, shortly before scheduled oral argument, this Court accepted certification of the case from the Court of Appeals. Ruling Accepting Certification (March 17, 2011).

B. Procedure for Terminating Parental Rights

The proceeding to terminate Ms. Luak’s parental rights, like all parental rights termination proceedings in Washington, focused exclusively on whether the legal right of the parent to the care, custody, and control of her children should be terminated. *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). A proceeding to terminate parental rights does not determine other issues regarding the child’s ongoing welfare, such as whether the child is returned to the parent’s home or remains in out-of-home care. Such decisions are made in the separate dependency proceeding, which begins prior to the termination proceeding,

continues after it, and encompasses all matters associated with the child's care and well-being during the dependency. *Compare* RCW 13.34.130 with RCW 13.34.180 and .190.

Washington applies a two-step process in termination decisions: step one focuses on the parent's adequacy; step two focuses on the child's best interests. *In re A.B.*, 168 Wn.2d at 911. A parent's legal rights to a child may be terminated only if the court first finds that the allegations in the termination petition and the parent's current unfitness are established by clear, cogent, and convincing evidence. *Id.* at 920; RCW 13.34.190(1).

If the first step is satisfied, the second step requires the court to determine whether termination "is in the best interests of the child." RCW 13.34.190(1)(b). The best interests of the child "need be proved by only a preponderance of the evidence." *In re A.B.*, 168 Wn.2d at 911.

During the termination proceeding, the parent or legal guardian has the statutory right to be represented by an attorney. Indigent parents have a statutory right to court-appointed counsel. RCW 13.34.090(1), (2).

A guardian ad litem must be appointed for the child, unless the court, for good cause, finds appointment unnecessary. RCW 13.34.100(1). The guardian ad litem is required to meet with the child and report to the court any views or positions the child expresses 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). The guardian ad litem may be represented by counsel. RCW 13.34.100(5).

Finally, the court may appoint counsel to represent a child in a termination proceeding. 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.”^{2,3}

IV. SUPPLEMENTAL ARGUMENT

A. RCW 13.34.100 Complies With The Federal Due Process Clause

1. The constitutional issue was not properly preserved; is not a “manifest” error; and was harmless.

By failing to ask the trial court to appoint counsel for M.S.R. and T.S.R., Ms. Luak failed to preserve the issue for appeal. Ms. Luak’s request that the trial court hear directly from the children is not equivalent to requesting counsel. Luak Suppl. Br. 28-29. Contrary to Ms. Luak’s

² Additionally, children twelve and older must be notified of their right to request counsel and asked whether they wish to have counsel, and the court must inquire whether the child has received this notice. RCW 13.34.100(6). The guardian ad litem must report to the court that notice was given and the child’s position, and provide an independent recommendation as to whether appointment is in the child’s best interests. RCW 13.34.105(1)(g). 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.

³ Court rules also directs that, upon a party’s request or its own initiative, the court shall appoint a lawyer for a child who is unable to obtain one and has no guardian ad litem and “may, but need not, appoint a lawyer” if a guardian ad litem has been appointed. JuCR 9.2(c)(1).

claim, the trial court had no reason to resolve the issue by appointing counsel for the children because Ms. Luak made no such request.

Nor does the issue fall within the exception for “manifest error affecting a constitutional right” because the issue is not “manifest.”⁴ “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice[,]” a “‘plausible showing . . . that the asserted error had practical and identifiable consequences in the trial[.]’” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice cannot be established simply by postulating that if counsel had been appointed, counsel would have participated at trial and that participation would have had practical and identifiable consequences. Luak Suppl. Br. 27.

Finally, even if the Court were to apply the manifest error exception, any error would be harmless.⁵ Ms. Luak offers no basis to conclude that appointing counsel for M.S.R. and T.S.R. would have changed the result of the 13-day termination trial in which, after hearing from 22 witnesses, reviewing 56 exhibits, and expressly considering

⁴ For purposes of this analysis, the Department assumes, without conceding, that the issue of appointment of counsel for M.S.R. and T.S.R. is of constitutional magnitude as defined for purposes of RAP 2.5(a)(3). *O’Hara*, 167 Wn.2d at 98-99.

⁵ Ms. Luak suggests that failure to appoint counsel for the children is “structural” and therefore not subject to harmless error review. Luak Suppl. Br. 27-28. This Court recently confirmed that “‘structural error’ analysis does not apply to the civil context.” *In the Det. of D.F.F.*, 2011 WL 2790943 *5, ___ P.3d ___ (2011) (J. Johnson, J., concurring); *accord* *8 (Madsen, J., dissenting).

whether speaking directly with the children might affect his decision, the judge terminated her parental rights. CP 179-180; 7A-RP 990-91.

2. RCW 13.34.100(6) satisfies due process by authorizing appointment of counsel on a case-by-case basis.

a. The U.S. Supreme Court has held case-by-case appointment of counsel satisfies due process.

This case is governed by *Lassiter*. *Lassiter* examined whether the federal due process clause required the state to appoint counsel for indigent parents in a proceeding to terminate parental rights. The Court first found 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.” *Id.* at 26–27. The Court turned then to the three-part *Mathews* balancing test.⁶ The Court explained when considering a claimed right to counsel, a court must first balance the *Mathews* factors “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.” *Lassiter*, 452 U.S. at 27.

Balancing the *Mathews* factors, the Court concluded that

⁶ *Mathews* identified three considerations when evaluating arguments regarding procedural due process requirements: “the private interest that will be affected by the official action;” “the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and “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.

appointment of counsel might be required in an individual termination case if a parent's interests were at their strongest, the State's interests were at their weakest, and the risk of error were at its peak. *Lassiter*, 452 U.S. at 31. But recognizing that the *Mathews* factors would not always be so distributed, 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 a trial court determine in each case whether counsel should be appointed. This is exactly what RCW 13.34.100(6) provides. The trial 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).

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. Since a child's interest in the parent and child relationship is no greater than the parent's, 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

parent's fundamental liberty interest in the parent and child relationship, saying a parent's interest "in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). 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).

A child's interest in the parent and child relationship is certainly no broader. Children have an interest in their parents' "affection and care" that is corollary to their parents' interest. *Moore v. Burdman*, 84 Wn.2d 408, 411, 526 P.2d 893 (1974). But parents have that interest, plus the fundamental interest in their children's custody and control that entails a substantial measure of authority over children and justifies limitations on their freedoms. *Bellotti v. Baird*, 443 U.S. 622, 637-38, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (explaining children's rights cannot be equated with and are subordinate to those of parents, thus state can require minor to obtain parental consent or judicial approval after parental notification prior to an abortion). As children's interests in the parent-child relationship are no broader than parents', due process cannot require appointed counsel for children in every case when that right is not conferred on parents.

Ms. Luak also argues *Lassiter* is distinguishable, because some

parents need appointed counsel to protect their rights and other parents do not. By contrast, she says, counsel is always required for children because the risk of erroneous termination is insupportably high for children who “*always* bear the hallmarks of vulnerability that most need protection” Luak Suppl. Br. 19 (emphasis in original). This argument fails for three reasons.

First, in a proceeding to terminate parental rights, children are not in the same position as parents. “[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. The parent and the state each have counsel to protect the child’s interest. “In termination proceedings . . . the child’s interest is usually represented by the contending parties.” *In re Involuntary Termination of Parental Rights of Kapcsos*, 468 Pa. 50, 58, 360 A.2d 174 (1976). The parent represents the child’s interest in opposing termination, while the State represents the child’s interest in supporting it. The Department does not claim there will never be a conflict between the child and the parent or the child and the state. But if there is such a conflict, RCW 13.34.100(6) authorizes the trial court to take that into consideration in deciding whether to appoint counsel. Thus, the case-by-case approach applies to

the child, just as it did to the parent in *Lassiter*.

Second, unlike parents in a termination proceeding, children have a guardian ad litem. RCW 13.34.100(1); JuCR 9.2(c)(1). The guardian ad litem is required to communicate to the court both what is in the child's *best interest* and what the child's *stated interest* is. RCW 13.34.105(1). There may be times when the appointment of a guardian ad litem will not be enough to protect a child's interests, but in those cases, RCW 13.34.100(6) authorizes appointment of counsel.⁷

Third, a child's lack of experience and judgment is a reason not to appoint counsel to advocate for the child's stated interest.⁸ As the Court recognized in *Bellotti*, "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 not be in his or her best interest. However, the duty of a child's attorney as envisioned by Ms. Luak would be to advocate for that interest nonetheless. Also, some children are too young to express any

⁷ Ms. Luak asserts that the "*Lassiter* court had no occasion to consider the issue raised here because the children had been appointed counsel." Luak Suppl. Br. 20 n.22 (citing *Lassiter*, 452 U.S. at 28). In *Lassiter*, a lawyer was appointed "as the child's guardian *ad litem*", not to represent the child's stated interest. *Lassiter*, 452 U.S. at 29. In Washington, RCW 13.34.100 requires children be appointed a guardian ad litem.

⁸ There are two dominant models for the role of counsel for children in termination proceedings--to represent the child's stated interest or to represent the child's best interest. Ms. Luak argues that counsel is required to represent children's stated interests. Luak Suppl. Br. 13.

stated interest, but Ms. Luak contends due process requires appointment of counsel for all children in all termination proceedings, regardless of age.

In sum, *Lassiter* controls this case, and RCW 13.34.100(6) complies with due process because it authorizes the trial court to appoint counsel for children when it is necessary.

3. As in *Lassiter*, consideration of the *Mathews* balancing test confirms RCW 13.34.100(6) satisfies due process.

Ms. Luak argues the *Mathews* balancing test requires counsel to be appointed for all children in all termination cases. Luak Suppl. Br. 4-18. This is not correct. Analysis of the three *Mathews* factors supports the conclusion that the case-by-case approach of RCW 13.34.100(6) is fully consistent with due process.

a. Children's interest in the parent and child relationship is no broader than parents.

The first *Mathews* factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. As discussed above, children's corollary interest in the affection and care of their parents is no broader than that of the parents, plus parents additionally have the fundamental right of custody and control over their children (*Troxel*, 530 U.S. at 65), to which children have no corollary. Additionally, this interest would not be implicated at all in cases where the child's stated preference would be termination of parental rights.

Ms. Luak asserts that the child's interest in "maintaining and establishing family bonds" supports a constitutional right to appointment of counsel in all cases, citing *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985). Luak Suppl. Br. 6. Ms. Luak's argument not only suffers from the same flaw discussed above where the child's preference would be termination of parental rights, but also misreads *Santos*. Although *Santos* recognized that in judicial determinations of the parent-child relationship, the "importance of familial bonds accords constitutional protections to the parties involved[,] the Court required that a guardian ad litem--not counsel--be appointed for a child in a paternity case. *Id.* at 146, 150. Thus, to the extent this Court has recognized a due process interest in representation for children under *Santos*, it was satisfied by the appointment of a guardian ad litem. The trial court's additional authority to appoint counsel for children under RCW 13.34.100(6) provides more protection than *Santos* requires.

Ms. Luak also claims two other liberty interests which are inapposite. Relying on *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003), she argues that at least foster children "have a right to be free from unreasonable risk of harm and a right to reasonable safety." Luak Suppl. Br. 7. 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.

Finally, Ms. Luak claims children's physical liberty interests are threatened in termination proceedings because "the State may gain permanent control of the child," including the authority to make placement decisions.⁹ Luak Suppl. Br. 7-8. There are two problems with this argument. First, this case concerns a child's right to counsel in a termination proceeding. But a termination proceeding does not determine where a child will be placed--that is a function of the dependency proceeding. Second, a child does not have a liberty interest in avoiding foster care. "[J]uveniles, unlike adults, are always in some form of custody,' and where the custody of the parent or legal guardian fails, the government may (indeed we have said *must*) either exercise custody itself or appoint someone else to do so." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (citation omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)).

b. The risk of erroneous deprivation in terminations is low, and the probable value of mandatory counsel for children is minimal.

The second *Mathews* factor examines how much the process sought would reduce the risk of erroneous deprivation of the private

⁹ Ms. Luak also inaccurately states that a termination order "dictates children's contact with siblings." Luak Suppl. Br. 8. To the contrary, a termination order simply "include[s] a statement addressing the status of the child's sibling relationships and the nature and extent of sibling placement, contact, or visits." RCW 13.34.200(3).

interest at issue. This requires comparison of probable outcomes and consideration of the value of the *additional* proposed procedural protections. *Mathews*, 424 U.S. at 343-49.

Ms. Luak claims that the current termination procedures “create an elevated risk of error” because “[t]he vast majority of children are left unrepresented while their fundamental rights are litigated.” Luak Suppl. Br. 9-11. This does not accurately reflect termination proceedings. Termination proceedings involve a full, evidentiary trial before a superior court judge, with discovery, motions practice, presentation of evidence and testimony, a heightened burden of proof, and opportunity for appellate review. Contrary to Ms. Luak’s suggestion, these hallmarks of trial enhance, rather than reduce, the accuracy of the result. The disputed issue—whether the legal relationship between the parent and child should be terminated—is tested under the gold standard of a full evidentiary hearing before a neutral decision maker.

Nor is the child’s interest left unrepresented. First, the parent and the State each have counsel, opposing and supporting termination respectively, and “the child’s interest is usually represented by the contending parties.” *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. But where it is not, RCW 13.34.100(6) authorizes the court to appoint counsel.

Second, the child has a guardian ad litem, who reports the child's stated interests and advocates the child's best interests to the court. RCW 13.34.105(1)(b), (f). Absent good cause, a guardian ad litem must be appointed for each child who is the subject of a termination proceeding. RCW 13.34.100(1). Without explanation, Ms. Luak contends a guardian ad litem cannot sufficiently protect a child's interest due to a lack of legal training. Luak Suppl. Br. 15. In other civil proceedings, the courts and the legislature have found that even when minors are *parties*, a child's interests are protected by appointment of a guardian ad litem.¹⁰ Again, at times a guardian ad litem may not be enough to protect a child's interests, but in those cases, the court is authorized by RCW 13.34.100(6) to appoint counsel. In sum, the current termination procedures already ensure a minimal risk of error.

Ms. Luak's claim that the standards in termination proceedings are "amorphous" and "subjective" is also inaccurate. Luak Suppl. Br. 11-12. Termination of parental rights requires proof of parental unfitness by clear, cogent, and convincing evidence, meaning the State must show that

¹⁰ Appointment of a guardian ad litem is mandatory when a minor is a party to a civil action. RCW 4.08.050; RCW 12.04.140. Proceedings in which a guardian ad litem is appointed include parentage actions (RCW 26.26.555(2)); involuntary commitment of minors (*State ex rel. Richey v. Superior Court for King County*, 59 Wn.2d 872, 371 P.2d 51 (1962)); sale of probate assets when minors are heirs (*Mezere v. Flory*, 26 Wn.2d 274, 173 P.2d 776 (1946)); Child in Need of Services proceedings (RCW 13.32A.170(1) and RCW 13.32A.190(1)); guardianship (RCW 13.36.080); minor parents consenting to adoption (RCW 26.33.070) and child custody (RCW 26.09.220, RCW 26.12.175).

the ultimate fact in issue is highly probable. *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010). The State must prove the six statutory requirements of RCW 13.34.180(1), including that court-ordered services “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 the “continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home.” The court must also find the parent is currently unfit. *In re A.B.*, 168 Wn.2d at 921.

Ms. Luak ignores this first step in the termination proceeding. But it is only if the six termination factors are established that the State must then show, by a preponderance of the evidence, that termination is in the best interests of the child. *In re A.G.*, 155 Wn. App. at 590. Thus, even if the State proves that the parents are unfit, parental rights will not be terminated if it is not in the child’s best interest. Thus, the current termination process has substantial procedural protections built into it.¹¹

¹¹ Ms. Luak’s description of the consequences of an erroneous termination decision is also mistaken. Luak Suppl. Br. 12. If a trial court errs in failing to terminate parental rights, the child is not returned to an abusive or neglectful parent, as Ms. Luak suggests. *Id.* If parental rights are not terminated, the child remains dependant, and is not returned home until and unless the court in the dependency proceeding finds that a reason for removal under RCW 13.34.130 no longer exists. RCW 13.34.138(2)(a). Conversely, any trial court error terminating parental rights is subject to appellate review.

Ms. Luak argues that providing lawyers for all children would substantially mitigate the risk of error. Luak Suppl. Br. 12-15. In essence, she contends that adding lawyers always improves the process. This is not necessarily true. First, Ms. Luak claims counsel for children is necessary to represent “a child’s expressed interest in reunification or termination[.]” *Id.* at 13. As previously discussed, the parent and State usually represent these positions, making counsel for the child redundant. Ms. Luak’s examples of what counsel for M.S.R. and T.S.R. could have done illustrate this point.¹² *Id.* at 13-14. Moreover, the stated interest attorney envisioned by Ms. Luak would be superfluous for preverbal children.¹³

More generally, 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. Thus, providing children with attorneys to advocate for their stated interest may be counter to their 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*

¹² For example, Ms. Luak suggests counsel could have examined witnesses regarding Ms. Luak’s anger management deficiency and presented evidence showing it did not affect her ability to parent the children. Luak Suppl. Br. 13. Such actions opposing termination would be expected of Ms. Luak’s own counsel.

¹³ Contrary to Ms. Luak’s claim (Luak Suppl. Br. 13 n.14), the Rules of Professional Conduct are silent regarding preverbal children.

Custody, Visitation And Child Protection Proceedings, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998). A child may want to stay with unfit parents, or to have parental rights terminated because he or she has grown close to foster parents. Having a lawyer aggressively advocate for either of these positions may increase the likelihood of an erroneous result.¹⁴

c. The government's interests do not weigh in favor of appointing counsel for all children.

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 and, “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*

¹⁴ Ms. Luak also suggests that “children without legal representation are less likely to achieve permanency than children who are represented.” Luak Suppl. Br. 12 (citing Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (Chicago: Chapin Hall Center for Children at the University of Chicago 2008) (Palm Beach Study)). The Palm Beach study is of limited use here. First, it examined the effect of providing attorneys in both dependencies and terminations. *Id.* at 1. Second, it examined the effects of appointing counsel for children in only some cases under ideal conditions of trained and motivated attorneys with small caseloads, and thus may not reflect the results of a system in which every child is appointed counsel. *Id.* at 2, 4, 12. Finally, as a parent Ms. Luak’s reliance on the study seems misplaced, given the study results suggested that improvements in permanency were achieved through earlier petitions for termination, and noted complaints by social workers that children’s attorneys were less willing to give parents a chance to improve in order to reunify the family. *Id.* at 2, 9-10, 32.

re Dep. of Schermer, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). Ms. Luak argues that children's attorneys further this interest. Luak Suppl. Br. 16. As previously explained, however, this argument simply assumes that appointing counsel in every case would promote a correct decision, when that is not so. Moreover, appointing attorneys for children may result in emotional harm, because children will be required to grapple with what position to take regarding the termination of their own parent's rights. This is particularly true if attorneys must be appointed for all children in all cases, without regard to a child's maturity or developmental abilities.

The State's second interest is financial and administrative. Ms. Luak asserts that the State cannot rely on financial cost alone.¹⁵ Luak Suppl. Br. 16-17. However, as *Mathews* observed, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard . . . may be outweighed by the cost." *Id.* at 348. That is the case here. As this Court recognized with regard to appointing counsel for children in initial truancy hearings, because "it is reasonable to conclude that costs would rise and additional administrative resources would be expended if an attorney had to be appointed" for every

¹⁵ Ms. Luak's reliance on the Palm Beach Study for the idea that appointing children's counsel would reduce the long-term financial burden on the State is misplaced. Luak Suppl. Br. 17 n.17. The study expressly recognized it does not provide a basis to draw conclusions about overall fiscal impact. Palm Beach Study 22.

child in every termination proceeding, “the third *Mathews* factor does not weigh in favor of requiring counsel.” *Bellevue Sch. Dist. v. E.S.*, 2011 WL 2278158 at *7, ___ P.3d ___ (2011).

In sum, when the *Mathews* factors are balanced, they clearly weigh against providing counsel to all children in termination proceedings, just as they did for parents in *Lassiter*. The *Mathews* test supports the conclusion that the case-by-case approach of RCW 13.34.100(6) is fully consistent with due process.

4. Washington’s case-by-case approach is consistent with other jurisdictions.

Contrary to Ms. Luak’s suggestion, Washington is not an outlier in the level of procedural protections it provides for children in termination proceedings. For example, Ms. Luak relies on the 2006 U.S. Summary Chart, which places Washington in Category E based on the statutes in effect in 2005. Luak Suppl. Br. 17 n.19 (citing Representing Children Worldwide, U.S. Summary Chart). However, amendments since then, which require the guardian ad litem to convey children’s stated interests to the court as well as to advocate their best interests, would place Washington in category C, reflecting that Washington provides protections similar to many other states and beyond those of more than twenty others. Laws of 2008, ch. 267, § 13 (amending RCW 13.34.105).

Other state courts, considering the issue prior to *Lassiter*, also concluded that due process is satisfied by statutes like RCW 13.34.100(6) that permit, but do not require, a trial court to appoint counsel for a child.¹⁶ The foreign decisions cited by Ms. Luak do not compel a different conclusion. *In re Jamie T.T.*, 191 AD.2d 132, 599 N.Y.S.2d 892 (App. Div. 1993), is of limited use because it involved an abuse hearing, which could result in the alleged abuser regaining immediate custody of the child, rather than a parental rights termination hearing, and the decision appeared to be animated by the court's conclusion that the state had not effectively represented the child's legal interests. Under those circumstances, applying *Mathews* the court held that due process entitled Jamie T.T. to effective legal representation. This result is consistent with Washington's case-by-case approach. Similarly, *Kenny A.*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005), has limited application here because it

¹⁶ 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.). See, also, *In re Kapsos*, 360 A.2d 174 (1976), discussed above.

involved both dependencies as well as hearings to terminate parental rights, and based its decision on the Georgia state constitution, not federal due process. As for *In re Guardianship of S.A.W.*, 856 P.2d 286, 290, 1993 OK 95 (1993), that decision did not engage in a *Mathews* analysis but merely expanded the holding of an earlier Oklahoma decision that found a statutory right to counsel for children in termination proceedings. Finally, *Roe v. Conn*, 417 F. Supp. 769 ((M.D. Ala. 1976), was decided prior to *Lassiter* and can be distinguished on that basis alone.

B. RCW 13.34.100 does not violate the due process clause of the Washington constitution, article I, section 3.

1. The Court should not reach the state constitutional issue, which Ms. Luak raises here for the first time.

Even if the Court considers the federal due process issue, notwithstanding Ms. Luak's failure to properly preserve it, it should decline to reach the state due process issue. Prior to her supplemental briefing before this Court, Ms. Luak did not argue that article I, section 3 of the state constitution provides greater due process protections or address the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court should not address this issue, raised for the first time, in supplemental briefing. RAP 2.5(a); *see also Hardee v. Dep't of Soc. & Health Serv.*, 2011 WL 2649997 *3 n.7, ___ P.3d ___ (2011).

2. The *Gunwall* factors do not support broader due process protections for children 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 378, 392, 174 P.3d 659 (2007). Ms. Luak begins her *Gunwall* analysis by mistakenly suggesting that *Gunwall* identified a parent's due process right to counsel in dependency proceedings as illustrative of greater protection offered under the state constitution, by citing to *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975). Luak Suppl. Br. 22. *Gunwall* did no such thing. The case referred to was *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984), an article I, section 7 search and seizure case. *Gunwall*, 106 Wn.2d at 59 n.3.

Gunwall Factors 1 and 2 consider the text and textual differences between the state and federal provisions. *Id.* at 61. This Court has repeatedly recognized that the first and second *Gunwall* factors do not support a more expansive 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

(language of state and federal provisions is identical).¹⁷

Gunwall Factor 3 considers whether the state constitutional provision's history reflects "an intention to confer greater protection" than its federal analog. *Id.* at 61. Ms. Luak claims an intent to confer greater protection can be read from the framers' "model[ing] Article I, Section 3 after the Oregon and Indiana constitutions rather than the federal constitution." Luak Suppl. Br. 23-24 (citing Justice Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 3 (2002)). But Ms. Luak's foundational premise is flawed. The Oregon and Indiana Constitutions extant in 1889 when Washington's constitution was drafted did not contain the due process clause language of article I, section 3.¹⁸ Consequently, no such intent on the part of the framers to rely on other states' constitutions can be derived.

What is known is that Washington's State Constitutional

¹⁷Ms. Luak acknowledges that the state and federal provisions "are not significantly different[,] but suggests this should not end the inquiry. Luak Suppl. Br. 22-23. By way of example, she cites *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), a pre-*Gunwall* decision which held that a capital punishment statute violated the state due process and cruel punishment provisions although it was not invalid under federal due process. *Id.* at 639-40. However, Ms. Luak herself calls into question the relevance of *Bartholomew* by pointing out that "[b]ecause of the context-specific nature of constitutional rights, criminal cases . . . are inapposite to the issue of children's due process right to counsel in termination proceedings." Luak Suppl. Br. 21 n.24.

¹⁸Utter and Spitzer's *The Washington State Constitution: A Reference Guide*, at 17, points to the 1857 Oregon and the 1851 Indiana Constitutions as sources of Washington's article I, section 3 language. This is incorrect. Neither contains the article I, section 3 due process language. See 1857 Oregon Constitution (available at <http://arcweb.sos.state.or.us/exhibits/1857/learn/transcribed/index.htm>, last visited July 29, 2011); and 1851 Indiana Constitution (available at <http://www.in.gov/history/2473.htm>, last visited July 29, 2011).

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 at 303 (considering Rosenow at 495–96).

Gunwall Factor 4, preexisting state law, likewise establishes no basis to expand state due process protections for children. 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) (focusing Factor 4 analysis of article I, section 12 on law around the time the provision was adopted). Nineteenth century law and society provided little or no protection when a problem concerned a child’s safety within the 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’s stated interests in a

parental rights termination action would have been completely foreign.

Instead of focusing on historical legal protections as *Gunwall* directs, Ms. Luak points to *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995) and *In re Welfare of Hall*, 99 Wn.2d 842, 664 P.2d 1245 (1983). She claims these cases somehow inform the intended scope of article 1, section 3. Luak Suppl. Br. 24-25. Neither Ms. Luak's reliance on these recent cases, nor her claim withstands scrutiny. First, *Gunwall* factor 4 looks to the law existing when a constitutional provision was adopted, and that is not informed by court decisions issued more than 100 years later. Second, *Grove* and *Hall* merely rely on *Luscier* and *Myricks*, which predated *Lassiter* and which do not establish broader protection under the state due process clause. See *Bellevue Sch. Dist.*, 2011 WL 2278158 at *8 (noting *Luscier* "did not separately analyze the state and federal constitutional provisions at issue").¹⁹

Indeed, *Luscier* and *Myricks* treat the Washington and federal due process clauses as equivalent. Neither case suggests that the due process

¹⁹*Grove*, which considered when civil appellate counsel would be provided at public expense, recited without further analysis that a constitutional right to legal representation exists "where a fundamental liberty interest, similar to the parent-child relationship, is at risk[.]" *Grove*, 127 Wn.2d at 237 (citing *In re Luscier*, 84 Wn.2d 135 and *In re Myricks*, 85 Wn.2d 252).

Hall, which considered whether a parent's court-appointed counsel in a parental rights termination would be allowed to withdraw from a frivolous appeal, recited similarly without analysis that the right to counsel for a parent in child deprivation proceedings "except in limited circumstances, finds its basis solely in state law." *Hall*, 99 Wn.2d at 846 (citing *Luscier* and RCW 13.34.090, which provides a statutory right to counsel for parents in child dependency and parental rights termination proceedings).

clause of the state constitution offers broader protection than its federal counterpart. *Luscier* was based on both the federal and state constitutions. *In re Luscier*, 84 Wn.2d at 139 (“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.”). *Myricks* refers generally to “due process,” does not cite to a particular constitutional provision, and relies almost exclusively on due process decisions of the United States Supreme Court. *In re Myricks*, 85 Wn.2d 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.

This Court has held that Factor 5, structural differences between the state and federal constitutions, supports an independent analysis. *In re Marriage of King*, 162 Wn.2d at 393. However, this factor argues for independent analysis in every case, and does not dictate that such an analysis supports broader rights under the state due process clause. 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)). As is the case with Factor 5, the fact that this factor may support an independent analysis does not mean that article I, section 3 provides greater due process protection in this context, and

Ms. Luak offers no sound argument to the contrary.

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)). The *Gunwall* analysis 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 state constitution does not mandate appointment of counsel for every child in every termination hearing. Accordingly, RCW 13.34.100 does not violate the state’s due process clause.

V. CONCLUSION

The Department respectfully requests the Court to uphold RCW 13.34.100 providing for the appointment of counsel for children in termination proceedings.

RESPECTFULLY SUBMITTED this 10th day of August, 2011.

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NO. 85729-6

SUPREME COURT OF THE STATE OF WASHINGTON

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In re Dependency of M.S.R. & T.S.R.,

Washington State Department of
Social and Health Services,

Respondent,

v.

Nyakat Luak,

Appellant.

CERTIFICATE OF
SERVICE

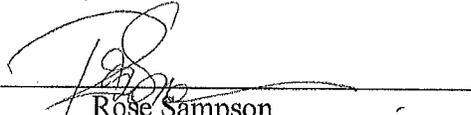
I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Supplemental Brief of Respondent Department of Social and Health Services on the following parties by sending it via electronic E-mail transmittal:

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Sent on behalf of Allyson S. Zipp, Deputy Solicitor General, WSBA# 38076

Attached you will find the Supplemental Brief of Respondent Department of Social and Health Services and Certificate of Service in the above referenced matter.

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