

No. 73615-9-1

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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NASRO ABUBAKAR,

Petitioner-Appellant,

v.

ABDIMALIK HASSAN,

Respondent-Appellee,

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MEMORANDUM OF AMICUS CURIAE NORTHWEST JUSTICE  
PROJECT IN SUPPORT OF PETITION FOR REVIEW

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## **I. INTRODUCTION**

This Court should grant review because the decision of the Court of Appeals, Division One is in conflict with a published decision of Division Two, *In re Dependency of E.H.*, 158 Wn. App. 757, 243 P.3d 160 (2010). It also raises an issue of substantial public interest, concerning an indigent parent's right to counsel in custody proceedings that are inextricably linked with a pending dependency case, which should be determined by this Court. RAP 13.4(b)(2), (4).

## **II. IDENTITY AND INTEREST OF AMICUS**

Northwest Justice Project is the largest provider of civil legal aid to low-income persons in Washington and is especially concerned with ensuring access to justice in matters that impact basic human needs and fundamental rights to family integrity. The identity and interest of Amicus, Northwest Justice Project ("NJP"), is set forth in its separate Motion to Participate as Amicus Curiae, filed pursuant to Rap 13.4(h) and RAP 10.6.

## **III. STATEMENT OF CASE**

Amicus primarily relies on the facts as set out by the Court of Appeals' decision, and in the Appellant's Petition for Discretionary Review. Additional facts relevant to this Memorandum are set out below.

Abubakar and her family came to the U.S. as Somali refugees. CP 203. Because of the couple's minority status within the Somali Muslim

community, Abubakar was subjected to torture by her own family, including being stoned. CP 203. During the four years the family resided in a refugee camp, she suffered physical and emotional trauma, including beatings resulting in head injuries associated with cognitive impairment. CP 203, 208.

After arriving in the U.S., the couple divorced and a final Parenting Plan was entered on January 17, 2012. CP 12. The final Parenting Plan designated Abubakar as the primary custodian and restricted Hassan's contact with the children and his right to make decisions because of domestic violence and other limiting factors. CP 13. The court also extended the expiration of Abubakar's domestic violence protection order obtained against Hassan to March 3, 2028. CP 18. The domestic violence perpetrated against Abubakar by her husband was described as "complex and sustained DV trauma" and the kind that "most people do not survive." CP 340.

Abubakar speaks and understands some English but requires an interpreter. CP 203. She has minimal marketable skills and requires community supports, including financial assistance. CP 203, 207.

Trial on Hassan's petition for modification proceeded after the State filed juvenile court dependency proceedings related to the same minor children at issue in in the modification. In addition to designating Hassan

as the children's primary custodian, the trial court restricted Abubakar's residential time and her right to make decisions regarding their care. CP 302-07. The court also ordered Abubakar to undergo a psychological assessment. CP 299.

#### IV. ARGUMENT

##### A. The Right to Care, Custody, and Control of a Child is a Fundamental Liberty Interest.

A parent's right to the care, custody, and control of a child is the oldest fundamental liberty interest recognized by the U.S. Supreme Court.<sup>1</sup> Washington also recognizes the fundamental nature of the parent-child relationship. This Court has expressly observed that "a parent's interest in the custody and control of minor children [is] a 'sacred' right . . . characterized . . . as 'more precious to many people than the right of life itself.'"<sup>2</sup> The right of a parent to the companionship of his or her child is

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<sup>1</sup> *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests") (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed. 772 (1997).

<sup>2</sup> *In re Luscier's Welfare*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (alteration to original) (citations omitted).



part of the bundle of rights associated with marriage, establishing a home, and rearing children.<sup>3</sup>

**B. An Indigent Parent’s Right to Counsel in Dependency Proceedings and Closely Related Family Law Proceedings is Guaranteed by Due Process and RCW 13.34.090.**

A parent threatened with deprivation of her fundamental liberty interest has a due process right to counsel.<sup>4</sup> *In re Welfare of Luscier* held a right to counsel in permanent child deprivation proceedings is constitutionally required to mitigate the power imbalance between a *pro se* parent and the “highly skilled” representative of the state.<sup>5</sup>

In *In re Myricks*, again noting the power imbalance, this Court extended an indigent parent’s right to counsel to the dependency fact-finding proceedings, thereby leveling the playing field:

The full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.<sup>6</sup>

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<sup>3</sup> *In re Myricks’ Welfare*, 85 Wn.2d 252, 253–54, 533 P.2d 841 (1975).

<sup>4</sup> *Luscier’s Welfare*, 84 Wn.2d at 139.

<sup>5</sup> *Id.* at 137; *Cf. State v. Parvin*, 184 Wn.2d 741, 759, 364 P.3d 94 (2015) (reaffirming state Constitution component of the holding in *In re Luscier’s Welfare*).

<sup>6</sup> *Myrick’s Welfare*, 85 Wn.2d at 254-55.

In addition to the due process right to counsel in dependencies, parents have a statutory right to counsel at all stages of proceedings under Chapter 13.34 RCW.<sup>7</sup> Specifically, RCW 13.34.090 provides that a parent has a right to be represented by an attorney, and, if indigent, the right to have counsel appointed at all stages of a proceeding in which a child is alleged to be dependent.<sup>8</sup> This right means what it says – a right to counsel exists at *all* stages of the proceedings, including appeals.<sup>9</sup>

Division Two of the Court of Appeals held in *In re Dependency of E.H.* that indigent parents are entitled to appointed counsel in Title 26 RCW custody proceedings where such proceedings are inextricably linked to dependency proceedings.<sup>10</sup> The *E.H.* court ruled that a parent’s right to counsel under RCW 13.34.090 extends to concurrent non-parental custody proceedings in which the State’s plan for a dependent child’s placement is to be determined, because such a proceeding is “inextricably linked” to the dependency proceeding under Chapter 13.34 RCW.<sup>11</sup> “Inextricably linked” concisely captures the reality that when a family court decides child custody issues so entwined with a dependency proceeding that the family court

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<sup>7</sup> RCW 13.34.090(1),(2).

<sup>8</sup> RCW 13.34.090(1),(2).

<sup>9</sup> *In re Grove*, 127 Wn.2d 221, 233, 897 P.2d 1252 (1995).

<sup>10</sup> *In re Dependency of E.H.*, 158 Wn. App. 757, 243 P.3d 160 (2010).

<sup>11</sup> *Dependency of E.H.*, 158 Wn. App. at 768; RCW 13.34.090(1) (“Any party has a right to be represented by an attorney *in all proceedings under this chapter . . .*”) (emphasis added).

decision is dispositive of the dependency, it functions as a “stage” of a dependency proceeding, in which the right to counsel attaches under RCW 13.34.090.<sup>12</sup>

**C. Appellant Was Entitled to Appointed Counsel In the Parenting Plan Modification Action Heard Concurrently with the Pending Dependency Cases.**

Like *Luscier* and *Myrick*, the power imbalance facing Abubakar in the parenting plan modification action is strikingly apparent. Abubakar is an indigent refugee who understands and speaks limited English. She is a survivor of domestic violence and refugee trauma. Without counsel, she faced the superior power of the State whose resources were “trained”<sup>13</sup> on her to accomplish placement of the children under the full time care and custody of Respondent: the State openly supported Respondent’s request for primary custody of the children; two of Respondent’s witnesses were State social workers; Respondent’s third witness was the children’s dependency GAL; and the Court’s findings (including its basis for ordering Abubakar to submit to psychological exam) almost exclusively relied on State developed and supplied testimony and reports; information similar, if

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<sup>12</sup> *Dependency of E.H.*, 158 Wn. App. at 768; see also RCW 13.34.090(2) (“At all stages of a proceeding in which a child is alleged to be dependent, the child’s parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court.”).

<sup>13</sup> *Myrick’s Welfare*, 85 Wn.2d at 254-55.

not identical, to what would be presented in a dependency fact-finding hearing.<sup>14</sup>

And like in *E.H.*, the parenting plan modification was “inextricably linked” with an issue reserved for the dependency proceeding: whether the children would be placed outside the home of their primary parent or return home to Abubakar. A juvenile court order granting the family court concurrent authority to proceed with the parenting plan modification action exists.<sup>15</sup> Hassan’s counsel informed the family court of the procedural posture of the dependency cases, stating that juvenile court is “simply waiting on the resolution of this matter in order for them to make a decision about what to do with the dependency action,” and that “Dependency Court . . . has kicked the can to us to see if we can adjudicate and figure it out.”<sup>16</sup> The family court, acknowledging the pending dependency cases, agreed with Hassan’s counsel that as between it and juvenile court, it would resolve a dispositive dependency issue.<sup>17</sup> And, Hassan’s witness, a DSHS social worker, testified that the State would likely dismiss the dependency

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<sup>14</sup> Abubakar herself recognized the gross unfairness, stating in her Motion for Order re New Trial that “such an imbalance of power denied me getting a fair trial.” CP 348.

<sup>15</sup> Brief for Respondent at 2, *Abdimalik Hassan v. Nasro Abubakar*, No. 73615-9 (Div. I, 06/06/2006) (“[T]he concurrent jurisdiction order appears nowhere in the record for this case. It is only in the dependency court file (Hassan’s appellate counsel has seen it), but it is not in the record here.”).

<sup>16</sup> Brief for Petitioner Appellant at 9, *Abdimalik Hassan v. Nasro Abubakar*, No. 73615-9 (Div. I, 04/06/2016).

<sup>17</sup> *Hassan v. Abubakar*, No. 73615-9-1, slip op. at 3 (Div. I, Dec. 27, 2016).

proceedings against Abubakar if Hassan was granted primary custody.<sup>18</sup> It is clear from the record that the juvenile court granted the family court authority to not only determine Hassan's petition for modification, but that such a determination would dispositively resolve the issues pending before the juvenile court.<sup>19</sup>

**D. The Court of Appeals Erred by Failing to Analyze the Inextricable Link Between the Modification and Dependency Proceedings.**

The Court of Appeals' failure to consider this issue based on the purported absence of an order granting concurrent jurisdiction was more than legal error. It resulted in the denial of significant procedural rights and undermined the statutory mandate of appointed counsel in RCW 13.34.090.

Furthermore, contrary to the Court of Appeals' decision, this Court's decision in *King v. King* is not dispositive of whether Abubakar was entitled to counsel under RCW 13.34.090. In *King*, this Court held that in a "purely private" dissolution proceeding, a fundamental parental liberty interest is not sufficiently at stake to constitutionally mandate appointment

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<sup>18</sup> Hassan v. Abubakar, No. 73615-9-1, slip op. at 3 (Div. I, Dec. 27, 2016).

<sup>19</sup> In *Perry v. Perry*, 31 Wn. App. 604, 644 P.2d 142 (1982), the absence of the dependency record containing the Juvenile Court's concurrent jurisdiction order did not preclude a conclusion that concurrent jurisdiction was established based on the parties' briefing containing descriptions of the record. See also *In re Custody of M.S.*, 194 Wn. App. 1033 (2016), an unpublished decision cited in accordance with GR 14.1 and has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

of counsel.<sup>20</sup> In contrast to a dependency, *King* expressly observed that the State’s involvement in such proceedings is “meaningfully different.”<sup>21</sup> The Court also relied on procedural safeguards such as a GAL or parenting investigator that provided protections to both parents from erroneous decisions.<sup>22</sup>

However, Abubakar’s case is significantly different than *King*. The parenting plan modification action here was not a purely private dispute: Respondent’s initiation of the action was openly encouraged by the State, his witnesses were the CPS State actors and the dependency GAL, and the family court’s decision was based almost exclusively on information supplied by the State. In this context, the “procedural safeguards” noted in *King* were not only inadequate to protect Abubakar against an erroneous decision, these “safeguards” were occupied by State child welfare workers who initiated the dependency actions and were “trained against” Abubakar.

#### **E. Public Policy Supports a Right to Counsel Here.**

The recent, updated Washington civil legal needs study confirms that roughly 70% of legal needs of low-income communities go unmet (many involving high stakes matters), creating a “justice gap” and casting

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<sup>20</sup> *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007).

<sup>21</sup> *Id.* at 386.

<sup>22</sup> *King*, 162 Wn.2d at 387.

doubt on whether there is true, meaningful access to our legal system.<sup>23</sup> In this harsh context, it is critically important that this Court ensure that Washington courts are enforcing the statutorily mandated right to counsel “at all stages” of the dependency process, including family court proceedings so inextricably intertwined with the dependency, as those in this case.

#### V. CONCLUSION

This Court should grant review to address the important issue of right to appointed counsel in family court proceedings inextricably linked to dependency proceedings.

Respectfully submitted this 10<sup>th</sup> day of May, 2017.

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<sup>23</sup> OFFICE OF CIVIL LEGAL AID, CIVIL LEGAL NEEDS STUDY UPDATE 3 (2015).

CERTIFICATE OF SERVICE

I hereby certify that on the date below I caused the attached and/or foregoing MEMORANDUM OF AMICUS CURIAE NORTHWEST JUSTICE PROJECT IN SUPPORT OF PETITION FOR REVIEW to be served on all parties of record via e-mail and first class United States mail, addressed as follows:

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