

No. 74002-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

In re the Welfare of: M.B.S.

State of Washington, Department of Social and Health Services,

Respondent,

v.

Mary Spehar,

Appellant.

FILED  
Mar 17, 2016  
Court of Appeals  
Division I  
State of Washington

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

---

APPELLANT'S OPENING BRIEF

---

RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES..... 2

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT ..... 15

    1. The due process clause of article I, § 3 of the Washington Constitution is more protective than the federal constitutional analog and requires that children like M.S. be represented by counsel in termination of parental rights cases. .... 15

        a. The State bears the heavy burden to prove the elements of RCW 13.34.180(1) and current parental unfitness by clear, cogent, and convincing evidence..... 15

        b. Background on a child’s right to counsel in termination of parental rights proceedings. .... 17

        c. Article I, § 3 provides greater protection to children in termination proceedings than the Fourteenth Amendment. .... 20

    2. The due process clause of the Fourteenth Amendment required the court to appoint counsel for M.S..... 30

        a. Given the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions, due process required that M.S. be provided an attorney..... 30

        b. M.S.’s fundamental liberty interests were at stake in the termination of parental rights proceeding. .... 31

        c. The large risk of error inherent in a full evidentiary trial, compounded by the GAL’s mistaken view that she did not have a duty to report M.S.’s views to the court,

|   |    |
|---|----|
| would have been substantially mitigated by appointment<br>of counsel. ....  | 32 |
| d. The financial or administrative burden to the<br>government caused by providing M.S. counsel did not<br>outweigh the interest in protecting him.....   | 36 |
| 3. The failure to appoint M.S. counsel requires reversal. ....  | 37 |
| 4. Violating the discrete two-step process, the court improperly<br>considered the “best interests” of the child in deciding that Ms.<br>Spehar was currently unfit and that the elements of RCW<br>13.34.180(1) were met. .... | 39 |
| 5. The Department failed to prove that continuation of the parent-<br>child relationship diminished M.S.’s prospects for early<br>integration into a stable and permanent home.....   | 42 |
| F. CONCLUSION.....  | 44 |

## **TABLE OF AUTHORITIES**

### **United States Supreme Court Cases**

|  |            |
|--|------------|
| <u>Gore v. U. S.</u> , 357 U.S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958).....                    | 29         |
| <u>Lassiter v. Dep’t of Soc. Servs.</u> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)..... | passim     |
| <u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....               | 23         |
| <u>Rose v. Rose</u> , 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)...                      | 27         |
| <u>Santosky v. Kramer</u> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....              | 15, 28, 32 |

### **Washington Supreme Court Cases**

|  |                |
|--|----------------|
| <u>Bellevue Sch. Dist. v. E.S.</u> , 171 Wn.2d 695, 257 P.3d 570 (2011) .....                              | 27             |
| <u>Braam v. State</u> , 150 Wn.2d 689, 81 P.3d 851 (2003) .....  | 32             |
| <u>City of Woodinville v. Northshore United Church of Christ</u> , 166 Wn.2d 633, 211 P.3d 406 (2009)..... | 21             |
| <u>Dependency of K.D.S.</u> , 176 Wn.2d 644, 294 P.3d 695 (2013).....                                      | 15, 42, 43     |
| <u>Gourley v. Gourley</u> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....                                       | 30             |
| <u>In re Custody of Smith</u> , 137 Wn.2d 1, 969 P.2d 21 (1998) .....                                      | 40             |
| <u>In re Dependency of MSR</u> , 174 Wn.2d 1, 271 P.3d 234 (2012).....                                     | passim         |
| <u>In re Grove</u> , 127 Wn.2d 221, 897 P.2d 1252 (1995) .....   | 26             |
| <u>In re Luscier’s Welfare</u> , 84 Wn.2d 135, 524 P.2d 906 (1974).....                                    | 20, 25, 26     |
| <u>In re Myricks Welfare</u> , 85 Wn.2d 252, 533 P.2d 841 (1975) .....                                     | 20, 25, 26     |
| <u>In re Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973) .....  | 16             |
| <u>In re Welfare of A.B.</u> , 168 Wn.2d 908, 232 P.3d 1104 (2010).....                                    | 16, 39, 40, 41 |

|   |            |
|---|------------|
| <u>In the Matter of the Dependency of M.H.P.</u> , 184 Wn.2d 741, 364 P.3d 94 (2015)..... | 20, 26     |
| <u>State v. Bartholomew</u> 101 Wn.2d 631, 683 P.2d 1079 (1984).....                      | 23         |
| <u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....                          | 20, 21, 23 |
| <u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....                          | 24         |
| <u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991).....                           | 27         |
| <u>State v. Watt</u> , 160 Wn.2d 626, 160 P.3d 640 (2007).....                            | 39         |
| <u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....                           | 21         |
| <u>Sunnyside Valley Irr. Dist. v. Dickie</u> , 149 Wn.2d 873, 73 P.3d 369 (2003).....     | 30         |

**Washington Court of Appeals Cases**

|   |        |
|---|--------|
| <u>In re Dependency of G.G., Jr.</u> , 185 Wn. App. 813, 344 P.3d 234 (2015)..... | 20, 26 |
| <u>In re Welfare of G.E.</u> , 116 Wn. App. 326, 65 P.3d 1219 (2003).....         | 37     |
| <u>In re Welfare of H.S.</u> , 94 Wn. App. 511, 973 P.2d 474 (1999).....          | 38     |
| <u>In re Welfare of R.H.</u> , 176 Wn. App. 419, 309 P.3d 620 (2013).....         | 42     |
| <u>In re Welfare of S.V.B.</u> , 75 Wn. App. 762, 880 P.2d 80 (1994).....         | 44     |
| <u>State v. Boling</u> , 131 Wn. App. 329, 127 P.3d 740 (2006).....               | 38     |
| <u>State v. Davis</u> , 38 Wn. App. 600, 686 P.2d 1143 (1984).....                | 23     |
| <u>State v. Silva</u> , 108 Wn. App. 536, 31 P.3d 729 (2001).....                 | 38     |

**Other Cases**

|  |        |
|--|--------|
| <u>Beecham Corp. v. Abbott Labs.</u> , 740 F.3d 471 (9th Cir. 2014).....   | 38     |
| <u>In Interest of Von Rossum</u> , 515 So. 2d 582 (La. Ct. App. 1987)..... | 28     |
| <u>In re A.T.</u> , 744 N.W.2d 657 (Iowa Ct. App. 2007).....               | 32, 38 |

|  |            |
|--|------------|
| <u>In re T.M.</u> , 131 Hawai'i 419, 319 P.3d 338 (2014).....                          | 26         |
| <u>Kenny A. ex rel. Winn v. Perdue</u> , 356 F. Supp. 2d 1353<br>(N.D. Ga. 2005) ..... | 28, 34, 37 |
| <u>Matter of K.L.J.</u> , 813 P.2d 276 (Alaska 1991).....                              | 27         |
| <u>State in Interest of James</u> , 535 So. 2d 1061 (La. Ct. App. 1988).....           | 28         |

**Constitutional Provisions**

|                              |        |
|------------------------------|--------|
| Const. art. I, § 3.....      | 15, 22 |
| Const. art. IX, § 1 .....    | 27     |
| Const. art. XIII, § 1 .....  | 27     |
| U.S. Const. amend. XIV ..... | 15, 22 |

**Rules**

|                   |    |
|-------------------|----|
| GALR 2a.....      | 35 |
| JuCR 9.2(c) ..... | 17 |

**Other Authorities**

|   |        |
|---|--------|
| <u>A Child's Right to Counsel: A National Report Card on Legal Representation for Abused &amp; Neglected Children</u> (3rd. ed. 2012).....  | 29, 33 |
| Cornell W. Clayton, <u>Toward a Theory of the Washington Constitution</u> , 37 Gonz. L. Rev. 41 (2001/2002) .....   | 24     |
| Hugh D. Spitzer, <u>New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead-Long Live Gunwall!"</u> , 37 Rutgers L.J. 1169 (2006).....                                | 22     |
| Justice Robert F. Utter & Hugh D. Spitzer, <u>The Washington State Constitution: A Reference Guide</u> 3 (2002) .....   | 24     |
| Justice Robert F. Utter, <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> , 7 U. Puget Sound L. Rev. 491 (1983-1984)..... | 24     |

## **A. INTRODUCTION**

M.S., a nine-year-old boy with behavioral issues, had his relationship with his mother terminated without his voice being heard. When his relationship was severed, M.S. was in an institution, not a foster home, and had no current prospects of adoption. He loved his mother and maternal grandmother. He wanted to be returned to his grandmother's care, who had cared for M.S. during most of the dependency, but had been unable to continue caring for him by herself after suffering a stroke. At trial, the guardian ad litem testified that it was her role to represent M.S.'s "best interests," and not to report what M.S. wanted. The trial court refused his mother's motion to continue the trial and appoint her son counsel so that he could be heard. Because constitutional due process demanded that M.S. be appointed counsel, this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of constitutional due process as guaranteed by article I, § 3 and the Fourteenth Amendment, the court erred in denying Ms. Spehar's motion to appoint M.S. an attorney.
2. The court erred in denying Ms. Spehar's motion to continue the trial so that M.S. could receive legal representation.

3. Failing to abide by the two-step process mandated by statute, which discretely considers parental fitness before considering the best interests of the child, the court mixed the two inquiries together.

4. The court erred in finding that there was little likelihood that Ms. Spehar's parental deficiencies will be remedied so that M.S. can be returned to her in the near future. CP 276 (FF 2.20).

5. The court erred in finding that the parent-child relationship clearly diminishes M.S.'s prospect for early integration into a stable and permanent home. CP 277 (FF 2.25).

6. The court erred in finding that termination of the parent-child relationship was in M.S.'s best interests. CP 277 (FF 2.26).

7. The court erred in finding that Ms. Spehar was currently unfit to parent M.S. CP 278 (FF 2.27).

### **C. ISSUES**

1. Due process under article I, § 3 may provide greater protections than under the Fourteenth Amendment. Unlike due process under the Fourteenth Amendment, due process under article I, § 3 provides parents with a categorical right to counsel in dependency and termination of parental rights proceedings. Washington courts recognize that children have significant liberty interests at stake in termination cases and that children have at least the same due process right to counsel as parents

under the Fourteenth Amendment. Only an attorney can effectively protect the child's liberty interests and give voice to the child's actual desires. Does article I, § 3 provide children like M.S. a categorical right to an attorney in termination of parental rights proceedings?

2. Under the Fourteenth Amendment, children may have a due process right to counsel in termination of parental rights proceedings. This depends on the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. The stakes for M.S., a nine-year old boy with no intellectual disabilities who wanted to return home and not remain institutionalized, were great. The government had an interest in an accurate resolution. The cost of providing M.S. an attorney and continuing the proceedings were small. The risk of error was great because M.S.'s voice in the proceeding was absent. Did due process require that the court grant Ms. Spehar's motion to appoint counsel to M.S.?

3. Termination is a discrete two-step process. The court must first determine that the parent is unfit. Only then does the court consider whether termination is in the child's best interests. Mixing the second-step into the first-step is error. Some of the trial court's findings on the statutory factors related to current fitness refer to the child's best interests. Did the court err in failing to abide by the two-step process?

4. The Department bore the burden of proving by clear, cogent, and convincing evidence that continuation of M.S.'s and Ms. Spehar's parent-child relationship clearly diminished M.S.'s prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(f). Relegated to an institution and having behavioral problems that made placement in a foster home difficult, there were no current prospects of nine-year-old M.S. being adopted. The trial court found that M.S.'s relationship with his mother was good, that she understands M.S.'s many needs, nurtures him, and has insight into him. Did the Department fail to meet its burden to prove that Ms. Spehar's relationship with M.S. clearly diminished M.S.'s prospects for early integration into a stable and permanent home?

#### **D. STATEMENT OF THE CASE**

Mary Spehar is the mother of M.S, a boy born on April 7, 2006.<sup>1</sup> Ex. 1 (Order of Dependency). M.S. has a history of behavioral problems. In addition to throwing tantrums at home and school, M.S.'s problems included hitting, kicking, screaming, and being overly aggressive. CP 276 (FF 2.23). His hostility would sometimes be directed at family pets or himself. CP 276 (FF 2.23). M.S. has been diagnosed with behavioral

---

<sup>1</sup> M.S.'s father relinquished his parental rights on September 9, 2014. CP 273 (FF 2.10).

disorders, including attention-deficit/hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), and autism spectrum disorder. CP 276 (FF 2.22).

Concerned about M.S.'s behavior, Ms. Spehar brought M.S. to see a therapist, Johnathan Vander Schuur, on August 17, 2011. CP 276 (FF 2.23); 8/25/15RP 32-33. He spoke to Ms. Spehar about parenting techniques, medication, and nutrition in an attempt to reduce M.S.'s behaviors. 8/25/15RP RP 36-37. For the next couple of years, he saw Ms. Spehar and M.S. on and off. 8/25/15RP 39. M.S. made progress. 8/25/15RP 39. He followed directions more often and the nutritional guidelines reduced M.S.'s hyperactivity. 8/25/15RP 40.

Despite this progress, M.S. was removed from his mother's care on June 20, 2013. CP 273 (FF 2.9). The Department filed its dependency petition on June 24, 2013, alleging that Ms. Spehar had mental health issues and that M.S. had behavioral issues that made him difficult for Ms. Spehar to parent. CP 272 (FF 2.5); Ex. 1. M.S. was found dependent on September 17, 2013 under RCW 13.34.030(6)(c). CP 272 (FF 2.7). Ms. Spehar agreed to the dependency so that she could get help. 8/24/15RP 27-28.

M.S. was placed with his maternal "grandmother, Carolyn Spehar in a healthy, loving environment." CP 273 (FF 2.9). M.S. has known his

grandmother all of his life. 8/25/15RP 124-25. M.S. and Ms. Spehar lived with her shortly after M.S. was born for about six months. 8/25/15RP 124. They also lived with her for about a year and a half when M.S. was around five or six years old. 8/25/15RP 134.

The dependency order provided for visits two hours per week with permission for the grandmother to supervise additional visits. CP 8-9. Ms. Spehar was permitted to attend M.S.'s medical appointments. CP 9. Diana Yonkman supervised visits with M.S. and Ms. Spehar from July 15, 2013 through September 2, 2013. CP 279 (FF 2.34); Ex. 31; 10/27/15RP 15. Ms. Spehar was always on time, was nurturing, and encouraged M.S. appropriately. CP 279 (FF 2.34). Cynthia Bradley supervised visits in April 2014 through August 2014. CP 279 (FF 2.34); Ex. 30; 8/26/15RP 11. As before, Ms. Spehar was always on time, was nurturing, and encouraged M.S. appropriately. CP 279 (FF 2.34). Ms. Spehar had additional visits supervised by the grandmother. 8/25/15RP 113. Ms. Spehar regularly visited M.S. in 2013 and 2014. 8/25/15RP 112; Ex. 1.<sup>2</sup> The trial court later found that Ms. Spehar loves M.S., understands his many needs, nurtures him, and shows him affection during their visits. CP 2.30 (FF 2.30).

---

<sup>2</sup> First Dependency Review Order at 8; Permanency Planning Order at 8; Dependency Review Order at 8.

Ms. Spehar's services initially included a psychological evaluation with parenting component, a substance abuse evaluation, random drug testing through urinalyses (UAs), mental health services, and age-appropriate parenting instruction. Ex. 1 at 6-7 (Order of Dependency). As recounted in an order entered in December 2013, the provision of these services to Ms. Spehar was delayed due to the actions of the social worker. Ex. 1 at 1 (Interim Review Hearing Order). The Department terminated the social worker's employment. Ex. 1 at 1 (Interim Review Hearing Order). The court noted that this delay impacted Ms. Spehar's ability to engage in services. Ex. 1 at 2 (Interim Review Hearing Order).

For the most part, Ms. Spehar complied with the services in early to mid-2014. See Ex. 1 at 4-7 (Permanency Planning Order); CP 273-75 (FF 2.13, 2.14, 2.16, 2.19). In May 2014, Ms. Spehar had made progress toward correcting the problems that had necessitated M.S.'s placement out of her care. Ex. 1 at 8. (Permanency Planning Order).

Dr. David Hall, a psychologist, saw Ms. Spehar. 8/17/15RP 9.<sup>3</sup> Ms. Spehar participated in mental health counseling and medication management with Dr. Hall from October 2013 through late August 2014. CP 274 (FF 2.16); 8/17/15RP 32. Ms. Spehar had initiated treatment with

---

<sup>3</sup> This citation refers to the Perpetuation Deposition of Dr. Hall. It was admitted into evidence. 8/28/15RP 77. A supplemental designation for this document has been filed. Sub. # 44.100.

Dr. Hall herself, not through a Department referral. 8/17/15RP 48-49. He noted that Ms. Spehar's poverty created challenges for her. 8/17/15RP 58. Dr. Hall diagnosed Ms. Spehar with bipolar disorder, obsessive compulsive disorder, and attention deficit hyperactivity disorder. CP 275 (FF 2.16). Dr. Hall opined that Ms. Spehar's diagnoses made parenting more difficult for her, but "would not preclude her from being a good parent." 8/17/15RP 43.

In early February 2014, Ms. Spehar participated in a psychological evaluation with Dr. Jason Prinster. Ex. 20. Ms. Spehar acknowledged difficulty in maintaining her home and managing M.S.'s behavior. Ex. 20 at 10. Still, M.S. was "the love of [her] life." Ex. 20 at 11. Dr. Prinster, who observed M.S. with Ms. Spehar, wrote that mother and son had a positive relationship and a strong attachment to one another. Ex. 20 at 14. Dr. Prinster's prognosis was positive on whether M.S. could be returned to his mother's care in the near future. Ex. 20 at 18.

Dr. Hall also saw M.S., who was brought by his grandmother, between September 2013 through November 2014. 8/17/15RP 18. Ms. Spehar attended about 10 of these appointments. 8/17/15RP 38. M.S. "was excited to see [his mother]." 8/17/15RP 39. Dr. Hall noted that M.S. would often make comments about discussions that Dr. Hall was having with his grandmother or mother, and that he "could be quite verbal

about things he was interested in talking about.” 8/17/15RP 67. Dr. Hall noted that mother and son were bonded. 8/17/15RP 58. He also saw that M.S. and his grandmother were bonded and that she was one of the “most important people in [M.S.’s] life.” 8/17/15RP 60. He cautioned that the psychological effect on M.S. not seeing his mother again could be “horrible,” and that “[M.S.] really wants to be with his mom [and] she really wants to be with him.” 8/17/15RP 59. He testified that he would not sever M.S. from his mother and grandmother “if there was any viable alternative.” 8/17/15RP 62.

M.S. also continued to see the family therapist, Mr. Schurr. 8/25/15RP 48. He testified that M.S. was strongly bonded with his mother and grandmother. 8/25/15RP 52-53. Ms. Spehar was in tune with M.S., he recalled that M.S. was very responsive to Ms. Spehar and that she nurtured M.S. well. 8/25/15RP 47-48, 52. Consistent with this testimony, the trial court later found that Ms. Spehar had insight into M.S.’s needs. CP 278 (FF 2.27). Mr. Schurr believed that severing M.S.’s ties with his family would have significant effects on M.S. and would cause M.S. to feel abandoned. 8/25/15RP 55.

Starting around May 2014, Ms. Spehar’s participation in services declined and she was found to not be in compliance with many of the services. See Ex. 1 (Dependency Review Order entered in October 2014

and Permanency Planning Order entered in March 2015); See CP 274 (FF 2.16, 2.18, 2.19). Although chemical dependency issues had only been a secondary concern of the Department, Ms. Spehar missed many of the weekly UA tests and tested positive for substances in April and May 2014. 8/25/15RP 120-21; CP 273 (FF 2.12).

The grandmother suffered a stroke in November 2014 and she was no longer able to care for M.S. by herself. CP 273 (FF 2.9). M.S. was briefly placed with Jerry Bongard, a close friend of the grandmother and “Grandpa Jerry” to M.S. CP 279 (FF 2.34); 8/27/15RP 30. While Mr. Bongard provided support and encouragement as to M.S., he was unable to provide a permanent placement because of M.S.’s behavioral issues. CP 279 (FF 2.34).

At M.S.’s last appointment with Dr. Hall on November 18, 2014, Dr. Hall noted that M.S. understood that his grandmother had suffered a stroke. Ex. 2 of 8/17/15RP at “<246>”.<sup>4</sup> M.S. expressed that he did not want to go live with a stranger. Ex. 2 of 8/17/15RP at <246>.

On December 4, 2014, M.S. was placed far away from his mother, grandmother, and everyone else he knew at the Ruth Dykeman Children’s

---

<sup>4</sup> This exhibit is attached to the Deposition Transcript. It was admitted. 8/28/15RP 78.

Center in Burien. CP 273 (FF 2.9, 2.24). Children at the facility have severe behavioral problems. 8/26/15RP 26.

The Department petitioned to terminate Ms. Spehar's parental rights on December 10, 2014. The petition did not allege that there was a prospective adoptive placement for M.S. Rather, the petition alleged that termination was necessary "to allow adoption planning to being." CP 301.

M.S. exhibited behavioral problems at the facility, including pulling his hair out, urinating on the floor and in garbage cans, running from the center, and exposing himself. CP 277 (FF 2.24). His behavior had improved initially, but he regressed somewhat after his birthday in April, when he saw his mother and others. 8/6/15RP 37-38. This was typical and this sort of correlation does not equal causation. 8/26/15RP 57-58. M.S. also learned bad behaviors from other children at the facility. CP 277 (FF 2.24); 8/26/15RP 75. Another problem created by the institution was that the staff could not be nurturing to children. 8/26/15RP 57. This policy was to prevent accusations that staff touched a child inappropriately. 8/26/15RP 57.

M.S. did not like living at Ruth Dykeman. He expressed to staff that he did not want to stay there. 8/26/15RP 77. A therapist at the facility recounted that M.S. said "I cannot be disconnected from my family anymore," and "I don't pull my hair when I'm at home."

8/26/15RP 75. He told staff he wanted to go home and live with his grandmother. 8/26/15RP 81-82; CP 279 (FF 2.33). M.S. missed his mother and grandmother. 8/26/15RP 82.

About a week after M.S. was moved, Ms. Spehar lost her apartment. 8/24/15RP 46, 111. Her participation in services in 2015 continued to decline. See CP 275 (FF 2.17; 2.18). She briefly moved to Port Orchard in Kitsap County in January 2015, thinking that this would be closer to M.S. 8/24/15RP 47, 117. However, it proved to be a logistical challenge to travel to Burien because Ms. Spehar lacked transportation and could not reliably make it to the ferry. 8/24/15RP 117-18; 8/26/15RP 140, 147. Ms. Spehar missed appointments for three visits in late January and early February, and the contracted visitation supervisor canceled the contract. 8/26/15RP 141. Before M.S. was moved to Ruth Dykeman, Ms. Spehar's visits with M.S. were consistent. 8/26/15RP 145.

Ms. Spehar moved back to Anacortes around March 2015. 8/26/15RP 141. The Department provided Ms. Spehar with bus passes so that she could visit M.S. on Saturdays. 8/24/15RP 122-25. This required three bus connections and took about twelve hours roundtrip. 8/24/15RP 124; 8/26/15RP 143. As the social worker testified, this bus plan was not easy for anyone, but Ms. Spehar was willing to do whatever was necessary to visit M.S. 8/26/15RP 144. Ms. Spehar was able to make four trips by

bus. 8/24/15RP 124. Ms. Spehar also made additional visits in April and July when the social worker transported her. 8/26/15RP 141-42; CP 276 (FF 2.21). She was also able to attend M.S.'s birthday on April 7. 8/26/15RP 141.

Shortly before trial in August, the Department procured another opinion from Dr. Prinster on his prognosis. Ex. 27. Dr. Prinster revised his prognosis to "guarded or poor" due to Ms. Spehar's lack of recent participation in treatment. Ex. 27 at 3.

A five-day trial was held from August 24 to August 28, 2015. Ms. Spehar, who had recently moved back in with M.S.'s grandmother, had a plan to care for M.S. with the help of M.S.'s grandmother. 8/27/15RP 52. She was motivated and would take all necessary steps to succeed. 8/27/15RP 50-52. She testified that "my son is everything to me. And my family is the most important thing." 8/27/15RP 21.

The grandmother testified that she was willing to be a permanent placement for M.S. but wanted Ms. Spehar to live with her to help her care for M.S. 8/25/15RP 124, 133; CP 279 (FF 2.33). She would primarily be in charge. 8/25/15RP 138-39. Her home was M.S.'s home. 8/25/15RP 137. M.S. was comfortable in her neighborhood and her neighbors were good to M.S. 8/25/15RP 137-38. She testified that M.S. needs his mother and that he is happier when his mother is involved. 8/25/15RP 139-41.

She was only taking heart and blood pressure medication. 8/25/15RP 125. The Department had not included her in the planning process regarding M.S. since her stroke. 8/25/15RP 125. While the distance and length of the trip made it difficult, she visited M.S. monthly. 8/25/15RP 131-32.

On the second day of trial, the guardian ad litem (GAL) testified. 8/25/15RP 67-88. During cross-examination, the GAL testified that her duties did not include reporting to the court what M.S. wants. 8/25/15RP 80. She was unsure what M.S. wanted, but had heard from others at Ruth Dykeman that M.S. wanted to be with his mother. 8/25/15RP 80. She had not discussed with M.S. the possibility of having an attorney appointed for him. 8/25/15RP 81.

Shortly following the GAL's testimony, Ms. Spehar moved to stay the proceedings and for the court to appoint M.S. an attorney. 8/25/15RP 102. Ms. Spehar argued that M.S.'s views were not being represented and that the GAL did not understand that her duties included reporting what M.S. wanted to the court. 8/25/15RP 102-04. The GAL and the Department opposed the request. 8/25/15RP 104-06. The GAL argued that M.S. did not need a lawyer, was not entitled to one, and that she was adequately representing M.S. 8/25/15RP 105. Ms. Spehar argued that due process required appointment of counsel. 8/25/15RP 106-07. The court denied Ms. Spehar's request, but ruled that she could provide additional

authority on the issue. 8/25/15RP 107-08. Ms. Spehar renewed her motion on the fourth day of trial and provided written briefing arguing constitutional due process under the state and federal constitutions required appointment of counsel. 8/27/15RP 3-5, 9; CP 177-200. The court denied the motion. 8/27/15RP 10-12; CP 280.

After hearing closing arguments on the last day of trial, the court reserved ruling and let the parties know the court would issue a written ruling. 8/28/15RP 96-97. The court issued its written ruling terminating Ms. Spehar's parental rights on September 8, 2015. CP 281.<sup>5</sup>

## **E. ARGUMENT**

**1. The due process clause of article I, § 3 of the Washington Constitution is more protective than the federal constitutional analog and requires that children like M.S. be represented by counsel in termination of parental rights cases.**

**a. The State bears the heavy burden to prove the elements of RCW 13.34.180(1) and current parental unfitness by clear, cogent, and convincing evidence.**

Parents have a fundamental liberty interest in the custody and care of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Dependency of K.D.S., 176 Wn.2d 644, 652, 294 P.3d 695 (2013); U.S. Const. amend. XIV; Const. art. I, § 3.

---

<sup>5</sup> The court's findings of fact and conclusions of law are attached in the appendix. CP 271-82.

Only the most powerful reasons justify termination of a person's parental rights. In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

In general, before terminating the parent-child relationship, the Department must prove six statutory elements:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
- (e) 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
- (f) That 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). The Department must also prove that the parent is currently unfit to parent the child. In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010). These requirements must be proved by clear, cogent, and convincing evidence. Id. at 911; RCW 13.34.190. The court

then decides, using a preponderance standard, whether termination is in the child's best interests. A.B., 168 Wn.2d at 911.

**b. Background on a child's right to counsel in termination of parental rights proceedings.**

In Washington, children do not have a statutory right to counsel in either dependency or termination of parental rights proceedings. Rather, statutes and court rules give courts discretion to appoint an attorney to the child. RCW 13.34.100(7)(a) ("The court may appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department."); JuCR 9.2(c) ("If the court has appointed a guardian ad litem for the juvenile, the court may, but need not, appoint a lawyer for the juvenile."). Recognizing how important an attorney may be for a child, the legislature has provided that if the child does not have an attorney, any person may refer the child to an attorney or retain an attorney for the purposes of filing a motion to request appointment of an attorney at public expense. RCW 13.34.100(7)(b)(i). Additionally, the legislature has mandated that the children 12 years and older be informed that they have the right to request appointment of counsel. RCW 13.34.100(7)(c).

Our Supreme Court examined the issue of whether children have the right to counsel in termination of parental rights cases under the due process clause of the Fourteenth Amendment in In re Dependency of MSR, 174 Wn.2d 1, 271 P.3d 234 (2012). There, the court recognized that “children have fundamental liberty interests at stake in termination of parental rights proceedings.” MSR, 174 Wn.2d at 20. “These include a child’s interest in being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the integrity of the family relationships, including the child’s parents, siblings, and other familiar relationships; and in not being returned to (or placed into) an abusive environment over which they have little voice or control.” Id.

Still, the court rejected the argument that Fourteenth Amendment universally required counsel for all children in termination cases. Id. at 22. Rather, the court concluded that whether children have a constitutional right to counsel in termination of parental rights cases under the Fourteenth Amendment must be examined on a case-by-case basis using the three-part Mathews v. Eldridge<sup>6</sup> balancing framework. Id. at 20-22. This test considers the private interests at stake, the government’s

---

<sup>6</sup> Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

interest, and the risk that the procedures used will lead to erroneous decisions. Id. at 14.

The court's holding was premised primarily on a United States Supreme Court decision. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). There, the United States Supreme Court held that the Constitution does not require states to provide counsel to all parents facing termination proceedings. Lassiter, 452 U.S. at 31-32. Rather, the due process clause of the Fourteenth Amendment only requires a case-by-case analysis using the Mathews framework. Id.

Following Lassiter and balancing the Mathews factors, MSR held that "children have at least the same due process right to counsel as do indigent parents subject to dependency proceedings as recognized by the United States Supreme Court in Lassiter." MSR, 174 Wn.2d at 20. Hence, the predecessor to RCW 13.34.100(7),<sup>7</sup> which also gave courts discretion on whether to appoint children counsel, was not unconstitutional under the due process clause of the Fourteenth Amendment. MSR, 174 Wn.2d at 21-22.

---

<sup>7</sup> Former RCW 13.34.100(6); Laws of 2010, ch. 180. In 2014, the legislature expanded the right of children to counsel post-termination by requiring that counsel be appointed to children if the dependency case is still ongoing and there has been no remaining parent with parental rights for six months. RCW 13.34.100(6)(a); Laws of 2014, ch. 108.

Prior to Lassiter, our Supreme Court held that both the Fourteenth Amendment and article I, § 3 mandated appointment of counsel to parents in dependency and termination proceedings. In re Luscier’s Welfare, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (termination cases); In re Myricks Welfare, 85 Wn.2d 252, 255, 533 P.2d 841 (1975) (dependency cases). The state constitutional aspect of these holdings remain good law. See In the Matter of the Dependency of M.H.P., 184 Wn.2d 741, 759, 364 P.3d 94 (2015) (declining to “revisit the state constitutional component of *Luscier*.”); In re Dependency of G.G., Jr., 185 Wn. App. 813, 826 & n.18, 344 P.3d 234 (2015) (recognizing the continuing “vitality of the due process based right to counsel in termination proceedings” under article I, § 3).

**c. Article I, § 3 provides greater protection to children in termination proceedings than the Fourteenth Amendment.**

While the parent in MSR raised article I, § 3 of the Washington Constitution, the Court declined to consider whether this provision provided greater protection to children because the parent did not provide a Gunwall<sup>8</sup> analysis until at the Supreme Court. MSR, 174 Wn.2d at 20 n.11. Thus, the question remains whether children are afforded a greater

---

<sup>8</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

due process right to counsel under article I, § 3 than under the Fourteenth Amendment. Similar to parents, who have a categorical right to counsel in termination of parental rights proceedings under article I, § 3, this Court should hold that children also have a greater due process right to counsel under article I, § 3.

“When both the federal and Washington constitutions are alleged, it is appropriate to examine the state constitutional claim first.” State v. Young, 123 Wn.2d 173, 178, 867 P.2d 593 (1994). Our Supreme Court articulated standards to decide when and how Washington’s constitution provides different protection of rights than the United States Constitution in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The court examines six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62.<sup>9</sup>

---

<sup>9</sup> When it has already been determined that our state constitution provides greater protection than the federal constitution, no Gunwall analysis is required for the court to apply it. City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009). Moreover, a Gunwall analysis is not a hoop that litigants must jump through to invoke state constitutional rights:

Concerning the first two factors, the text is mostly identical. article I, § 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law.” Const. art. I, § 3. The Fourteenth Amendment provides in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. The difference is that the text of the Fourteenth Amendment restricts the power of the states while article I, § 3 is an affirmation of individual rights. This difference is accounted for in the fifth Gunwall factor.

Nevertheless, “[e]ven where parallel provisions of the two constitutions do not have meaningful [textual] differences, other relevant provisions of the state constitution may require that the state constitution

---

A strict rule that courts will not consider state constitutional claims without a complete *Gunwall* analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. *Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue. This is especially true where, as in many areas, the special protections of our state constitution have been previously recognized by this court. Listing the *Gunwall* factors is a helpful approach when arguing *how* Washington's constitution provides greater rights than its federal counterpart. But failing to subhead a brief with each factor does not foreclose constitutional argument.

Id. at 641-42. In other words, courts should use “the *Gunwall* criteria as interpretive tools rather than as a magic key to the walled kingdom of the state constitution.” Hugh D. Spitzer, New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall Is Dead-Long Live Gunwall!”, 37 Rutgers L.J. 1169, 1180 (2006).

be interpreted differently.” Gunwall, 106 Wn.2d at 61. For example, in one case involving capital punishment, our Supreme Court held that despite textual similarity, article I, § 3 is broader than the Fourteenth Amendment. State v. Bartholomew 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (interpretation of Fourteenth Amendment does not control interpretation of article I, § 3). Thus the provisions of the capital punishment statute at issue in Bartholomew violated due process under the state constitution even if the same result is not compelled under the Fourteenth Amendment. Id. Another example is a case where this Court declined to follow a United States Supreme Court decision and interpreted the state due process clause more broadly. State v. Davis, 38 Wn. App. 600, 604, 686 P.2d 1143 (1984) (use of defendant’s postarrest silence, regardless of whether such silence followed Miranda<sup>10</sup> warnings, violated state due process clause).

The third and fourth Gunwall factors, state constitutional history and preexisting law, strongly support broader interpretation in this area. State constitutional provisions require independent interpretation unless historical evidence shows otherwise. Justice Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the

---

<sup>10</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (interpret identically worded provisions independently absent a strong “historical justification for assuming the framers intended an identical meaning”); State v. Ortiz, 119 Wn.2d 294, 319, 831 P.2d 1060 (1992) (Johnson, J. dissenting). The framers of the Washington Constitution modeled article I, § 3 after the Oregon and Indiana constitutions rather than the federal constitution. Justice Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 3 (2002) (hereinafter Utter & Spitzer). Like their Indiana and Oregon counterparts, the framers “originally intended [the provisions of the Declaration of Rights] as the primary devices to protect individual rights.” Id. Thus the federal Bill of Rights, including the Fifth Amendment, “was intended as a secondary layer of protection” that applies only against the federal government. Utter, 7 U. Puget Sound L. Rev. at 636.<sup>11</sup>

Well before Lassiter, our Supreme Court had already determined parents have a due process right to counsel in termination proceedings

---

<sup>11</sup> Cf. Utter & Spitzer at 2-3 (“It would be illogical to assume that a state constitution written before the U.S. Constitution, or a declaration of rights copied from such a state constitution when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts’ interpretations of the federal Constitution.”). Moreover, unlike the federal constitution, Washington’s constitution reflects the political ideals of the Progressive Era and their influence on western state politics of the period. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 67-68 (2001/2002).

under both the federal and state constitutions. Luscier, 84 Wn.2d at 139. After surveying United States Supreme Court precedent, the court recounted that “[t]he courts of Washington have been no less zealous in their protection of familial relationships.” Id. at 137. The court recounted that termination proceedings have been “carefully scrutinized” “to assure that the interested parties have been accorded the procedural fairness required by due process of law.” Id. (emphasis added). The court extended the rule from Luscier a year later to dependency cases. Myricks, 85 Wn.2d at 253.

Luscier was not simply about the rights of parents. Presciently, the Luscier court recognized the interests of the child that is at stake in termination of parental rights cases:

As a result of a child deprivation proceeding, a child may be deprived of the comfort and association of its parents and be committed to the care of an institution.

Luscier, 84 Wn.2d at (emphasis added). In MSR, the court explicitly recognized that children have a significant liberty interest in termination proceedings. MSR, 174 Wn.2d at 20. The court explained that a “child is at risk of not only losing a parent but also relationships with sibling, grandparents, aunts, uncles, and other extended family.” Id. at 15. The child “may well face the loss of a physical liberty interest both because the child will be physically removed from the parent’s home and because if

the parent-child relationship is terminated, it is the child who may become a ward of the State.” Id. at 16. Hence, the stakes for the child is arguably greater than that of the parent. Moreover, unlike parents who might represent themselves, a child cannot present evidence or cross-examine witnesses. Given the significant liberty interest at stake and the inability of children to participate meaningfully in the hearing without counsel, the rule from Luscier should be extended to children.

While Lassiter overruled the federal constitutional component of Luscier, the state constitutional component remains. M.H.P., 184 Wn.2d at 750; G.G., 185 Wn. App. at 826 & n.18. Thus, in a case decided after Lassiter, our Supreme Court held that a constitutional right to legal representation is presumed where physical liberty is threatened *or* “a fundamental liberty interest, similar to the parent-child relationship, is at risk.” In re Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (citing Luscier, 84 Wn.2d at 135; Myricks, 85 Wn.2d at 252). This language in Grove is an implicit rejection of Lassiter’s holding that the liberty interests of parents should be balanced against competing interests on a case-by-case basis. Relatedly, other states have explicitly rejected Lassiter under their state constitutions. In re T.M., 131 Hawai’i 419, 319 P.3d 338, 355 (2014) (indigent parents guaranteed the right to court-appointed counsel in termination proceedings under due process clause of Hawai’i

Constitution); Matter of K.L.J., 813 P.2d 276, 286 (Alaska 1991) (parent entitled to counsel under due process clause of Alaska Constitution in adoption proceeding which terminated his parental rights).

The fifth Gunwall factor, differences in structure between the state and federal constitutions, supports an independent analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation on the State. Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 713, 257 P.3d 570 (2011). Moreover, the framers of the Washington Constitution recognized the state must be responsible for the care of children. Const. art. IX, § 1 (“paramount duty of the state to make ample provision for the education of all children residing within its borders”); Const. art. XIII, § 1 (institutions for “youth who are blind or deaf or otherwise disabled . . . and such other institutions as the public good may require, shall be fostered and supported by the state”).

Finally, the sixth factor weighs heavily in favor of independent interpretation because family relations and minors are inherently matters of state or local concern. State v. Smith, 117 Wn.2d 263, 286-87, 814 P.2d 652 (1991) (Utter, J. concurring); Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987). The United States Supreme Court has also noted that states may create independent and broader

procedures to protect due process rights where family matters are concerned. Lassiter, 452 U.S. at 33; Santosky, 455 U.S. at 769-70.

The Gunwall criteria support an independent state constitutional analysis and show that article I, § 3 is more protective than the Fourteenth Amendment. This Court should hold that article I, § 3 categorically requires that children in termination of parental rights proceedings be represented by independent counsel.

Washington's constitution would not be the first state constitution to be interpreted in such a manner. The due process clause of the Georgia Constitution has been interpreted to guarantee counsel for children in dependency and termination proceedings. Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005). Louisiana, while requiring counsel under its Code of Juvenile Procedure, has indicated that this rule is based on due process as mandated by its constitution. In Interest of Von Rossum, 515 So. 2d 582, 586 (La. Ct. App. 1987); State in Interest of James, 535 So. 2d 1061, 1062 (La. Ct. App. 1988).

Further, according to a report from 2012, 61 percent of the states (including the District of Columbia) require the appointment of attorneys to children in dependency and termination cases. A Child's Right to Counsel: A National Report Card on Legal Representation for Abused &

Neglected Children, 10 (3rd. ed. 2012).<sup>12</sup> And 31 percent of these jurisdictions mandate the appointment of client-directed representation. Id. The American Bar Association has also promulgated a “Model Act Governing Representation of Children in Abuse, Neglect, and, Dependency Proceedings,” which guarantees independent counsel to children in termination case.<sup>13</sup> Hence, a holding from this Court requiring counsel for children in termination cases would be reasonable, workable, and consistent with the evolving nature of due process. See Gore v. U. S., 357 U.S. 386, 392, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958) (recognizing that due process is an evolving concept).

This Court should hold that children are entitled to counsel in termination of parental rights proceedings under article I, § 3.

---

<sup>12</sup> Available at: [http://www.caichildlaw.org/Misc/3rd\\_Ed\\_Childs\\_Right\\_to\\_Counsel.pdf](http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf) (last accessed March 15, 2016). Regrettably, Washington was one of 10 states to receive an “F” grade largely because appointment of counsel to children is discretionary. Report at 123.

<sup>13</sup> Available at [https://apps.americanbar.org/litigation/committees/childrights/docs/aba\\_model\\_act\\_2011.pdf](https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf) (last accessed March 15, 2016).

**2. The due process clause of the Fourteenth Amendment required the court to appoint counsel for M.S.**

**a. Given the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions, due process required that M.S. be provided an attorney.**

Even if the article I, § 3 does not provide a greater due process right to counsel for children in termination cases, M.S. was still erroneously denied counsel under the lesser standard made applicable through the Fourteenth Amendment. In MSR, our Supreme Court directed that, when the issue is raised in the trial court, the trial court “subject to review, should apply the Mathews factors to each child’s individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel.” MSR, 174 Wn.2d at 20-22. These factors weigh the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions. Id. at 14.

“Questions of law and conclusions of law are reviewed de novo.” Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Hence, appellate review on this issue is *de novo*. Gourley v. Gourley, 158 Wn.2d 460, 479, 145 P.3d 1185 (2006) (citing standard in connection with application of the Mathews factors); CP 280 (trial court’s resolution of this issue entered as conclusion of law).

The trial court incorrectly concluded that the Mathews factors did not require granting the mother's motion:

The mother's motion to appoint an attorney for the child in the termination proceeding is denied based on the following: there was little to no potential for error without the appointment of an attorney as the case did not present any complex legal issues; there was not much more an attorney could have assisted the child with in this case; and the GAL took the child's expressed desires into consideration in forming her opinion of what is in the child's best interests. Furthermore, the motion was not brought in a timely manner or with adequate notice to the parties.

CP 280. A proper analysis of the Mathews factors establishes that both M.S.'s interests at stake and the risk of error if counsel was not provided to him were great; and that the government's countervailing interests in a less costly and speedier proceeding was minimal.

**b. M.S.'s fundamental liberty interests were at stake in the termination of parental rights proceeding.**

As explained earlier, the child's fundamental liberty interest in a termination proceeding is great. MSR, 174 Wn.2d at 15, 16, 20; Kenny, 356 F. Supp. 2d at 1360 (recognizing significant liberty interest of child). Besides severing a child's relationship with his or her parents and family members, the child may repeatedly be moved from one foster home or institution to another. MSR, 174 Wn.2d at 15-16. This movement may cause significant harm to the child. Braam v. State, 150 Wn.2d 689, 694,

699, 81 P.3d 851 (2003) (recognizing substantive due process right “to be free from unreasonable risk of harm . . . and a right to reasonable safety.”). Hence, “even when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.” Santosky, 455 U.S. at 766.

Here, M.S. was moved far away from his family and social network in Anacortes and placed in an institution in Burien. The trial court found that M.S. was learning bad behaviors from other children at this institution. CP 277 (FF 2.24). The record shows that the Department’s intervention had already impacted M.S.’s liberty interests. This factor indisputably weighs in favor of appointment of counsel.

**c. The large risk of error inherent in a full evidentiary trial, compounded by the GAL’s mistaken view that she did not have a duty to report M.S.’s views to the court, would have been substantially mitigated by appointment of counsel.**

“[T]here are many circumstances when counsel for a child would be extremely valuable.” MSR, 174 Wn.2d at 19. “[T]he older, more intelligent, and mature the child is, the more impact the child’s wishes should have, and a child of sufficient maturity should be entitled to have the attorney advocate for the result the child desires. In re A.T., 744 N.W.2d 657, 663 (Iowa Ct. App. 2007) (citing Gary Soloman, *Role of Counsel in Abuse and Neglect Proceedings*, 192 Prac. Law Inst. Crim.

Law and Urb. Prob. 543, 550 (2003)). “Age seven is viewed by some advocates as the appropriate separation between the need for a client-directed attorney and a best interests’ attorney.” A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children, 12 n. 14 (3rd. ed. 2012) (citing various research and scholarly articles).

Here, M.S., nine years of age, was capable of expressing his preferences and assisting an attorney. While he had behavioral issues, he had no intellectual disability. 8/24/15 RP 97; 8/25/15RP 73. At the time of the termination trial in August 2015, M.S. was about to enter the fourth grade. 8/24/15RP 51. In a psychological report from February 2014, the psychologist stated that M.S. “is bright and able to read and link what he has read to his own life.” Ex. 25 at 8. A supervisor at Ruth Dykeman testified that M.S. loves to read and is a “fantastic reader.” 8/26/15RP 39. M.S. also recognized, after the fact, the consequences of his behavior. See, e.g., 8/27/15RP at 34 (“Grandpa Jerry” recounting how M.S. apologized for his destructive behavior).

Our legislature has recognized that attorneys are unique in what they can provide to children through legal representation:

- (1) The legislature recognizes that inconsistent practices in and among counties in Washington have resulted in few children being notified of their right to request legal

counsel in their dependency and termination proceedings under RCW 13.34.100.

(2) The legislature recognizes that when children are provided attorneys in their dependency and termination proceedings, it is imperative to provide them with well-trained advocates so that their legal rights around health, safety, and well-being are protected. Attorneys, who have different skills and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child, should be trained in meaningful and effective child advocacy, the child welfare system and services available to a child client, child and adolescent brain development, child and adolescent mental health, and the distinct legal rights of dependent youth, among other things. Well-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care. Well-trained attorneys for a child can:

- (a) Ensure the child's voice is considered in judicial proceedings;
- (b) Engage the child in his or her legal proceedings;
- (c) Explain to the child his or her legal rights;
- (d) Assist the child, through the attorney's counseling role, to consider the consequences of different decisions; and
- (e) Encourage accountability, when appropriate, among the different systems that provide services to children.

Laws of 2010, ch. 180 § 1 (legislative findings accompanying amendment to RCW 13.34.100) (emphasis added). The MSR court similarly recognized that counsel to children have a unique and potentially valuable role to play. MSR, 174 Wn.2d at 21.

Hence, GALs do not adequately mitigate the risk of errors in termination cases. Kenny, 356 F. Supp. 2d at 1361. For example,

although a GAL represents the best interests of the child for whom he or she is appointed, such representation of the child's best interests "may be inconsistent with the wishes of the person whose interest the guardian ad litem represents." GALR 2a.

Contrary to the trial court's view, there was much that an attorney could have done for M.S. in this case. An attorney would have advocated for a resolution consistent with M.S.'s views. An attorney could have presented evidence, cross-examined witnesses, and provided argument to the court on how it should resolve matters. And, assuming it were M.S.'s wish, an attorney for M.S. might have advocated for a guardianship with M.S.'s grandmother, rather than termination. See chapter 13.36 RCW. A guardianship could establish permanency for M.S. and dismissal of the dependency without severing his relationship with his mother. RCW 13.36.010.

Given M.S.'s intelligence and the unique value that an attorney representing him would have brought to the proceedings, the trial court's opinion that there was little to no potential for error was incorrect. The court's decision on the issue of termination would have been greatly informed had M.S. been represented by counsel.

Moreover, the court erroneously concluded that the "GAL took the child's expressed desires into consideration in forming her opinion of what

is in the child's best interests." CP 10. To the contrary, the GAL testified that "[M.S.] didn't ever really speak to me about what he wanted."

8/25/15RP 81. She testified that she had not ever discussed with M.S. what his desires were, including M.S.'s position on who he wanted to live with. 8/25/15RP 82. This was consistent with her misunderstanding that it was not a part of her duties to report to the court what M.S. wanted. 8/25/15RP 80; RCW 13.34.105(1)(b) (GAL's duties include "report[ing] to the court any views or positions expressed by the child on issues pending before the court."). Thus, she only learned third-hand through M.S.'s counselor that M.S. had disclosed that he wanted to be with his mother. 8/25/15RP 81. M.S. could have supplied specific, cogent information through counsel.

This Court should conclude that the risk of error to M.S. by not appointing an attorney was great.

**d. The financial or administrative burden to the government caused by providing M.S. counsel did not outweigh the interest in protecting him.**

The third factor requires a court to weigh the State's interest in the proceeding, including fiscal and administrative burdens, against the State's interests in ensuring that a child's safety and well-being are protected. MSR, 174 Wn.2d at 14. The State "has a compelling interest in both the welfare of the child and in 'an accurate and just decision' in the

dependency and termination proceedings.” MSR, 174 Wn.2d at 18 (quoting Lassiter, 452 U.S. at 27)).

Here, the interest in protecting M.S. far outweighed any administrative or fiscal burden that appointment of counsel for M.S. might have entailed. See Kenny, 356 F. Supp. 2d at 1361.

The trial court concluded that Ms. Spehar’s motion was untimely and was brought without notice to the parties. CP 280. The catalyst for Ms. Spehar’s motion, however, was the GAL’s testimony that she was not required to convey the child’s position to the court. RP 103-04. Shortly after the GAL’s testimony, she moved for a stay of the proceeding and appointment of counsel for the child. 8/25/15RP 103-04. Regardless, the burden imposed by a delay did not outweigh M.S.’s interests in an accurate and just decision.

### **3. The failure to appoint M.S. counsel requires reversal.**

The erroneous denial of Ms. Spehar’s motion to appoint counsel to M.S. and to continue the case was necessarily prejudicial. In re Welfare of G.E., 116 Wn. App. 326, 65 P.3d 1219 (2003) is instructive. There, a parent was improperly deprived of his right to counsel at a termination of parental rights hearing. G.E., 116 Wn. App. 326, at 338. The court reversed without engaging in harmless error analysis. Id. Thus, the deprivation of counsel requires reversal. See also State v. Silva, 108 Wn.

App. 536, 542, 31 P.3d 729 (2001) (rejecting State’s argument that deprivation of the right to counsel in a criminal case is subject to harmless error analysis); A.T., 744 N.W.2d at 666 (ordering new trial on termination petition where child was deprived of her right to independent counsel without engaging in harmless error analysis); Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486-87 (9th Cir. 2014) (litigant’s improper use of peremptory challenge in civil case, which discriminated based on sexual orientation, required automatic reversal).

Even if harmless error analysis were appropriate, this constitutional error cannot be proven harmless beyond a reasonable doubt. M.S. See State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006) (“The court must grant a new trial unless it is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.”); In re Welfare of H.S., 94 Wn. App. 511, 525-26, 973 P.2d 474 (1999) (“Even if defective notice does implicate due process, it is harmless beyond a reasonable doubt when the complaining party subsequently participates in dependency review hearings and the termination adjudication.”). The appellate court presumes that constitutional errors are prejudicial and, to overcome this presumption, the State must prove beyond a reasonable doubt that the result of the proceedings would have

been the same absent the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Had M.S. been represented, the case would have been entirely different. The focus would have been on M.S.'s perception of his needs, and his mother and grandmother's abilities to meet his needs. It would have altered the court's analysis on whether the Department proved elements (e) and (f) of RCW 13.34.180(1), current parental unfitness, and whether termination was in M.S.'s best interests.

Accordingly, this Court should reverse and remand for the court to appoint M.S. an attorney to represent him at any future termination proceeding.

**4. Violating the discrete two-step process, the court improperly considered the “best interests” of the child in deciding that Ms. Spehar was currently unfit and that the elements of RCW 13.34.180(1) were met.**

Termination of a person's parental rights is a two-step process. A.B., 168 Wn.2d at 911. The first step focuses only on the adequacy of the parent. Id. The State must prove current parental unfitness and, in general, all six-elements enumerated at RCW 13.34.180(1). Id. Only then does the court proceed to the second step: the best interests of the child requirement. Id. The court must find by a preponderance of the evidence that termination is in the best interests of the child. Id. Mixing these

considerations is error. Id. at 911, 926-27; see In re Custody of Smith, 137 Wn.2d 1, 20, 969 P.2d 21 (1998) (“It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a ‘better’ decision.”).

A.B. is illustrative. There, the trial court terminated the father’s parental rights to his daughter. The court, however, improperly mixed the “best interests” of the child together with current parental fitness:

In the course of deciding whether to terminate [the father’s] parental rights, the trial court in this case reasoned in part that A.B. had been living with [the foster parent] all of her life; that A.B. was fully integrated into [the foster parent’s] home and had not developed a significant relationship with [her father]; and “that it is in [A.B.’s] best interest to maintain a relationship with her father and his family *provided* that the continuation of that relationship does not constitute a perpetual challenge to the legitimacy of the placement with [[the foster parent]].” In making these and other similar statements, the trial court was obviously focusing on A.B.’s best interests, as opposed to [the father’s] current unfitness. Accordingly, we are required to hold that the trial court reasoned erroneously.

A.B., 168 Wn.2d at 926 (footnote omitted; some brackets in original) (emphasis added).

A.B. dictates that the second step only becomes relevant if the first step is satisfied. Once the first step is satisfied, the logical question under the second step is whether it is in the child’s best interests to continue or sever the parent-child relationship.

Two of the findings of fact indicate that the trial court mixed in the best interests of the child inquiry in determining that the elements of RCW 13.34.180(1) and current parental unfitness were satisfied. The court's finding on the best interests of the child was number 2.26. CP 277-78 (FF 2.26). However, the previous finding, which concerns RCW 13.34.180(1)(f), recounts that this element was satisfied based on the "child's best interests":

The continuation of the status quo is not in the child's best interests and a resolution is needed as to who will be this child's permanent caretaker. The child's needs for permanence and stability must be accorded priority over the rights of the biological parent in order to foster the early integration of the child into a stable and permanent home as quickly as possible.

CP 277 (FF 2.25) (emphasis added). Similarly, in finding 2.24, the court expressed that it was "in the child's best interests to begin the transition into a family-type setting with one or more caregivers that are emotionally stable and familiar with the symptoms of an Autism Spectrum Disorder diagnosis and who can provide a calm, consistent, nurturing, and highly structured living environment." CP 277 (FF 2.24).

As in A.B., these findings establish that the court "was obviously" focusing on M.S.'s "best interests" in ruling on current parental fitness and the elements of RCW 13.34.180(1). A.B., 168 Wn.2d at 926. Because there is no oral ruling to supplement the written findings, the conclusion

that the court failed to keep the inquires discrete cannot be rebutted. The court's mixing of the second step into the first step requires reversal.

**5. The Department failed to prove that continuation of the parent-child relationship diminished M.S.'s prospects for early integration into a stable and permanent home.**

The Department bears the burden of proving that “continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home” by clear, cogent, and convincing evidence. RCW 13.34.180(1)(f). There are two ways the Department may prove this element. In re Welfare of R.H., 176 Wn. App. 419, 428, 309 P.3d 620 (2013). First, the Department “can prove prospects for a permanent home exist but the parent-child relationship prevents the child from obtaining that placement.” Id. Second, the Department “can prove the parent-child relationship has a damaging and destabilizing effect on the child that would negatively impact the child's integration into any permanent and stable placement.” Id. (citing In re Dependency of K.D.S., 176 Wn.2d 644, 659, 294 P.3d 695 (2013)).

Here, the trial court did not find that Ms. Spehar’s relationship with M.S. was damaging to him. CP 277 (FF 2.26). To the contrary, the court found that Ms. Spehar loves M.S., understands his many needs, nurtures him, and shows him affection during their visits. CP 2.30 (FF

2.30). The institution that M.S. was confined to could not nurture him.  
8/26/15RP 57.

As for M.S.'s prospects of a permanent home, there were none. The GAL was not aware of an adoptive family expressing interest in M.S. 8/25/15RP 82. Neither was M.S.'s counselor aware of any adoptive home being identified for M.S. 8/26/15RP 60. The GAL speculated that termination of Ms. Spehar's rights (like any termination of parental rights) might open up potential prospective placements for M.S. 8/25/15RP 83-84. The GAL acknowledged, however, that not all adoptions work out and that some adoptive parents terminate the adoption. 8/25/15RP 85-86. This is known as "adoption dissolution." 8/25/15RP 86. While the GAL was unfamiliar with the literature on this topic, she testified she would not be surprised if the research indicated that children with behavioral issues who are strongly attached to their biological parents present an increased risk of adoption dissolution. 8/25/15RP 86.

Because the evidence did not prove that M.S. had prospects for adoption or that Ms. Spehar's relationship with M.S. was harmful, the Department did not meet its burden to prove RCW 13.34.180(1)(f). See K.D.S., 176 Wn.2d at 658-59 (RCW 13.34.180(1)(f) satisfied because parent-child relationship harmed child's well-being). Severance of M.S.'s relationship only served the purpose of depriving him of the nurture and

love that his mother and grandmother indisputably provided him. See In re Welfare of S.V.B., 75 Wn. App. 762, 775, 880 P.2d 80 (1994) (element (f) not met because termination merely deprived child of the nurturing support of a parent). It left him isolated in an institution that cannot be nurturing to him. Together, his grandmother and mother were ready, willing, and capable of caring for him. This Court should hold the Department did not prove RCW 13.34.180(1)(f).

#### **F. CONCLUSION**

Constitutional due process demanded that Ms. Spehar's motion to appoint M.S. counsel be granted so that he could participate at the hearing and have his voice heard. The order terminating Ms. Spehar's parental rights should be reversed.

DATED this 17th day of March, 2015.

Respectfully submitted,

s/ Richard W. Lechich  
Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant

# Appendix

2015 SEP -8 PM 4:02

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF SKAGIT  
JUVENILE COURT**

Dependency of:

No: 14-7-00870-9

MICAH B. SPEHAR

**Hearing, Findings, and Order Regarding  
Termination of Parent-Child Relationship**

D.O.B.: 04/07/06

**Granted (ORTPCR)**

**Dismissed (ORDSM)**

**Clerk's Action Required: Paragraph 4.1**

The child is legally free. An attorney must be appointed for the child in dependency case number 13-7-00416-1 no later than six months from today's date. (NCLF)

**I. Hearing**

1.1 The court held a hearing in this case on August 22-28, 2015, on a petition requesting termination of the parent-child relationship.

1.2 **The following persons appeared:**

|   |  |
|---|--|
| <input checked="" type="checkbox"/> Mother: MARY SPEHAR                                       | <input checked="" type="checkbox"/> Mother's Lawyer: BENJAMIN HARRIS |
| <input type="checkbox"/> Father: CHRISTOPHER LAGERVALL<br><i>(rights terminated 09/09/14)</i> | <input type="checkbox"/> Father's Lawyer:                            |
| <input checked="" type="checkbox"/> Child's GAL: JEANNIE PACIOTTI                             | <input checked="" type="checkbox"/> GAL's Lawyer: DAVID YAMASHITA    |
| <input checked="" type="checkbox"/> DSHS SW: ANGELIA ETTER                                    | <input checked="" type="checkbox"/> Agency Lawyer: ANNE B. HONRATH   |
| <input type="checkbox"/> Other:   |  |

1.3 The court heard testimony from the mother, Angelia Etter, Dr. Jason Prinster, Dr. David Hall, Jeannie Paciotti, Shawnee Gardner, Shellie Roush, Kelslan Scarbrough, Elizabeth Morgan, Jonathan Vander Schuur, Jerry Bongard, and Dr. Ellen Walker.

**II. Findings**

2.1 **The following received adequate service:**

Mother  
 Other

Legal Guardian  
 Child (If age 12 or older)

271

1 2.2 Indian status:

2  Based upon the following, there is no reason to know that the child is an Indian child as

3 defined in RCW 13.38.040, and federal and Washington State Indian Child Welfare

4 Acts do not apply to these proceedings: *The CPS social worker interviewed the*

5 *family and inquired into Indian ancestry. The Indian Inquiry form was completed*

6 *and the parents denied Indian ancestry.*

7  The child is an Indian child as defined in RCW 13.34.080, and the federal and

8 Washington State Indian Child Welfare Acts do apply to these proceedings:

9  The petitioner  has  has not provided notice of these proceedings as required by

10 RCW 13.38.070 and the federal Indian Child Welfare Act to all tribes to which the

11 petitioner or court knows or has reason to know the child may be a member or eligible

12 for membership. The following tribes were notified:

13 2.3 The child's mother, Mary Spehar:

14  has appeared in this proceeding both personally and through her attorney,

15 Benjamin Harris.

16  has failed to appear, plead or otherwise defend against the termination petition and

17 has been found in default.

18 2.4 The Servicemembers' Civil Relief Act does not apply to this proceeding.

19 2.5 A Dependency Petition was filed in this matter on June 24, 2013.

20 2.6 The child herein was found to be a dependent child pursuant to RCW 13.34.030(6) by an Order of

21 Dependency entered in this matter on September 17, 2013 as to the mother and September 18, 2013 as to

22 the father.

23 2.7 A dependency dispositional order was entered pursuant to RCW 13.34.130 and incorporated into

24 the Order of Dependency entered in this matter on September 17, 2013 as to the mother and September

25 18, 2013 as to the father.

26 2.8 The child's dependent status has been reviewed by the court on November 13, 2013, December

10, 2013, May 6, 2014, November 12, 2014, and last on March 17, 2015. The next regularly scheduled

dependency review hearing is set for September 15, 2015.

2.9 The child, age 9, has been removed from the custody of the parents for over six months pursuant

to a finding of dependency under RCW 13.34. On June 20, 2013, the child was placed in out of home

care, and the child has remained in an out-of-home placement. He first stayed with his grandmother

272

1 Carolyn Spehar in a healthy, loving environment. She suffered a stroke in November 2014, and cannot  
2 care for him alone any longer. The child then went to a residential facility called the Ruth Dykeman Center.

3 2.10 Christopher Lagervall relinquished his parental rights as the child's father on September 9, 2014.

4 2.11 Since dependency was established, services ordered under RCW 13.34.130 have been expressly  
5 and understandably offered or provided to the mother, and all necessary services reasonably available and  
6 capable of correcting the parental deficiencies within the foreseeable future have been expressly and  
7 understandably offered or provided to the mother. These services included the following: random  
8 urinalysis, substance abuse evaluations and treatment, psychological evaluation with a parenting  
9 component, psychiatric evaluation, mental health counseling and medication management, dialectical  
10 behavioral therapy, family counseling, joint mental health counseling with the child, and parenting  
11 education. In addition, the following services were provided: case management services, monitoring  
12 parents' compliance with the service plan, assisting caregiver with available services, providing and  
13 facilitating implementation of services as available. Despite the offering of these services, there has been  
14 little improvement in parental functioning.

15 2.12 Since the establishment of dependency, the Department made approximately monthly referrals for  
16 the mother to participate in weekly random urinalysis (UA) to monitor her substance use. The mother  
17 participated in approximately 13 UAs, ten of which were positive for substances. The most recent UAs  
18 were from April and May 2014. The UA in April 2014 was positive for methamphetamines, amphetamines,  
19 marijuana, and benzodiazepines, and the UA in May 2014 was positive for methamphetamines. The  
20 mother missed 94 UA tests.

21 2.13 The mother participated in two substance abuse evaluations (10/18/13 and 04/01/14), both of  
22 which recommended intensive outpatient treatment due to the mother's substance dependence. The  
23 mother did not participate in intensive outpatient treatment, despite the Department providing the mother  
24 with transportation assistance. The Department made five subsequent referrals for updated substance  
25  
26

1 abuse evaluations, but the mother has not participated in an updated substance abuse evaluation. The  
2 mother preferred her own treatment choice by sporadically attending AA and NA meetings.

3 2.14 The mother participated in a psychological evaluation with a parenting component with Dr. Jason  
4 Prinster on February 5, 2014. Dr. Prinster diagnosed the mother with Bipolar II Disorder and Unspecified  
5 Anxiety Disorder, noted her history of using various substances as a way of self-medicating her emotional  
6 distress since her teenage years. Dr. Prinster identified the most significant risk factor relating to the  
7 mother's parental capacity as her history of reckless and impulsive behaviors and emotional lability  
8 associated with her Bipolar II Disorder – when she is depressed she is easily overwhelmed and unable to  
9 fulfill responsibilities associated with general activities of daily living and parenting; when she is manic or  
10 hypomanic she admits to having a pattern of engaging in impulsive or disorganized behaviors leading to  
11 dysfunctional relationships, which negatively affect the child. Dr. Prinster recommended the mother engage  
12 with a psychiatrist or psychologist on an ongoing basis, treatment in a Dialectical Behavioral Therapy (DBT)  
13 program, continue regular therapeutic contact with a psychiatrist including medication management, avoid  
14 becoming socially isolated, and continue to engage in parenting coaching and education. As of the date of  
15 the evaluation, Dr. Prinster's opinion of the likelihood that conditions would be remedied so that the child  
16 could be returned to the mother's care in the near future was positive, as long as the mother engaged in  
17 and maintained compliance with recommended services.

18 2.15 In an addendum dated July 16, 2015, Dr. Prinster updated his opinion of the likelihood that  
19 conditions will be remedied so that the child may be returned to the mother in the near future to be guarded  
20 to poor, based on the mother's lack of consistent participation, if any, in his treatment recommendations.  
21 Dr. Prinster believed it unlikely that the mother will make significant change or effect significant decrease in  
22 risk factors to the child over the next six months.

23 2.16 The mother participated in mental health counseling and medication management with Dr. David  
24 Hall from October 2013 until August 2014, after which time the mother stopped attending appointments and  
25 was discharged due to failure to attend appointments. Dr. Hall's primary diagnoses for the mother were  
26

1 | Bipolar II Disorder, Obsessive Compulsive Disorder (OCD), and Attention Deficit Hyperactivity Disorder  
2 | (ADHD). The mother missed numerous appointments that resulted in her prescriptions running out, which  
3 | affected her mental health stability. The mother admitted to multiple relapses into substance use during the  
4 | course of treatment. Based on his last appointment with the mother, before recommending that the child be  
5 | returned to the mother's care Dr. Hall believed the mother would need to demonstrate sobriety for a year,  
6 | maintain consistent and responsible contact with the child, and take care of herself both personally and in  
7 | creating a home base for herself.

8 | 2.17 In the last year, the mother has had multiple relapses into substance use, has not participated  
9 | regularly in mental health treatment, has not maintained consistent and responsible contact with the child,  
10 | has been homeless or otherwise resided in unstable housing, and has not taken good care of herself.

11 | 2.18 The mother has never participated in DBT, despite the Department making referrals for this service  
12 | on three separate occasions.

13 | 2.19 The Department referred the mother to the Positive Parenting Program ("Triple P") through Brigid  
14 | Collins Family Support Center on November 14, 2013. Triple P is used throughout Washington State and  
15 | internationally as an evidence-based curriculum designed to help families with children that have significant  
16 | behavioral problems. Typically sessions occur on a weekly basis and successful completion requires an  
17 | average of 13-15 sessions. The mother began Triple P in January 2014 and attended four sessions. The  
18 | provider cancelled the service in May 2014 because of a lack of contact with the mother and the mother's  
19 | failure to attend too many of the sessions. All sessions except for the first one took place at the mother's  
20 | apartment, and the date and time of each session was agreed upon by the mother and the provider at least  
21 | a week in advance of each session. The Department offered the parenting instructions through the  
22 | mother's counselor, Jonathan Vander Schuur. The mother didn't follow through. Vander Schuur called the  
23 | mother to meet for parenting classes but she did not come when referred by the Department.  
24 |  
25 |  
26 |

1 2.20 Given the over two years of services offered or provided and the mother's failure to successfully  
2 complete the services, there is little likelihood that the parental deficiencies will be remedied so that the  
3 child could be returned to the mother in the near future.

4 2.21 The mother has not maintained consistent visitation with the child in the last year. Despite the  
5 Department offering the mother weekly visitation and transportation assistance, in the last nine months the  
6 mother has visited the child six times. The mother was given bus passes for transportation to Burien to visit  
7 the child at the Ruth Dykeman Center. In the nine month the child was at the Center, the mother visited  
8 him only five times and was twice driven to the visits by the social worker.

9 2.22 The child has been diagnosed with a variety of behavioral disorders including ADHD, Oppositional  
10 Defiant Disorder, and Autism Spectrum Disorder. The child requires a calm, consistent, nurturing, and  
11 highly structured environment in order to make progress in managing and controlling his behaviors.

12 2.23 A licensed marriage and family therapist, Jonathan Vander Schuur first saw the child on August  
13 17, 2011. He was seen for ADHD and oppositional defiance disorder. The mother brought the child for his  
14 attention deficit disorder, hyper-activity, distractedness and oppositional behavior. The mother described  
15 the child's hitting, kicking, screaming, and aggressiveness. The child's grandmother described his fits of  
16 rage and attacking family pets. A history at school included temper tantrums and hitting his hands and  
17 head against the wall. The mother did not take the child to see a therapist regularly as recommended and  
18 needs. After the Department became involved, the mother did not attend such appoints with the child and  
19 the grandmother. The therapist offered the mother home sessions. His office was only one and one half  
20 miles from the grandmother's house. Vander Schuur thought the mother had a strong, nurturing bond  
21 with the child and was in tune with his needs. He felt that the mother was capable of providing needed  
22 discipline and care for the child, but she appeared overwhelmed by depression and anxiety. Vander  
23 Schuur encouraged the mother on several occasions to engage in the services offered to her by the  
24 Department. They discussed the consequences of losing her child in three specific conversations.  
25  
26

1 2.24 The child has been placed at the Ruth Dykeman Children's Center in Burien, WA, since December  
2 4, 2014. The child initially exhibited behavioral outbursts including breaking property, assaulting other  
3 children and throwing shoes. He had difficulty focusing and became aggressive if he didn't get his way.  
4 The child regressed after his birthday in April, 2015 when visited by the mother, grandmother, family friend  
5 Jerry Bongard, and the social worker. The child has pulled his hair out, urinated on the floor and in garbage  
6 cans, has run from the Center, and exposed himself. The child is learning bad behaviors from the Center's  
7 other residents. It is in the child's best interests to begin the transition into a family-type setting with one or  
8 more caregivers that are emotionally stable and familiar with the symptoms of an Autism Spectrum  
9 Disorder diagnosis and who can provide a calm, consistent, nurturing, and highly structured living  
10 environment.

11 2.25 Continuation of the parent-child relationship clearly diminishes the child's prospect for early  
12 integration into a stable and permanent home. The social worker, the GAL, and the child's therapist  
13 believe that the child should be transitioned out of RDCC, but that the uncertainty of the child's next  
14 placement inhibits the child from being emotionally and psychologically stable enough to begin the  
15 transition into a permanent home. The consensus of expert opinion is that both the likelihood and the ease  
16 with which a child will bond into a new family setting are increased when the child is placed into a family  
17 setting at a younger age versus a more delayed placement. The continuation of the status quo is not in the  
18 child's best interests and a resolution is needed as to who will be this child's permanent caretaker. The  
19 child's needs for permanence and stability must be accorded priority over the rights of the biological parent  
20 in order to foster the early integration of the child into a stable and permanent home as quickly as possible.

21 2.26 Termination of the parent-child relationship is in the best interests of this child because he is in  
22 imminent need of a stable and permanent home that can provide a calm, highly structured, and nurturing  
23 environment with a consistent routine, with one or more caregivers that are familiar with the needs and  
24 behaviors of a child on the Autism Spectrum. The mother is incapable of providing that for the child.  
25 Making the child legally free will allow adoption planning to begin and foster the creation of a stable and  
26

277

1 permanent placement for the child. It is in the child's best interest to have permanence rather than to have  
2 the child in the limbo of foster care for another six to twelve months while the mother seeks further  
3 rehabilitation services.

4 2.27 The mother is currently unfit to parent the child because her untreated substance abuse and  
5 mental health conditions make her unable to appropriately supervise the child, provide the child with a safe  
6 and stable home, or ensure the child's physical and mental health and safety. The mother has not  
7 completed any parenting classes designed to provide her with the tools necessary to manage a child with  
8 severe behavioral disorders. The mother was notified of her parental deficiencies. Because of these  
9 deficiencies, the mother was incapable of providing for the child's emotional, physical, mental and  
10 developmental needs. The mother is incapable of safely parenting the child. The mother has insight into  
11 the child's needs. However, the mother has, by her past behavior, little insight into how her parental  
12 deficiencies and numerous failures to participate in rehabilitation impacted her child.

13 2.28 On the second day of trial, after the guardian ad litem (GAL) testified, the mother's attorney  
14 brought a motion to strike the GAL's testimony on the basis that the GAL did not understand her duties  
15 under RCW 13.34.105 when she testified that it was not her duty as the child's GAL to report to the court  
16 what the child wants. The GAL did, however, subsequently testify that the child had at one point reported to  
17 his counselor that he wanted to be with his mother.

18 2.29 At the same time as the motion to strike the GAL's testimony, the mother's attorney also brought a  
19 motion to appoint an attorney for the child in the termination proceeding on the basis that the child's desires  
20 were not being adequately represented. The mother's attorney did not bring a motion to appoint an  
21 attorney for the child at any time previously.

22 2.30 The mother loves her child. She understands his many needs. She nurtures him and showed  
23 affection to him when she visited him.  
24  
25  
26

1 2.31 The mother believes she tried her best and was frustrated with the services provided by the  
2 Department. She wants more time to complete offered services. At the time of trial, she had not made any  
3 appointments to see her counselor or psychiatrist.

4 2.32 The child has no siblings.

5 2.33 It is not therapeutic for the child to not know who he will be living with. The child has expressed to  
6 the Center's staff that he wants to be with his grandmother, Carolyn Spehar. The grandmother is willing to  
7 be a permanent placement for the child but would need the mother to live in her home to help care for the  
8 child.

9 2.34 The mother had supervised visits with the child July 15, 2013 through September 2, 2013 and April  
10 2014 through August 2014. The mother was always on time and nurtured and encouraged the child  
11 appropriately. A close friend of the grandmother, Jerry Bongard is "Grandpa Jerry" to the child. He has  
12 provided support and encouragement for the family concerning the child, but is understandably unable to  
13 be a permanent placement for the child because of the child's behavioral issues.

14 2.35 The mother cannot parent the child on her own.

15 From the foregoing Findings of Fact, the court now makes and enters the following:

16 **III. Conclusions of Law**

17 3.1 The court has jurisdiction over the parties and subject matter of the above-entitled action including,  
18 but not limited to, personal jurisdiction over Mary Spehar.

19 3.2 The foregoing Findings of Fact have been established by clear, cogent, and convincing evidence.

20 3.3 The requirements of RCW 13.34.180(a) - (f) and RCW 13.34.190(2) have been established by  
21 clear, cogent, and convincing evidence.

22 (a) The child has been found to be a dependent child

23 (b) The court entered distortional orders pursuant to RCW 13.34.130

24 (c) The child has been removed from the mother's custody for at least six months.  
25  
26

1 (d) Services under RCW 13.34.136 have been expressly and understandably offered or  
2 provided and all necessary services, reasonably available, capable of correcting the parental deficiencies  
3 within the foreseeable future have been expressly and understandably offered or provided.

4 (e) There is little likelihood that conditions will be remedied so that the child can be returned to  
5 the parent in the near future.

6 (f) The continuation of the parent/child relationship clearly diminishes the child's prospects for  
7 early integration into a stable and permanent home.

8 3.4 It is in the child's best interest that the mother's parental rights be terminated.

9 3.5 The mother's motion to strike the GAL's testimony is denied based on the following: the GAL is  
10 qualified to act as a GAL; and the GAL fulfilled her statutory duty when she reported to the court the views  
11 expressed by the child. Any testimony from the GAL indicating it was not her duty to do so was likely a  
12 misunderstanding and in any event constituted harmless error as she proceeded to report to the court the  
13 views expressed by the child.

14 3.6 In considering whether to appoint counsel to a child subject to termination proceedings, RCW  
15 13.34.100(6) offers sufficient constitutional safeguards to protect such a child's right to counsel, and the  
16 court should make this determination on a case by case basis by applying the factors in *Mathews v.*  
17 *Eldridge*, 424 U.S. 319 (1976) (due process generally requires the court's consideration of the private  
18 interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous  
19 decisions). *In re Dependency of M.S.R. and T.S.R.*, 174 Wn.2d 1, 14-15, 21 (2012), *reconsideration*  
20 *denied* (May 9, 2012). The mother's motion to appoint an attorney for the child in the termination  
21 proceeding is denied based on the following: there was little to no potential for error without the  
22 appointment of an attorney as the case did not present any complex legal issues; there was not much more  
23 an attorney could have assisted the child with in this case; and the GAL took the child's expressed desires  
24 into consideration in forming her opinion of what is in the child's best interests. Furthermore, the motion  
25 was not brought in a timely manner or with adequate notice to the parties.  
26

1 3.7 The parent-child relationship existing between Micah Spehar, and  his  her mother, Mary  
2 Spehar, should be terminated pursuant to RCW 13.34.190 (1)(a) and (2).

3 From the foregoing Findings of Fact and Conclusions of Law, the court makes and enters the  
4 following:

5 **IV. Order**

6 4.1  The petition is denied and the termination action is dismissed  with  without  
7 prejudice.

8 4.2  The petition is granted.

9 4.2.1 All rights, powers, privileges, immunities, duties and obligations, including any rights to  
10 custody, control, visitation or support existing between  
11  Mother: Mary Spehar;  
12 and Micah Spehar are severed and terminated and the parent shall have no standing to  
13 appear at any further legal proceedings concerning the child.

14 4.2.2 Any support obligation existing prior to the effective date of this order remains in full force  
15 and effect.

16 4.2.3 This order does not affect the rights of a parent not named above.

17 4.2.4 The child is committed to the custody of:

- 18  the Department of Social and Health Services has the power and authority  
19 granted by RCW 13.34.210. The child is legally free.
- 20  other: The child remains a dependent child pending termination of the rights of  
21 the other parent(s)

22 4.3 Other:

23 Dated: September 8, 2015 Greg Allen  
24 Judge

25 Presented by:  
26 ROBERT W. FERGUSON  
Attorney General

281

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

ANNE B. HONRATH  
Assistant Attorney General  
WSBA 46789

APPROVED FOR ENTRY; NOTICE  
OF PRESENTATION WAIVED:

\_\_\_\_\_  
BENJAMIN HARRIS  
Attorney for Mother,  
WSBA # 45961

\_\_\_\_\_  
MARY SPEHAR, Mother

\_\_\_\_\_  
JEANNIE PACIOTTI  
Child's Guardian ad Litem/CASA

\_\_\_\_\_  
ANGELIA ETTER  
Social Worker

282

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

|                   |   |               |
|-------------------|---|---------------|
| IN RE M.B.S.      | ) |               |
| MINOR CHILD       | ) |               |
|                   | ) |               |
|                   | ) |               |
| M.S.,             | ) | NO. 74002-4-I |
|                   | ) |               |
|                   | ) |               |
| APPELLANT MOTHER. | ) |               |
|                   | ) |               |

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

|   |                   |  |
|---|-------------------|--|
| [X] ANNE HONRATH, AAG<br>[anneh2@atg.wa.gov]<br>OFFICE OF THE ATTORNEY GENERAL<br>103 E HOLLY ST, STE 310<br>BELLINGHAM, WA 98225 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE |
| [X] DAVID YAMASHITA<br>ATTORNEY AT LAW<br>1303 S 2ND ST<br>MOUNT VERNON, WA 98273   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____            |
| [X] M.S.<br>3709 W 3 <sup>RD</sup> ST<br>ANACORTES, WA 98221  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____            |

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MARCH, 2016.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711