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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Dependency of M.S.R., and T.S.R., minor children,
STATE OF WASHINGTON, DSHS,

Respondent,

v.

NYAKAT LUAK,

Appellant.

RESPONSE BRIEF OF DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS)

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ORIGINAL

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I. INTRODUCTION

The mother's parental rights were terminated only after she was given nearly five years to address her parental deficiencies and made no progress doing so. Her poor decision-making and uncontrolled violent reactions were the basis for the children's removal from her care in 2004, and she was continuing to engage in assaultive and threatening behavior up until the trial in 2009. The order terminating her rights was fully justified because the mother continued to deny or minimize her behavior and was not participating in good faith in mental health counseling offered to address it. Based on the length of time the children had been out of her care as well as the fact that she was not committed to participating in a critical service, there was substantial evidence that she would not be capable of appropriately parenting her children anytime in the near future.

The mother additionally claims that the children were denied a constitutional right to counsel. However, the record is clear that the issue of counsel was never raised at trial and that there was no prejudice to the mother such that it would constitute manifest error. RCW 13.34.100(6), which provides the trial court the discretion to appoint counsel for children, satisfies due process.

II. COUNTERSTATEMENT OF FACTS

A. Procedural History

At approximately 1:30 p.m. on December 8, 2004, four-year-old twins M.S.R. and T.S.R were left home alone with their two-year-old sister, S.D.M.[1] Ex. 2. A latex mattress in the apartment caught on fire and set off a fire alarm, alerting a maintenance worker who found the apartment full of smoke and the children behind a closed door in a bedroom. *Id.* When law enforcement arrived they waited two hours for a caretaker to arrive; when this did not occur, the children were taken into protective custody and transported to Children's Hospital. *Id.*

The mother arrived at the Children's Hospital parking lot at approximately 8:30 p.m. that evening, as DSHS social workers Mary Marrs and Larry Nelson were getting the children released from the hospital and placed in a car. 1RP 24.[2] The mother did not identify herself but forcibly attempted to enter the car in which the children were being buckled in. 1RP 25-26. Without knowing who she was, Marrs urged the mother to step away from the car for the children's safety. 1RP 25, 30. The mother turned around and punched Marrs in the face. 1RP 26. As Marrs spun around from the impact, the mother proceeded to kick her in

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[1] S.D.M.'s dependency case was dismissed after she was returned to her biological father and she is not a subject of the order on appeal.

[2] See Brief of Appellant for explanation of references to the Report of Proceeding.

the back of the legs and pummel her on the back of the head. *Id.* Marrs was required to seek medical care for her injuries. 1RP 28. The mother was later convicted of two counts of contributing to the dependency of a minor and one count of assault based on these events. 1RP 28.

The mother agreed to dependency on March 15, 2005. Ex. 2. In doing so, she stipulated to the fact that she had an "untreated anger management problem" resulting in an inability to protect the health, safety and welfare of the children in her home. *Id.* Pursuant to a dispositional order, she agreed to engage in remedial services, including parenting classes, anger management classes, a psychological evaluation with a parenting component and follow through with any treatment recommendations, and family preservation services. *Id.*

As the mother admits, M.S.R. and T.S.R. were returned to her care and then removed again by court order on three separate occasions between the establishment of dependency and the termination trial. The first time they were removed was on October 9, 2006 after M.S.R. sustained a head injury in the mother's care and the mother refused to provide a consistent explanation as to how the injury happened. CP 186 (FF 1.33).[3] The second time they were removed from the mother's care was on October 8, 2007,

[3] Unless noted otherwise, all findings of fact cited in this brief are uncontested. Unchallenged findings by the trial court are considered verities on appeal. *See e.g., Fuller v. Employment Security,* 52 Wn. App. 603, 605, 762 P.2d 367 (1988); *In re Santore,* 28 Wn. App. 319, *review denied,* 95 Wn.2d 1019, 623 P.2d 702 (1981).

following the mother being evicted from her housing and arrested on suspicion of stealing a vehicle and for an outstanding warrant for a weapons violation. CP 187 (FF 1.36). The children were removed for the final time on December 3, 2007 and as part of that order the mother was ordered to have an updated psychological evaluation. Ex. 16. T.S.R. and M.S.R. have been out of the mother's care since that time.[4]

B. The Mother's Primary Parental Deficiency and Unfitness to Parent at the Time of Trial

The mother's primary parental deficiency was her inability to manage her anger appropriately. Rage and violence were the basis for the children's first removal in 2004, and continued to be a problem for the mother up until the termination trial commenced in July 2009. The mother does not assign error to any of the findings of fact regarding the overwhelming number of incidents in which the mother assaulted, harassed or threatened relatives and service providers. These uncontested findings are summarized below:

> In December 2004, the mother assaulted DSHS social worker Mary Marrs by punching her in the head and kicking her in the leg. CP 185 (FF 1.28)

[4] While the court gave authority for the children to be returned to the mother's care in November 2007, the mother elected not to have them physically live with her, instead sending them to her brother's house. When they were removed pursuant to court order in December 2007, they remained with their uncle. 3A-RP 446-449. Although the uncle had an "open door" policy with the mother, permitting her to visit the children anytime she wanted to, she did not make use of this opportunity. 3A-RP 449.

> In February 2005, the mother physically pushed a visitation supervisor out of her house, resulting in the court reducing her visitation opportunities. CP 185 (FF 1.29)
>
> In May 2007, the mother threatened to "beat" the "ass" of Mrs. Martinez (the stepmother of S.D.M.) in the presence of S.D.M. CP 186-7 (FF 1.34)
>
> In September 2008, the mother again assaulted a visitation supervisor by punching her. S.D.M. got in the middle of the fight between the mother and the visitation supervisor. This event was traumatizing to S.D.M. CP 187 (FF 1.39)
>
> In October 2008, the mother assaulted her boyfriend Lomo Mawakii by throwing a hardboiled egg at him and punching him in the head. Mr. Mawakii was holding the mother's one-month-old son M.M. at the time. Following this assault, the mother was ordered by the court to have no contact with Mr. Mawakii. CP 187 (FF 1.40).
>
> In July 2009, the mother left threatening voicemails on Mr. Mawakii's telephone, telling him she would "destroy his life." CP 188-9 (FF 1.44).

The mother's anger management problem impacted her parenting because it showed an inability to control her emotions, it increased the risk that she would become angry and violent in the presence of her children, and without treatment it would eventually become the only "tool" she knew to express herself. 1RP 72-73. In addition to the impact on the children's own safety, witnessing rage and violence increased the likelihood that the children would grow up to perpetrate violence

themselves.[5] 2RP 248. Finally, nearly every DSHS social worker who testified at the termination trial reported that the mother routinely screamed at them, hung up on them, and used profanity and threatened them, indicating that her anger issues prevented the mother from being able to work cooperatively and maintain healthy relationships with service providers attempting to help her and her children. 1RP 119; 2RP 210-215; 4RP 421.

III. ARGUMENT

A. Standard of Review

A biological parent has a fundamental liberty interest in the care, custody and control of his or her child. *Santosky v. Kramer,* 455 U.S. 745, 752, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Dependency of A.V.D.*, 62 Wn. App. 562, 567, 815 P.2d 277 (1991). However, that fundamental right is not absolute. *In re Young*, 24 Wn. App. 392, 600 P.2d 1312 (1979). The State has both a right and an obligation to intervene to protect a child when a parent's action or inaction endangers the child's physical or emotional welfare. RCW 13.34.020; *In re Sumey,*

[5] S.D.M. was already beginning to show signs of aggression and bullying. 3A-RP 438. The mother does not assign error to Finding of Fact 1.52: "Additionally, the children have been present and been affected by her anger outbursts at others. [S.D.M.], for example, expresses a parentified concern to keep her mother out of jail and has physically inserted herself into Ms. Luak's verbal fights. She is aware of and anxious about her mother's anger. [S.D.M.] developed her own anger issues and bullying at a young age." CP 190.

94 Wn.2d 757, 762, 621 P.2d 108 (1980). Therefore, the dominant concern on review is the ultimate welfare of the child. *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

Until 1997, when Congress passed the *Adoption and Safe Families Act ("ASFA")*, Pub. L. No. 105-89, 111 Stat. 2115 (1997), the focus of juvenile dependency proceedings was on the parent – specifically family preservation and reunification – rather than the child. *ASFA* "revolutionized" dependency law by mandating that the safety, well-being and permanency of children be the paramount considerations of the juvenile court in making decisions regarding dependent children. Cindy S. Lederman and Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation*, 10 Psychol. Pub. Pol'y & L. 162 (2004). *See also,* 42 U.S.C. § 671(a)(15), §675; Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present,* 29 J. Legis. 51, 52 (2002).

Washington's dependency statute was amended in 1998 to make it consistent with *ASFA*. Laws of 1998, ch. 314, p. 1664. The paramount concern of juvenile dependency proceedings since that time has been the child's safety and well-being. RCW 13.34.020; *see also M.W. v.*

Department of Soc. & Health Svcs., 149 Wn.2d 589, 599, 70 P.3d 954 (2003). Moreover, "the statutes now reflect an emphasis on [the] permanency plan for the child." *In re Adoption of B.T.*, 150 Wn.2d 409, 420, 78 P.3d 634 (2003).

This is reflected in the legislative intent:

> When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. *The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.*

RCW 13.34.020 (emphasis added).

Permanency planning is required to begin within 60 days of a child's placement, and permanency planning goals are to be achieved at the earliest possible date, preferably before the child has been in out-of-home care for 15 months. RCW 13.34.145(1)(c). A parent's failure to substantially improve parental deficiencies within 12 months following entry of the dispositional order gives rise to a presumption that the parent is unlikely to correct their deficiencies in the near future. RCW 13.34.180(1)(e). The court must order DSHS to file a termination petition if the child has been in out-of-home care for 15 of the last 22 months since

the dependency petition was filed unless specific findings are made that a termination petition is not appropriate. RCW 13.34.145(3)(b)(vi).

In order to terminate parental rights, the State must show by clear, cogent and convincing evidence the following elements:

> (a) That the child has been found to be a dependent child under RCW 13.34.030(5); and
>
> (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; and
>
> (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 under RCW 13.34.030(5); and
>
> (d) That the services under RCW 13.34.130 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; and
>
> (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. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

> (i) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or
> (ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child 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); RCW 13.34.190(1)(a).

The court must also find that termination is in the best interests of the child. *See* RCW 13.34.190(2). For this element, the burden of proof is by a preponderance of the evidence. *In re Dependency of A.J.R.,* 78 Wn. App. 222, 896 P.2d 1298, *review denied,* 127 Wn.2d 1025 (1995).

In determining whether the requisite burden of proof has been established, the trial court is afforded broad discretion and its decision is entitled to great deference on review. *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re Dependency of K.S.C.*, 137

Wn.2d 918, 976 P.2d 113 (1999). Even if it disagrees with a trial court's determination, the reviewing court will not weigh the persuasiveness of conflicting evidence, the credibility of witnesses, nor draw its own inferences. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994); *In re Sego*, 82 Wn.2d at 740; *Valdez-Zontek v. Eastmont School District*, 154 Wn. App. 147, 225 P.3d 339 (2010) (stating, "...it is not our role to reweigh conflicting evidence."). It must uphold the decision so long as there is evidence that, if believed, supports the ruling. *Burnside*, 123 Wn.2d at 107-08; *see also Washington Belt Drive Sys., Inc. v. Active Erectors*, 54 Wn. App. 612, 616, 774 P.2d 1250 (1989) ("Even where the evidence is conflicting, this court need only determine whether the evidence most favorable to [the prevailing party] supports the challenged findings."). To ask whether the State presented substantial evidence is to ask whether the trial court could have found for the State. *In re Welfare of A.B.*, 168 Wn.2d 908, 925, 232 P.3d 1104 (2010).

B. The State Proved By Clear, Cogent, And Convincing Evidence All Facts And Legal Elements Necessary To Terminate Parental Rights.

1. The court did not err in concluding that all necessary services capable of remedying parental deficiencies had been expressly and understandably offered or provided to the mother.

To meets its burden under RCW 13.34.180(1)(d), DSHS must show it either offered the parent the required services and that the parent failed to engage in them, or that the parent waived his or her right to such services. *In re Welfare of S.V.B.,* 75 Wn. App. 762, 770, 880 P.2d 80 (1994). The court may consider any service received, from whatever source, if it relates to the potential correction of a parental deficiency. *In re the Dependency of D.A.,* 124 Wn. App. 644, 651-652, 120 P.3d 847 (2004).

The mother's sole argument in this regard is that DSHS did not do enough to provide her with services designed to help her manage her anger and work successfully with professionals involved in her children's welfare, nor did it underscore to her the importance of participating in those services. However, there was substantial evidence for the court to conclude that all necessary and available services had been offered, and any lack of improvement was attributable solely to the mother's denial and delay.

It is uncontested that mother had a chronic and intractable problem with outbursts of rage, violence against others, and poor understanding of how her behaviors affected her children.[6] Following the entry of the

[6] Although the clinical terms used to describe the mother's parental deficiency varied from "psychological incapacity," "mental deficiency," "conduct disorder" or

dispositional plan, the mother participated in a psychological evaluation with Dr. Carmela Washington-Harvey in August 2005. 2A-RP 186. From the start, Dr. Washington-Harvey identified the mother's reactive behaviors as her greatest obstacle to parenting appropriately. 2A-RP 200. She recommended the mother participate in anger management treatment, mental health counseling, Family Preservation Services (FPS) and a culturally-relevant parenting class. 2A-RP 205. Except for FPS, in which the mother's contract was terminated due to her poor participation, the mother participated in these services, sometimes more than once. CP 183 (FFs 1.16 and 1.17). However, the mother continued to violate court orders, have violent interactions with partners, lie to service providers and have an unstable residential and financial situation up until the time of trial (and even during an unexpected two-month recess of the trial). CP 183, 190 (FFs 1.16, 1.50). It was therefore clear that she was not benefitting from these services and further recommendations needed to be made. CP 183 (FF 1.19); 4RP 436. Dr. Washington-Harvey completed an updated evaluation of the mother in September 2008. 2A-RP 205. She concluded that the primary difference between the first evaluation and the second evaluation was that the mother had shown very little motivation to accept responsibility for or change her behaviors. 5A-RP 757. As a result, she

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"adjustment disorder," the court found that it was the underlying behavior that constituted the deficiency and the words used were largely immaterial. CP 191 (FF 1.54).

amended her recommendations to include Cognitive Behavioral Therapy, or "CBT," an intensive form of counseling designed to fundamentally change entrenched patterns of behavior and thought processes. 213. 2A-RP.

As soon as Dr. Washington-Harvey completed her report, DSHS made referrals for CBT to the mother. In October 2008, the mother was given a referral to a CBT provider by DSHS social worker Tuong Pham, both in writing and over the phone.[7] Ex. 56; 4RP 408. Between March 2009 and August 2009, the mother was given referrals to CBT providers by DSHS social worker Gina Torres.[8] 2RP 188-197; Exs. 57, 60, 61. Again, these referrals were made both in writing and verbally, and the mother was given choices of agencies in both King County and Snohomish County. 2RP 188, 193. The mother admitted at trial that she knew she could access CBT at the Refugee Women's Alliance ("ReWA") as early as June 2009, but didn't go in for an intake until September 2009, well after the start of the termination trial. RP 399-400.

Although the mother contends that she was unaware of the importance of actually participating in CBT, such a statement is blatantly disingenuous. The court made several findings regarding the mother's

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[7] In the dependency review hearing order of November 14, 2008, the mother acknowledged that she had received this referral. Ex. 21.

[8] In the dependency review hearing order of August 10, 2009, the mother asserted that she had already begun participating in CBT. Ex. 59.

awareness of the services ordered, none of which the mother assigns error to:

> "Ms. Luak's own testimony establishes that she knew and understood what was ordered, offered and expected." CP 182 (FF 1.7).
>
> "Ms. Luak herself testified repeatedly that she knew what had been ordered, what services were expected, and what the visitation rules were." CP 182 (FF 1.14).
>
> "While the nomenclature of [CBT], or the reason it does what it does, may not be understandable to Ms. Luak, it is clear that she has known for years that she has been ordered to do it and where to obtain it but has failed to do so." CP 183 (FF 1.18).
>
> "While there is some evidence that the concept of CBT is as culturally foreign to Ms. Luak as the idea that the government could permanently remove her children, there is extensive and persuasive evidence that she was repeatedly provided information about accessing CBT, and the need to participate was consistently reinforced." CP 183-184 (FF 1.20).
>
> "Ms. Torres testified that Ms. Luak would respond that she was 'too busy' to go [to CBT], but not busy at what, and not that she did not understand where to go." CP 184 (FF 1.21).

It was clear based on the testimony of several DSHS social workers that the mother was informed of the legal repercussions of not participating in services. When the mother told social worker Cara Moore after the third removal in December 2007 that a judge "can't take my kids," Moore informed her that there was "something that can govern her in her

relationship with the children and her relationship with her children can be severed legally." 3A-RP 437. But the mother maintained the attitude that "the rules didn't apply" to her. 3A-RP 452. Social workers Gina Torres also informed the mother several times that the return of M.S.R. and T.S.R. to her care was contingent on her participation in CBT. Exs. 57, 61; 2RP 260.

Although the mother argues that if only DSHS had made referrals to CBT earlier, or if it had provided more collateral information to Maralee Leland so that she could have offered CBT, she would have been able to demonstrate improvement by the time of trial. Br. of App. at 26-28. This is mere speculation, and is contradicted by uncontroverted testimony that the mother had very little motivation or intention to participate in good faith in CBT. The mother told social worker Gina Torres she didn't need counseling and was too busy to attend. 2RP 196; CP 184 (FF 1.21). She refused to accept responsibility for her actions or choices and remained in significant denial about them up to the time of trial. CP 189 (FF 1.49). When she finally did attend an intake with a CBT provider at ReWA in September 2009, she failed to disclose a single incident of violence she had perpetrated. Ex. 74. Without complete candor it would be impossible for her to benefit from the counseling relationship. 1A-RP 166.

The mother's claims must be also viewed in light of the fact that the trial court entered specific findings – undisputed on appeal – that the mother's testimony at trial was not credible. CP 181 (FF 1.4). In a termination proceeding, the trial court is afforded broad discretion and its decision is entitled to great deference on review. *In re Dependency of A.M.*, 106 Wn. App. 123, 131, 22 P.3d 828 (2001). The deference paid to the trial judge's advantage in having the witnesses before him or her is particularly important in termination proceedings because only the trial court can observe a witness' demeanor, making it more capable of resolving questions of weight and credibility than the appellate court. *In re Sego*, 82 Wn.2d at 739-740. When evidence has been weighed in a bench trial, the trial court must be deferred to on issues related to witness credibility and conflicting testimony. *Tae T. Choi v. Sung*, 154 Wn. App. 303, 313, 225 P.3d 425 (2010); *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

While the court was sympathetic to both the mother's culture and her traumatic past, there was substantial evidence presented that the mother was fully aware of the court's expectations of her and simply made a decision not to comply. Regardless of the culture from which the parents come, when a termination proceeding is initiated in a Washington court, the best interests of the children at issue are paramount. *In re*

Dependency of A.A., 105 Wn. App. 604, 610, 20 P.3d 492 (2001). The fact that "there is yet another culture whose fundamental values come into conflict with the values in the United States does not mean that the children should suffer for it. These cultural conflicts should not be the burdens of the children." *In re Dependency of A.A.*, 105 Wn. App at 611.

2. There was substantial evidence that there was little likelihood the children could have safely been returned to the mother anytime in the near future.

The mother argues that rebuttable presumption of RCW 13.34.180(1)(e) did not apply because CBT was not offered to her early enough. Br. of App. at 28-30. However, there was substantial evidence that once CBT was determined to be a service "capable of correcting the parental deficiencies" under RCW 13.34.180(1)(d), it was offered to the mother on multiple occasions yet she chose not to participate in a timely fashion. Furthermore, regardless of whether the court relies on the statutory presumption, RCW 13.34.180(1)(e) is met as long as the court finds by clear, cogent and convincing evidence that there is little likelihood that conditions would be remedied in the near future such that the children could have been returned. The purpose of RCW 13.34.180(1)(e) is to determine whether parental deficiencies have been corrected, and parent's unwillingness to avail herself of remedial services within a reasonable period is highly relevant to a trial court's

determination as to whether RCW 13.34.180(1)(e) has been satisfied. *In re Dependency of T.R.*, 108 Wn. App. 149, 165, 29 P.3d 1275 (2001).

The mother does not assign error to several of the court's findings indicating that there had been absolutely no change in the conditions that resulted in the original removal of M.S.R. and T.S.R. back in December 2004. These include Finding of Fact 1.46 ("Ms. Luak's choices and bad judgment present the same dangers to the twins now as they did at the time they were found alone in the burning apartment"); Finding of Fact 1.48 ("Ms. Luak is still involved in violence, lying about it, [and] failing to recognize any impact on her children...") and Finding of Fact 1.49 ("Ms. Luak's deep-seated denial system, which in the expert opinion of Dr. Washington-Harvey prevents her from benefiting from other services, is intact and undiminished. She has not accepted responsibility for her actions and choices or acknowledged the importance of doing so to anybody; she was unable to do so during the trial.") CP 189. And the prognosis for such a change was poor. Although mother had attended three appointments with a CBT provider by the time the trial concluded, she wasn't at a point where she was receptive to it or would benefit from it. 2RP 226. Dr. Washington-Harvey testified that, based on the mother's lack of progress between the first and second psychological evaluations,

she was not optimistic that the mother would make the necessary changes to reunify with the children in the next six or twelve months. 2A-RP 239.

Although the near future is not explicitly defined in the statute, the statute is clear that permanency is to be established at the earliest possible date. RCW 13.34.145. Furthermore, this issue must be determined by viewing time from the child's point of view. *See In re Welfare of Hall*, 99 Wn.2d 842; 664 P.2d 1245 (1983); *In re Dependency of T.R.*, 108 Wn. App. at 166. Even a matter of months is not within the foreseeable future for children to determine if there is sufficient time for a parent to remedy his or her parental deficiency. *In re Welfare of Hall,* 99 Wn.2d at 850-51. When it is "eventually possible," but not imminent, for a parent to be reunited with a child, the child's present need for stability and permanence is more important and can justify termination. *In re Dependency of T.R.*, 108 Wn. App. at 166.

Through its presumptions, the termination statute contemplates twelve months as the period of time that establishes that a parent is unable to remedy their deficiencies such that their child cannot be returned to them. RCW 13.34.180(1)(e). M.S.R. and T.S.R. at the time of the trial had been out of their mother's care without interruption for eighteen months, had been subject to a dependency petition for nearly *five* years, and during that time, they had to be removed from the mother's care an unprecedented *four*

times due to the mother's actions. As a result, there was substantial evidence the mother was not capable of parenting the children herself anytime in the near future.

C. Children Do Not Have a Constitutional Right to Counsel In Termination Proceedings.

1. Because the constitutional issue is raised for the first time on appeal and this case presents no manifest error affecting a constitutional right, this Court should not reach the issue.

On appeal, the mother argues for the first time that failing to appoint counsel to M.S.R. and T.S.R. violated their constitutional due process rights. Br. of App. at 31. A party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) "manifest error affecting a constitutional right." RAP 2.5(a). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Demonstrating actual prejudice requires a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (alteration in original). "In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim." *Id.* "If the facts necessary

to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The issue of appointment of counsel for M.S.R. and T.S.R. was not raised by any party below. Furthermore, the mother offers no basis to conclude that the absence of court-appointed counsel led to an erroneous result in the termination proceeding. The trial court listened to the testimony of 22 witnesses and reviewed 56 exhibits over the course of a 13-day trial. CP 179-180. The evidence considered by the trial court included witnesses who were willing to stipulate that, if asked, M.S.R. and T.S.R. might express that they wanted to return home to their mother. 3A-RP 379. The mother does not identify any additional evidence that could have been presented or any trial strategy that could have been pursued by an attorney appointed to represent M.S.R. and T.S.R. that would have caused the court to conclude she was a fit parent or that termination was not in the children's best interests. RAP 2.5(a)(3) "was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below." *In re Disability Proceeding Against Diamondstone*, 153 Wn.2d 430, 443, 105 P.3d 1 (2005) (internal quotations omitted). As a result, this Court should decline to hear the constitutional issue.

2. If the Court reaches the constitutional issue, RCW 13.34.100(6) satisfies due process because it authorizes appointment of counsel for children.

a. Appointment of counsel on a case-by-case basis satisfies due process.

This issue of whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires a state to appoint counsel for indigent parents in a proceeding to terminate parental rights is governed by *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In *Lassiter*, the Court explained that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[9] *Lassiter*, 424 U.S. at 26–27. In all other cases, and specifically in termination of parental rights cases, the right to counsel in every case is not guaranteed, but must be decided on a case-by-case basis, using the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Lassiter*, 452 U.S. at 27. A trial court "must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the

[9] The mother's reliance on *Bellevue School District v. E.S.*, 148 Wn.App. 215, 199 P.3d 1010 (2009), *review granted* 166 Wash.2d 1011, 210 P.3d 1018 (2009) (Br. of App. at 33) is misplaced for this very reason, as *E.S.* dealt with truancy proceedings for juveniles, which can result in detention and loss of liberty.

indigent, if he is unsuccessful, may lose his personal freedom." *Id.*

In *Lassiter*, the Court balanced the *Mathews* factors and concluded that, although in some cases due process would require counsel to be appointed, the Constitution did not require the appointment of counsel in every termination proceeding. *Id.* at 31. Accordingly, the Court held that "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings [is] to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32; *see also King v. King*, 162 Wn.2d 378, 392 174 P.3d 659 (2007) (recognizing *Lassiter* as holding "that the federal Constitution does not require appointment of counsel in every parental termination proceeding.")

Thus, due process requires the trial court to determine in each case whether counsel should be appointed. This is exactly what RCW 13.34.100(6) provides in requiring the trial court to use its discretion, considering the child's age and needs as well as other factors, to appoint counsel when appropriate. RCW 13.34.100(6)(f) provides: "If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court *may* appoint an attorney to represent the child's position" (emphasis added). Upon a child's twelfth birthday, and

at least annually thereafter, the Department and the child's GAL are required to "notify a child of his or her right to request counsel and shall ask the child whether he or she wishes to have counsel." RCW 13.34.100(6)(a). Even for children younger than twelve, the court is authorized to appoint counsel "if the guardian ad litem or the court determines that the child needs to be independently represented..." RCW 13.34.100(6)(f).

b. As a child's constitutional rights are inherently more limited than a parent's, it cannot follow that children have a constitutional right to counsel that exceed that of parents.

As the Court explained in *Lassiter*, "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." *Lassiter*, 452 U.S. at 26. Since parents have a greater liberty interest in the parent and child relationship than their children, it does not follow that children would have a due process right to counsel in every case when their parents do not.

The United States Supreme Court has frequently described the fundamental nature of the parent's liberty interest in the parent and child relationship. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (a parent's liberty interest "in the care, custody, and control of their children is perhaps the oldest of the

fundamental liberty interests recognized by this Court.") In contrast, the Court has consistently held that a child's constitutional rights are more limited. "The Court long has recognized that the status of minors under the law is unique in many respects." *Bellotti v. Baird*, 443 U.S. 622, 633, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). *Bellotti* outlined three reasons that the constitutional rights of children cannot be equated with those of adults: because the State is entitled to account for children's inherent vulnerability; because "that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them;" and because the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Id.* at 635-637.

Although the mother cites to *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), as the only example of a court addressing this issue in a published decision, courts of other states have concluded that a child's due process rights in a termination proceeding are satisfied by statutes like RCW 13.34.100(6) that authorize, but do not require, the trial court to appoint counsel for a child. In *In the Matter of D.*, 24 Or. App. 601, 609, 547 P.2d 175 (1976), an Oregon court explained that the "trial court, directed by statute to exercise its authority for the benefit of the child would appear to be peculiarly well suited to make the

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

3. Under the *Mathews* balancing test, RCW 13.34.100(6) does not violate due process.

The mother argues that *Mathews* would require counsel to be appointed for children in all termination cases. Br. of App. at 33-45.

However, it is clear that when the factors set out in *Mathews* are weighed, the current practice under RCW 13.34.100(6) satisfies due process.

a. The Court should disregard the mother's arguments regarding harms allegedly arising from lack of counsel in dependency proceedings.

As a preliminary matter, it should be noted that the mother is appealing an order terminating her parental rights. Although the issue is consequently limited to whether children have a constitutional right to counsel in *termination* proceedings, the mother nonetheless argues extensively about *dependency* proceedings.[10] A litigant lacks standing to challenge a statute on constitutional grounds unless the litigant is harmed by the particular provision it claims is unconstitutional. *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). Because termination and dependency cases are different actions with different cause numbers and different purposes, the Court should disregard arguments that counsel for children would improve the dependency process.

A parental rights termination case is a discrete proceeding focused exclusively on whether the legal right of a parent to the care, custody, and

[10] Appellant directs this Court's attention to *In re Dependency of D.R. and A.R.*, (No. 84132-2) currently scheduled for oral argument before the Washington Supreme Court on January 27, 2011. Br. of App. at 32 n.5 (referencing "*In re Termination of Roberts*)"). In that case, the Supreme Court also granted discretionary review "*limited* to the issue of appointment of counsel in *termination cases only*" (emphasis added). *Id.*, Order of June 2, 2010.

control of his or her child should be terminated. *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). When the court reaches a decision on the merits of the termination petition, the termination proceeding is over. A dependency proceeding, in contrast, concerns the child's ongoing welfare and encompasses all matters associated with the child's care and well-being during the dependency. Unlike a termination proceeding, a dependency is a "preliminary, remedial, nonadversarial proceeding." *In re Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992).

Notwithstanding this difference, the mother's *Mathews* briefing argues extensively about matters that arise under and are addressed through dependency proceedings, such as foster care placements and contempt proceedings. Because this case is not about dependency proceedings, the Court should disregard any arguments about the potential value of counsel in such proceedings.

b. Factor #1: the private interest at stake.

The first *Mathews* factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. The mother claims that children have a liberty interest in a termination proceeding because they are in the custody of the State and are subject to a wide variety of placements. Br. of App. at 35-37. However, a child's

placement is a function of the dependency proceeding. Placement is not and cannot be considered as part of a termination proceeding. *See, e.g., In re Dependency of K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113 (1999) (holding that "the State does not have to prove that a stable and permanent home is available at the time of termination."). Even if a trial court denies a termination petition, placement can only be addressed in the underlying dependency proceedings. RCW 13.34.138(2)(a) ("a child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists.").

Additionally, a child does not have a liberty interest in avoiding foster care. As the Supreme Court explained in *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), a juvenile's "interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." *Schall*, 467 U.S. at 265. "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Id.*

Similarly, although the mother points out that children in dependency proceedings are at risk of detention for being found in

contempt of court for violation of a court order under RCW 7.21, contempt is, again, a function of a dependency proceeding and not a termination proceeding. Furthermore, in *Tetro v. Tetro*, 86 Wn.2d 252, 544 P.2d 17 (1975), the Washington Supreme Court rejected a parent's contention that he had a right to appointed counsel in a child support proceeding because violation of the resulting order could lead to contempt sanctions including incarceration: "The mere *possibility* that an order in a hearing may later serve as a predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance." *Tetro*, 86 Wn.2d at 255 (emphasis added).

The mother also argues that the children have a fundamental liberty interest in "maintaining the integrity of the family unit and in having a relationship with his or her biological parents," relying on *Kenny A.*, 356 F. Supp. 2d at 1360. Br. of App. at 34-35. While the Department agrees that children have an important interest in seeing that the parent and child relationship is not terminated without due process protections, a child's liberty interest is not equivalent to the parent's liberty interest in the family unit. *See supra* pp. 25-27. Furthermore, representatives for children have routinely argued in termination proceedings that the child's stated interest or best interest is to actually *terminate* parental rights.

The mother additionally argues that the children have a liberty

interest in being free from "unreasonable risks of harm and a right to reasonable safety," relying on *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). But *Braam* has nothing to do with the termination of parental rights, and a dependent child may remain in the foster care system regardless of whether parental rights are terminated.

b. Factor #2: the risk of erroneous deprivation and value of additional procedural safeguards

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. The mother argues that only appointment of counsel for children involved in termination proceedings can adequately mitigate error. Br. of App. at 37-41. However, this ignores both the substantial procedural protections already in place for children's interests in termination proceedings, as well as the risk of error potentially created by appointing counsel in every termination proceeding.

First, the child's interest is fully represented in a termination proceeding by the GAL. All children who are the subject of a termination proceeding must have a GAL appointed for them, absent good cause.

RCW 13.34.100(1).[11] Without such an inquiry, a termination proceeding may be voidable. *In re the Dependency of A.G.*, 93 Wn. App. 268, 968 P. 2d 424 (1998); *In re Dependency of O.J.*, 88 Wn. App. 690, 947 P.2d 252 (1997). The role of the GAL is to "represent and be an advocate for the best interests of the child" and to "and report to the court any views or positions expressed by the child on issues pending before the court." RCW 13.34.105(1)(b) and RCW 13.34.105(1)(f). The GAL is required to "monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order." RCW 13.34.105(1)(c). A GAL receives the same notice contemplated for a parent or other party. RCW 13.34.100(5). Through counsel or as otherwise authorized by the court, the GAL has the right to receive discovery, present evidence, examine and cross-examine witnesses, and to be present at all hearings. *Id.*

The mother asserts that a GAL cannot sufficiently protect a child's interest due to a lack of legal training. Br. of App. at 38. However, she offers no evidence for this assertion. And the courts and the legislature have consistently determined that, in other types of proceedings, even when minors are *parties* to those proceedings, a GAL is appropriate to

[11] In King County, the county in which the termination trial took place, the guardian ad litem (GAL) is referred to as a "court-appointed special advocate" (CASA). However, the two terms are interchangeable. RCW 13.34.030(9).

represent a child's interests.[12]

Second, a GAL is in the best position to represent a child because of the statutory mandates that a GAL must share with the court both what is in the child's *best interest* and what the child's *stated interest* is. See RCW 13.34.105(1)(a) and RCW 13.34.105(1)(e) (duty to report to the court factual information and make recommendations regarding the best interests of the child) and RCW 13.34.105(1)(b) (duty report to the court any views or positions expressed by the child on issues pending before the

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[12] In all civil actions, when a minor is a defendant or a plaintiff, appointment of a GAL is mandatory. See RCW 4.08.050 ("[e]xcept as provided under RCW 26.50.020 and RCW 28A.225.035, when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act.") and RCW 12.04.140 ("[e]xcept as provided under RCW 26.50.020, no action shall be commenced by any person under the age of eighteen years, except by his guardian...").

Other specific proceedings in which GALs are appointed to protect minors' interests include parentage actions[12] (RCW 26.26.555(2) ("if the child is a party, or if the court finds that the interests of a minor child or incapacitated child are not adequately represented, the court shall appoint a guardian ad litem to represent the child."); involuntary commitment proceedings for minors (*State ex rel. Richey v. Superior Court for King County*, 59 Wn.2d 872, 371 P.2d 51 (1962) ("when infant is defendant in proceeding to adjudicate him as mentally ill, he shall appear by guardian, and if he has no guardian, court shall appoint one.")); sale of probate assets when minors are heirs (*Mezere v. Flory*, 26 Wn.2d 274, 173 P.2d 776 (1946); Child in Need of Services (CHINS) proceedings under chapter RCW 13.32A (RCW 13.32A.170(1) and RCW 13.32A.190(1)); guardianship proceedings under chapter RCW 13.36 (RCW 13.36.080); minor parents consenting to adoption (RCW 26.33.070) and child custody proceedings (RCW 26.09.220 and RCW 26.12.175).

Similarly, incapacitated persons are also provided a GAL, not an attorney, in actions involving their interests. See RCW 4.08.060 ("[w]hen an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem."). This requirement is not satisfied by the appointment of an attorney. *Flaherty v. Flaherty*, 50 Wn.2d 393, 312 P.2d 205 (1957).

court).[13] In this case, the children's interests were thoroughly represented by the GAL. Mikie Helman, the children's CASA at the time of the trial, had been involved in advocating for dependent children for over ten years, and had more than twenty years of experience as a nurse in the area of child and adolescent mental health. 3A-RP 342-343. She additionally had specialized experience in helping resettled refugee families from the Sudan adjust to the cultural differences inherent in living in the United States. 3A-RP 343-344. At the time of the trial, she had been the children's CASA for nearly two years. 3A-RP 345. She informed the court that she believed the children's stated wish was to return to their mother's care, and that, in fact, her *own* wish was for them to be able to return. 3A-RP 379, 405. However, based on her first-hand assessment of the mother's fitness to parent, and the children's need for early permanency, she testified that she not believe it was in their best interest to return to the mother, and recommended termination of the mother's parental rights. 3A-RP 380-381. The mother does not challenge on appeal the court's finding that termination of her parental rights was in the children's best interest. CP 194 (FF 1.75).

Second, there is no evidence to support the mother's assertion that *only* an attorney representing the child's interest will improve the process.

[13] The requirement to also report the child's stated interest was added to RCW 13.34.105 in 2008. Laws of 2008, ch. 267, § 13

The primary and overriding goal of a termination proceeding is to serve the best interests of the child. *In re Dependency of C.T.*, 59 Wn. App. 490, 497, 798 P.2d 1170 (1990), *review denied*, 116 Wn.2d 1015 (1991). However, there are situations in which appointment of counsel could be inconsistent with a child's best interest.

One view of the lawyer's role is to advocate for the child's stated interest. But, a child's stated interest is not the same as a child's best interest. Children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635. A child may want to stay with his or her parents even though they are unfit, or a child may want to terminate parental rights because he or she has grown close to the foster parents. Having a lawyer aggressively advocate for either of these positions may result in an erroneous result. "[P]roviding children with aggressive lawyers who will attempt to tilt the outcome of the case in the direction of the child's wishes will make it less likely, not more likely, that the 'correct' legal result be reached." Martin Guggenheim, *Reconsidering The Need For Counsel For Children In Custody, Visitation And Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998).[14]

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[14] The risk of error in advocating for the child's stated interest is of particular concern given the age at which most children become subject to dependency proceedings. Recent data indicates that approximately one-third of children in foster care nationwide

The chance of increased error also may exist even if the lawyer advocates for what the lawyer believes is in the best interest of the child. "[M]any lawyers are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own." Randi Mandelbaum, *Revisiting The Question Of Whether Young Children In Child Protection Proceedings Should Be Represented By Lawyers*, 32 Loy. U. Chi. L.J. 1, 36 (Fall 2000). Thus, "there [is] a significant chance that these decisions and ensuing positions may be against the best interests of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative..." *Id.* It "also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child." *Id.*

Finally, the legislature has recognized that, when attorneys are appointed to represent children in dependency proceedings, they must be

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are between the ages of birth to five. U.S. Department of Health and Human Services, *The AFCARS Report: Final Estimate for FY 1998 Through FY 2002* (2006). In Washington, that number is even higher, with 15.4% of children subject to dependency proceedings being zero to twelve months old; 16.6% between the ages of one and two; and 20.3% being between ages three and five. Washington State Institute for Public Policy, *Decline in Washington's Family Reunifications: What Influenced This Trend?* (2004), available at http://www.wsipp.wa.gov/rptfiles/04-05-3901.pdf (as of November 12, 2010).

of the highest caliber.[15] However, Washington does not currently require specialized education or training for attorneys appointed to represent children, nor does it have caseload standards.[16] Adding attorneys to termination proceedings who are charged with representing children but lack the specialized training to do so may have the effect of increasing, rather than reducing, the risk of erroneous results.

The Department does not claim that there will never be a conflict between a child and the parents, or the child and the State, regarding the child's interest. However, there is insufficient evidence that children are ill-served by GALs or that appointment of counsel would address any problems alleged by the mother. Whether children would benefit from appointment of counsel is a fact-specific inquiry that should be decided on a case-by-case basis, and the flexibility provided to the trial court by RCW 13.34.100(6) satisfies due process.

c. Factor #3: the governmental interest.

The third *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the

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[15] "...[W]hen 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 ... 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." RCW 13.34.100 (Findings 2010, c 180).

[16] First Star, *National Report Card on Legal Representation for Children* (2009), available at http://www.firststar.org/library/report-cards.aspx (as of November 19, 2010).

additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. In addition to managing the financial and administrative impact such a requirement would have, the State has an interest in protecting the physical, mental, and emotional health of children. "It is well established that when a child's physical or mental health is seriously jeopardized by parental deficiencies, the State has a *parens patriae* right and responsibility to intervene to protect the child." *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). A lack of experienced, well-trained attorneys available to represent children in dependency and termination proceedings, as discussed *supra*, impacts both the interest to protect children as well as the financial and administrative concern. Furthermore, any potential improvement to the process that appointment of counsel for children would bring to the table would be marginal. For this reason, the State's financial interest weighs more heavily weighs against appointing counsel in every case and in favor of appointing counsel on a case-by-case basis under RCW 13.34.100(6).

IV. CONCLUSION

The evidence established that the mother was offered or provided all services reasonably available and capable of correcting her parental deficiencies, but failed to fully participate in the services offered and did not benefit from the services she did participate in. The presumption that

the mother would not be able to remedy her parental deficiencies so that the children could be returned to her in the near future was properly used by the court and RCW 13.34.180(1)(e) was established even without the presumption being used. The mother has not raised a manifest error affecting a constitutional right, and even if this court addresses the constitutional challenge, the case-by-case approach of RCW 13.34.100(6) fully comports with due process. Therefore, respondent respectfully requests this court to affirm the order terminating the mother's parental rights.

RESPECTFULLY SUBMITTED this 22nd day of November, 2010.

SUSAN E. LLORENS
Assistant Attorney General
WSBA #38049

NO. 64736-9-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

In Re the Dependency of M.S.R., and T.S.R., minor children STATE OF WASHINGTON, Respondent, v. NYAKAT LUAT, Appellant.	DECLARATION OF SERVICE

I, Vanessa Valdez, declare as follows:

I am a legal assistant employed by the Washington State Attorney General's Office. On November 22, 2010, I sent a copy of: **Response Brief of Department and Social Health Services (DSHS) and Declaration of Service.**

FILED
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STATE OF WASHINGTON
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Said copy was sent by US Mail, State Campus Mail, and/or by Legal Messenger, on the 22nd day of November, 2010 to:

1. **Mindy Carr**, Washington Appellate Project

   1511 Third Avenue, Ste. 701, Seattle, WA 98101

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ORIGINAL

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of November, 2010, in Seattle, Washington.

VANESSA VALDEZ
Legal Assistant