

* Appendices are
SEALED

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

In re Dependency of: E.H., (d.o.b. 12/06/07), A dependent child.	No. 76000-9-I MOTION FOR DISCRETIONARY REVIEW
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I. IDENTITY OF PETITIONER

Ramona R. seeks review of the Superior Court's decision designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Petitioner requests review of the Superior Court's order of October 11, 2016 (Appendix A), which denied the mother's motion for revision of the order denying an attorney to her nine year-old son, E.H.

The Commissioner's order of September 1, 2016, is attached as Appendix B.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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III. STATEMENT OF FACTS

a. Family History

Petitioner Ramona R. is the mother of six dependent children, who were between the ages of five and 17 years old at the time of her motion for the appointment of counsel for her nine year-old son E.H. Appendix C (Order of Dependency); Appendix F (Motion for Appointment of Counsel for Dependent Child at Public Expense). The children were found dependent due to the actions of a third party, after they were no longer living with Ms. R. Id.

Two years earlier, when Ms. R. learned she was facing a federal sentence in California, she arranged for her children to live with a family friend in Washington during her incarceration. Appendix C at 3.¹ The children are roughly divided into two groups, based upon their ages; at the time of the underlying motion, the older three boys were between the ages of 14 and 17, and the younger three children were between the ages of five and nine. Id. E.H., at age nine, is the oldest of the younger group of children. Id.

Four months after Ms. R. left Washington to serve her sentence, the family friend who was caring for the children became overwhelmed,

¹ Ms. R.'s expected release date is July 2019. App. A at 9; App. D at 4.

sending the older three boys to live with another individual. Id. In the new home, the older three boys unfortunately suffered serious physical and psychological abuse. Id. The Department of Social and Health Services (Department) removed the three older boys and acknowledged “the mother was not aware of this abuse.” Id.

A safe placement was found for the older three boys. Id. Since that time, the younger three children have been shuttled among various foster care placements. Id.; Appendix D. These placements included several foster homes, a motel room with a social worker and, for a time, the children’s teacher’s own home. Id.

Meanwhile, Ms. R. has pursued parenting classes while incarcerated in California, has followed the disciplinary expectations and guidelines of her facility, and has worked diligently on her compassionate release application. Appendix D at 4. Ms. R. calls her children approximately twice each week and sends cards and letters. Id. at 7; Appendix H. The juvenile court has found her in full compliance with the services offered. Appendix H at 30. Recently, the court found her participation in the “many services and programs available to her” to be “considerable” and “notable.” Appendix E.

Ms. R. has also participated in liberal in-person visitation with her children during several furloughs throughout her incarceration, which have been conducted at the maternal grandfather's home, as well as at various local recreation areas. Appendix A at 2; Appendix E (visitation at Coulon Park and local water park with younger children, with overnights permitted for older three children).²

b. Motion for Counsel

In August 2016, Ms. R. moved for counsel on behalf of her nine year-old son, E.H. Appendix F.³ In support of her motion, Ms. R. argued the Washington and United States Constitutions require appointed counsel for similarly situated children. Id.

Ms. R. also argued that E.H.'s interests were not adequately protected by the Court-Appointed Special Advocate (CASA), who was volunteering in a non-attorney guardian ad litem (GAL) capacity, on behalf of all three younger children. Id. at 2-3; Appendix G (CASA's Response to Mother's Motion for Counsel for Child) at 3. E.H. has

² The Bureau of Prisons (BOP) discontinued Ms. R.'s eligibility for furloughs shortly before the underlying motion for appointment of counsel was heard. Appendix H at 21. The Department agreed this was due to a prior "clerical error" at BOP, rather than any rule violation by Ms. R. Id. at 21, 27.

³ The older three children are already represented by counsel, and no motion was made on behalf of the younger two children, aged five and six.

ferently expressed his wish to return to his mother as soon as possible, following her incarceration; E.H. is also the only child in the younger group of siblings to be placed alone. Appendix F.⁴ However, the CASA has advocated for the termination of Ms. R.'s parental rights as to the three younger children. Id. The CASA therefore does not represent E.H.'s stated interests.

c. Decision on Review

On September 1, 2016, the juvenile court Commissioner denied Ms. R.'s motion for appointment of counsel for E.H. Appendix B. The Commissioner found that the CASA advocates strongly for E.H.'s best interest, informs the court of E.H.'s stated interest, and that there is no evidence the child's desires are not being met. Appendix B.

On October 11, 2016, the Honorable Helen Halpert denied the mother's motion for revision. Appendix A. Following a full Gunwall⁵ analysis, the court held that there is no independent basis under Article I, section 3 to appoint counsel for children in dependency proceedings.

⁴ The CASA argued below that a guardianship was recommended as an alternative permanent plan in May 2016. Appendix G at 2. According to the CASA, this was "out of respect for [E.H.]'s wishes to be reunited with his mother." Id. A guardianship is not actually E.H.'s wish, however. Appendix 2 at F (E.H. expressed his wish to return home "for good").

⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Id. at 6-7. The court applied a case-by-case analysis based on the three-part test of Mathews v. Eldridge,⁶ and concluded federal due process also does not require the appointment of counsel for E.H. “at this time.”

Appendix A.

The mother seeks review in this Court. RAP 2.3(b)(2), (3).

IV. ARGUMENT

This Court may grant discretionary review where the superior court has committed probable error and the decision of the lower court substantially alters the status quo or substantially limits the freedom of a party to act. RAP 2.3(b)(2).

This Court should grant discretionary review because the juvenile court abused its discretion when it improperly applied the case-by-case Mathews factors. The court also erred when it failed to recognize E.H.’s right to counsel under Article I, Section 3. RAP 2.3(b)(2). For the same reason, the lower court’s decision was outside the accepted and usual course of judicial proceedings, calling for this Court’s review. RAP 2.3(b)(3).

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

A. The underlying decision amounted to probable error and a departure from the usual course of judicial proceedings, requiring review under RAP 2.3(b)(2) and (3).

The trial court's ruling – that E.H. was not constitutionally entitled to counsel – constituted probable error, because the court misapplied the Mathews test, contrary to due process. U.S. Const. Am. XIV.

Whether the due process clause of the Fourteenth Amendment requires the trial court to appoint counsel for E.H. is reviewed de novo. Bellevue School District v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011); see also Dep't of Family Servs. v. Currier, 295 P.3d 837, 842 (Wyo. 2013) (de novo review applied to trial court's application of Mathews factors and to trial court's decision that party was entitled to counsel in civil contempt proceeding).

1. Children's fundamental liberty interests require a case-by-case determination of the right to counsel in dependency proceedings.

Our Supreme Court examined the issue of whether children have the right to counsel in termination cases under the Fourteenth Amendment's due process clause in In re Dependency of M.S.R., 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.” M.S.R., 174 Wn.2d at 20. The children’s interests include: “being free from unreasonable risks of harm and a right to reasonable safety;” “maintaining the integrity of the family relationships, including the child’s parents, siblings, and other familiar relationships;” and “not being returned to (or placed into) an abusive environment over which they have little voice or control.” Id.

Still, the Court ruled that the Fourteenth Amendment does not universally require counsel for all children in termination cases. Id. at 22. The issue must be examined on a case-by-case basis using the three-part Mathews framework. Id. at 20-22. The Court also stated that a different analysis might be required during the dependency phase of a case. Id. at 22 n.13.

The M.S.R. Court’s holding was premised primarily on the United States Supreme Court decision in Lassiter. There, the Court held the due process clause of the Fourteenth Amendment does not require states to provide counsel to all parents facing termination proceedings. Lassiter, 452 U.S. at 31-32. It does, however, require a case-by-case Mathews analysis. Id.

Following Lassiter and employing the Mathews balancing factors, M.S.R. 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.” M.S.R., 174 Wn.2d at 20. Hence, the predecessor to RCW 13.34.100(7),⁷ which gave courts discretion to appoint children counsel, did not violate due process under the Fourteenth Amendment. M.S.R., 174 Wn.2d at 21-22.

Before Lassiter, our Supreme Court held article I, section 3 mandated appointment of counsel to parents in dependency and termination proceedings. In re Welfare of Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (termination cases); In re Welfare of Myricks, 85 Wn.2d 252, 255, 533 P.2d 841 (1975) (dependency cases). 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).

⁷ 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 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.

As set forth below, E.H. was entitled to counsel upon his mother's motion, under both the federal and state constitutions.

2. Given the interests at stake and the risk the procedures used will lead to erroneous decisions, the federal due process clause required that E.H. be appointed counsel.

E.H. was erroneously denied counsel under the Fourteenth Amendment. In M.S.R., the Supreme Court directed that, when the issue is raised in the trial court, the 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." M.S.R., 174 Wn.2d at 20-22.

Questions of due process are constitutional issues reviewed de novo. See, e.g., Currier, 295 P.3d at 842 (de novo review applied to trial court's application of Mathews factors and to court's decision that party was entitled to counsel in civil contempt proceeding).

A child's fundamental liberty interest in a dependency proceeding is great. M.S.R., 174 Wn.2d at 15, 16; Kenny, 356 F. Supp. 2d at 1360 (recognizing significant liberty interest of child). During a dependency, a child may repeatedly be moved from one foster home or institution to another. M.S.R., 174 Wn.2d at 15-16. This movement may cause significant harm. 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 v Kramer, 455 U.S. at 745, 102 S.Ct 1388, 71 L.Ed.2d 599 (1982).

E.H.’s dependency commenced when one of E.H.’s older brothers was victimized by a third party, not by Ms. R. Appendix C; Appendix F. E.H. is extremely bonded with his mother and asks during visits when he can come home with her to live. Appendix F at 2. He speaks with his mother by phone weekly and receives mail from his mother regularly. Id. The Foster Care Assessment Program (FCAP) visitation report noted E.H.’s sadness and despondency at a recent visit during his mother’s furlough, expressing how much he misses Ms. R. Id. (Ex. A at 7). The FCAP report also noted Ms. R.’s positive parenting skills with her children. Id.

Despite this clear bond and expressed intent, the CASA has advocated for termination of Ms. R.’s parental rights, arguing it is in E.H.’s best interest. Appendix G at 2-3. This conflict with E.H.’s own goals weighs in favor of appointment of counsel for E.H., due to the

high risk of error. See Mathews v. Eldridge, 424 U.S. at 335.

“[T]here are many circumstances when counsel for a child would be extremely valuable.” M.S.R., 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) (internal citations omitted).

Here, when the mother moved for counsel for E.H. in August 2016, the child was almost nine years old. Appendix F. E.H. was old enough to express his interest and to assist an attorney. He could have provided relevant information to the court through counsel, as easily as he did to his CASA, if not more so. See Appendix A at 10 (noting E.H. is “slow to trust and to open up”).

Moreover, 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 M.S.R. court similarly recognized that counsel to children have a unique and potentially valuable role to play. 174 Wn.2d at 21.

Contrary to the court's reasoning, the presence of a CASA does not adequately mitigate the risk of errors in this case. For example, although the CASA represents the *best interests* of the child, 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.

Here, there was much that an attorney could have done. An attorney would have advocated for a resolution consistent with E.H.'s *actual*, stated interests. An attorney might have focused the court's attention on E.H.'s interest in reunification, rather than a plan of a guardianship or a termination petition – both permanency plans suggested to the court by this CASA. Appendix G; Appendix H at 15. An attorney also could have advocated for visits with his older brothers, a strong desire of E.H., not necessarily shared by the younger two siblings – both of whom the CASA also represents. Appendix F (Ex. A at 7). Unlike the CASA, it would be unethical for an attorney to represent more than one party in the action, due to this inherent conflict of interest. See RPC 1.7.

Because E.H. was old enough to express his wishes and counsel would have brought unique value to the proceedings, the court's opinion that there was little risk of error was erroneous. The court's decision would have been greatly informed by counsel for the child. The court erroneously concluded that there is "no benefit" to appointing counsel and, likewise, "it is unclear what counsel could contribute that a conscientious CASA represented by an attorney cannot." Appendix A at 10.

The court's conclusions indicate its confusion between the roles and ethical duties of guardians ad litem and licensed attorneys.⁸ For example, the court suggests that the CASA's attorney somehow adequately protects E.H.'s interests, while clearly the ethical duty of the CASA's attorney is to her own client – the CASA – and not to the child. Nor does the CASA's attorney share a confidential relationship with anyone but her own client, the CASA. See Appendix A at 10; Appendix F, Ex. B (WSBA Resolution).

The third Mathews factor requires a court to weigh the State's interest in the proceeding, including fiscal and administrative burdens,

⁸ See, e.g., Laws of 2010, ch. 180 § 1 (legislative findings accompanying amendment to RCW 13.34.100); Appendix A (including exhibits); see also https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf (last accessed January 24, 2017).

against the State's interests in ensuring that a child's safety and well-being are protected. M.S.R., 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." M.S.R., 174 Wn.2d at 18 (quoting Lassiter, 452 U.S. at 27)). Here, the interest in protecting E.H. far outweighed any administrative or fiscal burden that appointment of counsel for him might have entailed. See Kenny A., 356 F. Supp. 2d at 1361; Stukenberg v. Abbott, 2017 WL 74371 at *9-10 (U.S. District Ct. Texas, Jan. 9, 2017).⁹ In Stukenberg, the Southern District Court of Texas recently certified a class of long-term foster children and found these "most vulnerable citizens ... are entitled to counsel at every step of their legal journey through the Texas foster care system." Id. The court deemed the children's lack of counsel a "constitutional deficiency." Id. at *10.

The court should hold due process required granting Ms. R.'s motion to appoint counsel for her son. The juvenile court's misapplication of the Mathews test constituted a violation of constitutional due process, requiring review, as probable error. RAP 2.3(b)(2).

⁹ Citation is pursuant to GR 14.1; case is cited as persuasive authority.

3. The court erred when it found that Article I, § 3 provides no greater protection to children in dependency proceedings than does the Fourteenth Amendment.

The juvenile court erred when it concluded the protections of Article I, Section 3 are no broader than the provisions of the Fourteenth Amendment. Appendix A at 2, 7 (citing E.S., 171 Wn.2d 695). This question remains open after M.S.R.¹⁰ Because the juvenile court's decision was inconsistent with legal precedent that children have a categorical right to counsel in termination proceedings under article I, § 3, the court's decision constituted probable error, meriting review. RAP 2.3(b)(2).¹¹

In Gunwall, our Supreme Court articulated standards to decide when and how Washington's constitution may provide broader protection than does the United States Constitution. 106 Wn.2d 54. The court examines six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel

¹⁰ The Supreme Court declined to reach the state constitutional issue in M.S.R. 174 Wn.2d at 20 n.11 (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)).

¹¹ This Court will hear oral argument on the children's right to counsel issue in In re Dependency of A.B., No. 74722-3-I, on February 22, 2017. Division Two heard argument on the same issue on November 1, 2016, in In re Dependency of S.K.P., No. 48299-1-II. A decision is expected shortly.

state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the two constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62.

a. Article I, Section 3 is more protective of children than the Fourteenth Amendment.

As Ms. R. argued below, the Gunwall criteria support an independent state constitutional analysis showing that article I, § 3 is more protective than its federal counterpart.

Concerning the first two Gunwall 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: “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 Fourteenth Amendment restricts the power of the states while article I, § 3 is an affirmation of individual rights.

“Even 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 be interpreted differently.” Gunwall, 106 Wn.2d at 61. For example, in a case

involving capital punishment, our Supreme Court held that 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 the Fourteenth Amendment does not control our interpretation of the state constitution’s due process clause”). Thus, the provisions of the capital punishment statute at issue in Bartholomew violated “the stringent procedural safeguards” of due process under the state constitution, regardless of what the Fourteenth Amendment required. Id. Similarly, this Court declined to follow a United States Supreme Court decision and interpreted article I, § 3 more broadly in State v. Davis, 38 Wn. App. 600, 604, 686 P.2d 1143 (1984).

Given the history of the state and federal constitutions, this approach makes sense:

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.

Justice Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 2-3 (2002) (hereinafter Utter &

Spitzer).¹² One federal appellate judge explained that despite similar or identical language, there was no reason to think that provisions from different sovereigns would mean the same thing, especially if the guarantee is highly generalized:

There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same. Still less is there reason to think that a highly generalized guarantee, such as prohibition on “unreasonable” searches, would have just one meaning for a range of differently situated sovereigns.

Jeffrey S. Sutton, What Does—and Does Not—Ail State Constitutional Law, 59 U. Kan. L. Rev. 687, 707 (2011). It is particularly important to remember this “whenever the United States Supreme Court’s decisions dilute or underenforce important individual rights and protections.” State v. Mole, No. 2013-1619, 2016 WL 4009975, at *5 (Ohio July 28, 2016) (interpreting equal protection provision in Ohio Constitution independently of Fourteenth Amendment).

The third and fourth Gunwall factors, state constitutional history and preexisting law, also support broader interpretation. State constitutional provisions require independent interpretation unless

¹² Moreover, 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).

historical evidence shows otherwise. Justice Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the 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. Utter & Spitzer at 3. 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.

Well before Lassiter, our Supreme Court had already determined parents have a due process right to counsel in termination proceedings under both constitutional provisions. 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). A year later, the Court extended the rule from Luscier 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:

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 138 (emphasis added). As discussed, in M.S.R., the Court explicitly recognized that children have a significant liberty interest in termination proceedings. M.S.R., 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 a child may be greater than for a parent. Moreover, unlike parents who might represent themselves, most children cannot do so effectively. Given the significant liberty interest at stake and the inability of children to participate meaningfully without counsel, the rule from Luscier should be extended to children such as E.H.

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 is an implicit rejection of Lassiter’s holding that a person’s liberty interests in the parent-child relationship should be balanced against competing interests on a case-by-case basis.

Other states have explicitly rejected Lassiter under their state constitutions. In re T.M., 131 Hawaii 419, 319 P.3d 338, 355 (2014) (indigent parents guaranteed the right to court-appointed counsel in

termination proceedings under due process clause of Hawaii Constitution); Matter of K.L.J., 813 P.2d 276, 286 (Alaska 1991) (parent entitled to counsel under the Alaska Constitution's due process clause in adoption proceeding that terminated 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. E.S., 171 Wn.2d at 713. Moreover, the framers of the Washington Constitution recognized the State must be responsible for the care of children. See, e.g., Const. art. IX, § 1 (paramount duty to provide education to children); Const. art. XIII, § 1 (institutions for the benefit of disabled youth to be supported).

The sixth factor weighs 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.

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 also indicated that this rule is based on due process as mandated by its own 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).

According to a report from 2012, 61 percent of 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).¹³ 31 percent of these jurisdictions mandate the appointment of client-directed representation.

Id. The American Bar Association (ABA) has also promulgated a

¹³ Available at: http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf (last accessed January 24, 2017). Regrettably, Washington was one of 10 states to receive the grade of "F". Report at 123.

“Model Act Governing Representation of Children in Abuse, Neglect, and, Dependency Proceedings,” which guarantees independent counsel to children in termination cases.¹⁴ The ABA discusses the difference between a lawyer and a “best interest advocate.” See supra, n.7. The ABA Model Act notes that a lawyer has the duty to his or her juvenile client of “undivided loyalty, confidentiality and competent representation,” while a “best interest advocate” “does not function as the child’s lawyer and is not bound by the child’s expressed wishes in determining what to advocate.” Id.

- b. The juvenile court’s erroneous conclusion that Article I, Section 3 did not require the appointment of counsel was erroneous, requiring review.

Because the juvenile court erroneously concluded that Article I, section 3 did not require the appointment of counsel for E.H., as well as for the additional reasons above, the court’s decision constituted probable error, requiring review. RAP 2.3(b)(2). In addition, because the court’s decision was outside the accepted and usual course of judicial proceedings, the decision merits this Court’s review. RAP 2.3(b)(3).

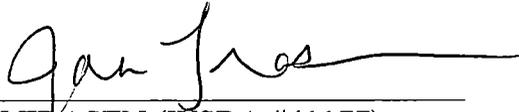
¹⁴ Available at:
https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf (last accessed January 24, 2017).

V. CONCLUSION

For the reasons set forth above, Ms. R. respectfully requests this Court grant discretionary review, as the Superior Court committed probable error and issued a ruling outside the accepted and usual course of judicial proceedings. Review should be granted.

DATED this 30th day of January, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jan Trasen", with a long horizontal flourish extending to the right.

JAN TRASEN (WSBA #41177)
Attorney for Petitioner
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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Motion for Discretionary Review** was filed in the **Court of Appeals – Division One** under **Case No. 76000-9-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Zachary Brown, AAG
Office of the Attorney General-DSHS Division
- April Rivera - Attorney for CASA/GAL
- appellant
- Attorneys for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 30, 2017

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 JAN 31 AM 11:10