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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In re the Dependency of E.H.

STATE OF WASHINGTON/DSHS,

Respondent,

v.

RAMONA RIGNEY,

Appellant.

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**DEPARTMENT'S RESPONSE TO MOTION FOR  
DISCRETIONARY REVIEW**

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## I. INTRODUCTION

Ramona Rigney is the mother of E.H., a boy born in 2007. E.H. and his five siblings became dependent in 2014. Ms. Rigney is in prison until the year 2019, and she is unavailable to parent E.H. and his siblings. E.H. has lived in a stable foster home since August 2015. In the dependency proceeding, E.H.'s interests have been represented by his Court Appointed Special Advocate. The Court Appointed Special Advocate has been extremely active on his behalf.

After E.H.'s Court Appointed Special Advocate proposed a permanency plan other than return home to Ms. Rigney, Ms. Rigney filed a motion seeking appointment of an attorney for E.H. The lower court found "no benefit" to appointing counsel for E.H. and denied the motion. The lower court determined that the Washington Constitution and the federal constitution did not require appointment of counsel for E.H. The lower court noted its ruling was based upon the child's current circumstances, and that appointment of counsel may be required for the child in the future. The lower court's ruling is consistent with the Washington and federal constitution. Ms. Rigney's motion for discretionary review should be denied.

## II. ISSUES PRESENTED FOR REVIEW

1. Did the juvenile court commit probable error when it considered the *Mathews* factors and denied the motion to appoint counsel

for E.H.?

2. Did the juvenile court commit probable error when it considered the *Gunwall* analysis presented by the parties and decided that the Washington Constitution did not require appointment of counsel for E.H.?

### III. STATEMENT OF THE CASE

Ramona Rigney is the mother of E.H., a boy born on December 6, 2007. E.H. and his five siblings became dependent in September 2014. Ms. Rigney has been incarcerated since 2013 on weapons and drug charges. App. C<sup>1</sup> at 3. Ms. Rigney's parenting history includes several child protective services referrals related to substance abuse, physical neglect, lack of supervision, and criminal involvement. App. F (foster care assessment program report, p. 2). Ms. Rigney is scheduled to be released from prison in 2019. App. C. at 3.

E.H. lives in a stable foster home, and he has lived with the same foster family since August 2015. App. 1 at 1. E.H.'s Court Appointed Special Advocate ("CASA") was assigned to E.H. and his two young siblings in July 2015. App. G at 3. The CASA has been extremely active on behalf of E.H. and his two young siblings. App. 1 at 2. She sees E.H.

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<sup>1</sup> This refers to the appendix attached to Ms. Rigney's motion for discretionary review. In this response, when references are made to a lettered appendix, the reference is to Ms. Rigney's motion. If a reference to a numbered appendix, the reference is to the Department's attached appendix.

on a regular basis, she communicates with E.H., and she communicates directly with E.H.'s service providers. *Id.* The CASA also is represented by an attorney through the King County CASA program. *Id.* at 4.

At a permanency planning hearing in February 2016, the CASA supported a primary plan of adoption for E.H. App. G. at 2. In the report prepared for the court, the CASA relayed E.H.'s positive thoughts regarding his foster care placement and his desire to avoid having conversations about his mother. App. G at Ex. A. The CASA also reported to the dependency court on E.H.'s engagement in mental health therapy. *Id.* In the CASA's May 2016 report to the court, the CASA again reported on E.H.'s therapy sessions. *Id.* She reported he had been diagnosed with anxiety disorder and adjustment disorder. *Id.* She reported that E.H.'s express wish was to remain in his current foster home. *Id.* E.H. stated he felt "very safe" in the home of his caregivers. *Id.* In deference to the child's wish to maintain his connection with his mother, the CASA recommended to the juvenile court that guardianship, not termination of parental rights, become a permanent plan for E.H. App. G. at 2.

In August 2016, Ms. Rigney filed a motion for appointment of counsel for E.H. App. F. The CASA and her attorney opposed the motion. App. G. The CASA response included six lengthy CASA reports that had been filed at previous hearings. *Id.* The CASA's response stated that E.H.'s

express wish did not include a preference for an attorney. App. G at 11. E.H. does not trust easily, and it takes him time to “open up” about things. *Id.* at 12. E.H. has developed a trusting relationship with his CASA. *Id.* The Department also opposed the motion to appoint counsel for E.H. App. 1.

Ms. Rigney’s motion was denied by a pro tem commissioner, and a motion for revision was filed. App. B. On October 11, 2016, King County Superior Court Judge Helen Halpert issued a memorandum opinion which determined that the Washington Constitution does not require appointment of counsel for all dependent children. App. A at 8. Judge Halpert also considered appointment of counsel for E.H. under the federal constitution, and applied a *Mathews*<sup>2</sup> balancing test. *Id.* at 8-11. Judge Halpert found “no benefit” to appointing counsel for E.H. *Id.* at 10. The order on revision denied the mother’s motion. *Id.* at 12. The ruling was based upon the child’s current circumstances, and whether the federal constitution would require appointment of counsel at some time in the child’s future, such as after a termination of parental rights petition was filed, was not an issue addressed by the court. App. A at 10, n 8. Ms. Rigney’s motion for discretionary review followed.

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<sup>2</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

#### IV. REASONS WHY REVIEW SHOULD BE DENIED

##### A. Standard of review

Ms. Rigney cannot demonstrate that the trial court abused its discretion in denying her motion for court-appointed counsel for E.H. and thereby committed probable error. Under RCW 13.34.100(7)(a), a court's decision to appoint counsel for children in dependency proceedings is discretionary, and, if review is granted, such a decision is reviewed for abuse of discretion. *In re Welfare of J.H.*, 75 Wn. App. 887, 894, 880 P.2d 1030 (1994), *review denied*, 126 Wn.2d 1024 (1995) (“Orders in dependency cases are reviewed for abuse of discretion.”). The juvenile court did not abuse its discretion in denying the motion for court-appointed counsel for E.H., and did not thereby commit probable error as required for review.

##### B. **The lower court did not commit probable error when it considered the *Mathews* factors and denied the motion to appoint counsel for E.H.**

In *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012), the Washington Supreme Court held that appointment of counsel for all children in termination of parental rights proceedings was not constitutionally required. The lower court's decision not to appoint counsel to E.H. was not manifestly unreasonable because it considered the unique facts of the child's situation and, applying the *Mathews* factors,

determined that the additional procedure of appointment of counsel was not constitutionally mandated. The lower court appropriately considered “[t]he private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *M.S.R.*, 174 Wn.2d at 14 (citing *Lassiter v. Dep’t of Soc. Svcs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)).

The *M.S.R.* court recognized the private interests a child may have in a dependency proceeding, including the right to be free from “unreasonable risks of harm” and a “right to reasonable safety.” *M.S.R.*, 174 Wn.2d at 17. The juvenile court considered this language from *M.S.R.* and quoted this language from in its ruling. App. A at 4. The juvenile court also considered E.H.’s liberty interests as a child in foster care. *Id.* at 11.

The juvenile court appropriately considered E.H.’s interest in being “free from unreasonable risk of harm.” *M.S.R.*, 174 Wn.2d at 17. The juvenile court determined that E.H. wishes to remain in his current foster placement until his mother is released from prison. App. A at 9-10. The CASA report indicated that E.H. felt “very safe” in the home of his caregivers. App. G at Ex. A. The juvenile court’s ruling appropriately considered the child’s private interests.

The government’s interest is its *parens patriae* interest in the

child's welfare, obtaining an accurate decision, and in reducing the county's administrative burden and cost of appointing counsel. *M.S.R.* recognized that "the State has a compelling interest in both the welfare of the child and in an accurate and just decision." *M.S.R.*, 174 Wn.2d at 18. The juvenile court identified the government's interests as identical to those in *M.S.R. Id.* at 9.

The last *Mathews* factor is "the risk of erroneous deprivation and the value of the additional procedures sought." *M.S.R.*, 174 Wn.2d at 18. This factor may "turn on whether there is someone in the case who is able to represent the child's interests or whose interests align with the child's." *M.S.R.*, 174 Wn.2d at 18. Here, E.H. had a CASA. The CASA provided important information to the court and other parties, and consistently advocated for E.H.'s best interests. App. G. The juvenile court appropriately considered the abilities of the CASA to represent the child's interests. App. A at 9-10.

The juvenile court's determination that appointment of counsel would not add value to the proceedings is supported by the fact that the CASA has been represented by an attorney. The CASA has not only been very articulate about the needs and wants of E.H., but also has been utilizing her attorney to litigate for the child's welfare. *Id.* at 10.

There is no evidence to indicate that *only* an attorney representing

the child's interest will improve the process, and this issue was not decided in *M.S.R.* See *M.S.R.*, 174 Wn.2d at 19. Under some circumstances, appointing attorneys who will attempt to tilt the outcome in the direction of the child's wishes may make it more likely that there will be an erroneous result. 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)). For example, a child may want to return home to an unfit parent. Advocacy by a child's attorney to this effect will make it less likely, not more likely, that the correct legal result will be reached.

A child's developmental level plays a role in the ability to benefit from counsel. See *M.S.R.*, 174 Wn.2d at 21. When the motion was heard, E.H. was eight years of age. This is significantly younger than the age (twelve years) at which our Legislature has required notification of the right to request an attorney. RCW 13.34.100(7)(c). The age of E.H. is also younger than the age of the children at issue in *M.S.R.* *M.S.R.*, 174 Wn.2d at 6 and 10. The younger age of the child limits his ability to direct counsel, and undermines any additional value appointing counsel would have when compared to the advocacy already being rendered by the CASA.

In summary, after considering the child's private interests, the

government's interest, and the risk that the procedures used will lead to an erroneous decision, the court did not abuse its discretion in denying Ms. Rigney's request to appoint counsel to E.H. The juvenile court correctly determined that appointment of counsel for the child provided no added value in terms of preventing an erroneous outcome in the dependency proceeding.

**C. The lower court correctly determined that the Washington Constitution does not require appointment of counsel for E.H.**

Ms. Rigney's contention that the Washington State Constitution requires appointment of counsel for E.H. is incorrect. In *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012), the Washington Supreme Court held that appointment of counsel for all children in termination of parental rights proceedings was not constitutionally required. Although that decision rested upon the Fourteenth Amendment to the U.S. Constitution, the same result is achieved when applying the Washington State Constitution's nearly-identical provision in Const. art. I § 3. The due process clause of the state constitution does not mandate appointment of counsel for every child in dependency proceedings and Ms. Rigney's *Gunwall*<sup>3</sup> analysis fails to establish that E.H. must be appointed counsel.

The six *Gunwall* factors govern whether a state constitutional

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<sup>3</sup> *State v. Gunwall*, 109 Wn.2d 54, 720 P.2d 808 (1986).

provision extends broader rights than its federal analog. *In re Marriage of King*, 162 Wn.2d 378, 392, 174 P.3d 659 (2007). Under the facts of this case, providing an attorney to E.H. would not have extended broader rights to him than that which he currently enjoys. Under RCW 13.34.100(1), dependent children have a right to an appointment of a guardian ad litem. Given that E.H. already had an active CASA, Judge Halpert found “no benefit” to appointing counsel for E.H. App. A at 10. The record supports this finding. E.H. was residing in a stable placement, where he wished to remain. App. 1 at 1; App. G at Ex. A. E.H. felt “very safe” in the home of his caregivers. App. G at Ex. A. Return home to his mother was not an option because she was in prison. Providing an attorney to E.H. would not have afforded him greater protection than that which was already provided to him by his CASA and the attorney from the King County CASA Program.

Additionally, appointment of counsel for E.H. presented risks. E.H. had been diagnosed with anxiety disorder and adjustment disorder. App. G at Ex. A. E.H. does not trust easily, and it takes him time to “open up” about things. App. G. at 12. E.H. has developed a trusting relationship with his CASA. *Id.* E.H. did not wish to have an attorney. App. G at 11. The lower court noted that E.H. has had many adults in and out of his life since 2013, when his mother was became incarcerated. App. A. at 10. E.H. does not like

being “called out as a foster child. *Id.*; App. G at 12. The lower court properly determined that an “attorney would be one more person that [E.H.] would need to integrate into his life.” App. A. at 10. In addition, “attorneys appointed to represent children in child protection proceedings are often unable to spend the time necessary to adequately investigate cases, develop relationships with their child clients, monitor orders, and generally perform their responsibilities in an ethical and competent manner.” App. F (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, 6 (Fall 2000).

**1. Nearly identical text in the State and federal constitutional provisions supports identical due process protections in the area of counsel for dependent children**

If this Court determines that appointment of counsel for E.H. would afford him with broader protection, then the six *Gunwall* factors should be considered. *In re Marriage of King*, 162 Wn.2d at 392. The first and second *Gunwall* factors consider the text and textual differences between the state and federal provisions. *Gunwall*, 109 Wn.2d at 61. The Washington Supreme Court has repeatedly recognized that the first and second *Gunwall* factors do not support a more expansive interpretation of the state due process clause. “[T]here are no material differences between

the 'nearly identical' federal and state provisions. This disposes of the first two *Gunwall* factors." *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (footnote omitted) (quoting *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992)); *In re Marriage of King*, 162 Wn.2d at 392, (language of state and federal provisions is identical).

In attempting to downplay the significance of textual similarity, Ms. Rigney cites to *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), a pre-*Gunwall* case, for the proposition that Const. art. I, § 3 has been held to be "broader than the Fourteenth Amendment." Br. Appellant at 19. However, she fails to address the fact that the court in *Bartholomew* entwined Const. art. I, § 3 and 14 (regarding cruel and unusual punishment) in asserting that the death penalty statutes then in use in Washington did not meet the requirements of Washington's constitution.

It is easy to see the *Bartholomew* case, decided without the benefit of the *Gunwall* framework and lacking any rigorous analysis of the two separate state constitutional sections that were discussed, focused on the seriousness and finality of capital punishment, and so implicated Const. art. I, § 14 as much, if not more, than Const. art. I, § 3. Given the context of the *Bartholomew* case and its reliance on Const. art. I, § 14 as well as § 3, *Bartholomew* has little to no application here. Additionally, Ms. Rigney neither addresses nor rebuts the cases cited above as to factors 1

and 2 of the *Gunwall* analysis.

**2. There is no justification in legislative history to expand Const. art. I, § 3 beyond the protections of the Fourteenth Amendment**

The third *Gunwall* factor considers whether the state constitutional provision's history reflects "an intention to confer greater protection" than its federal counterpart. *Gunwall*, 109 Wn.2d at 61. What is known is that Washington's constitutional convention adopted the due process clause as proposed, without modification or debate. *Journal of the Washington State Constitutional Convention, 1889*, at 495-96 (Beverly Paulik Rosenow ed. 1962). Thus, no legislative history "provide[s] a justification for interpreting the identical provisions differently." *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (considering *Rosenow* at 495-96).

Ms. Rigney argues (contrary to the concept driving the sixth *Gunwall* factor), that the third *Gunwall* factor always supports an independent analysis unless there is specific historical evidence suggesting otherwise. Br. Appellant at 20-21. She offers no argument on factor three and four specific to this issue.

**3. There was no conception of child welfare protection, much less counsel for children in such proceedings, when the State Constitution was adopted**

The fourth *Gunwall* factor, preexisting state law, likewise establishes no basis to expand state due process protections for children. It

“requires [the court] to consider the degree of protection that Washington State has historically given in similar situations.” *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (focusing analysis of Const. art. I, § 12 on law around the time the provision was adopted). Nineteenth century law and society provided little or no protection when a problem concerned a child’s safety within the family. Marvin R. Ventrell, *Rights & Duties: An Overview Of The Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259, 264 (Winter 1995). Indeed, “[a]lthough numerous private agencies dedicated to protecting children from harm existed throughout the world by the end of the nineteenth century, children still had no established legal right to this protection.” *Id.* (footnotes omitted). Thus, at the time the constitution was adopted, the concept of a lawyer representing a child’s stated interests in a parental rights termination action, let alone a dependency case, would have been completely foreign.

Instead of focusing on historical legal protections as *Gunwall* directs, Ms. Rigney cites *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995). Br. Appellant at 23. However, the fourth *Gunwall* factor looks to the law existing when a constitutional provision was adopted, so this analysis is not informed by court decisions issued more than 100 years later. Also, *Grove* relies merely on *In re Welfare of Luscier*, 84 Wn.2d

135, 137, 524 P.2d 906 (1974), and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975) without analyzing either case. Both of these cases involved counsel for parents in child welfare proceedings, not for children. Both also predated the Supreme Court decision in *Lassiter v. Dep't of Soc. Servs of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) which analyzed whether the due process clause of the federal constitution entitled an indigent parent to counsel in a termination case. Neither case establishes broader protections under the state due process clause. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (noting *Luscier* “did not separately analyze the state and federal constitutional provisions at issue”).<sup>4</sup> Similarly, the Washington Supreme Court has observed that *Myricks* and *Luscier* predated the *Gunwall* decision and did not distinguish between what process was due under the federal and state constitution. *In re M.S.R.*, 174 Wn.2d at 13-14.

Relevant to this case, *Luscier* and *Myricks* treat the Washington and federal due process clauses as equivalent. Neither case suggests that the due process clause of the state constitution offers broader protection than its federal counterpart. *Luscier* was based on both the federal and

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<sup>4</sup>*Grove*, which considered when civil appellate counsel would be provided at public expense, recited without further analysis that a constitutional right to legal representation exists “where a fundamental liberty interest, similar to the parent-child relationship, is at risk[.]” *Grove*, 127 Wn.2d at 237 (citing *In re Luscier*, 84 Wn.2d 135 and *In re Myricks*, 85 Wn.2d 252).

state constitutions. *In re Luscier*, 84 Wn.2d at 139 (“the right to one’s children is a ‘liberty’ protected by the due process requirements of the Fourteenth Amendment and [Wash.] Const. Art. [I], § 3.”). *Myricks* refers generally to “due process,” does not cite to a particular constitutional provision, and relies almost exclusively on due process decisions of the United Supreme Court. *In re Myricks*, 85 Wn.2d at 253-54. Finally, *Grove*, *Myricks* and *Luscier* all addressed the appointment of counsel for parents, not children in the context of dependency proceedings. Thus, there is no basis for concluding that the cases stand for the proposition that Const. art. I, § 3 offers broader protection for children in the area of appointed counsel than the Fourteenth Amendment.

Preexisting state law does nothing to advance Ms. Rigney’s cause here. No established legal theory, statute, or case decision which predates the Washington State Constitution provided or advocated a universal right to counsel in a proceeding (dependency) which did not exist at the time. Contrary to Ms. Rigney’s argument, this *Gunwall* factor lends no support to her due process claim.

**4. The fifth and sixth *Gunwall* factors support independent, but not necessarily broader, analysis**

The Washington Supreme Court has held that the fifth *Gunwall* factor, structural differences between the state and federal constitutions,

supports an independent analysis. *In re Marriage of King*, 162 Wn.2d at 393. However, this factor argues for independent analysis in every case, and does not dictate that such an analysis supports broader rights under the state due process clause. Regarding the sixth factor, issues of family relations are generally matters of state or local concern. *In re Custody of R.R.B.*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) (citing *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)). As is the case with the fifth factor, the fact that this factor may support an independent analysis does not mean that Const. art. I, § 3 provides greater due process protection in this context and Ms. Rigney offers no sound argument to the contrary.

The Washington Supreme Court “traditionally has practiced great restraint in expanding state due process beyond federal perimeters.” *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002). *Gunwall* analysis offers no reason to abandon that restraint in the context of appointment of counsel for children in dependency or termination proceedings. This particular case, with an anxious child well represented by a dedicated CASA, demonstrates why mandating an attorney for all children is not constitutionally required, and might even result in actual harm to growth and development for some. The due process clause of the state constitution does not mandate appointment of counsel for every child

in every dependency case. Appointment of counsel for children involved in dependency proceedings is discretionary, and Ms. Rigney has not demonstrated that the trial court abused its discretion in denying her motion for court-appointed counsel for E.H.

#### V. CONCLUSION

The Department requests that this Court deny discretionary review because the trial court properly exercised its discretion in declining the mother's request to have counsel at public expense for her child when her child's interests were adequately represented the CASA and the CASA attorney in the dependency proceeding.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of February, 2017.

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## CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Court of Appeals, Division One, under Case No. 76000-9-I and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Jan Trasen, Washington Appellant Project; and wapofficemail@washapp.org; and jan@washapp.org; and
2. Kathleen Martin, Dependency CASA Program, casa.group@kingcounty.gov; and kathleen.martin@kingcounty.gov.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of February, 2017, at Seattle, WA.

  
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