

NO. 94798-8

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE DEPENDENCY OF E.H.

R.R.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**DSHS RESPONSE TO PETITIONER'S MOTION FOR  
DISCRETIONARY REVIEW**

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## I. INTRODUCTION

R.R. is the mother of E.H., a boy born in 2007. E.H. and his five siblings became dependent in 2014. Ms. R. 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. E.H.'s interests have been represented by his Court Appointed Special Advocate ("CASA") in the dependency proceeding. His CASA has been extremely active on his behalf.

After E.H.'s CASA proposed a permanency plan other than return home to Ms. R., Ms. R. filed a motion seeking appointment of an attorney for eight year old E.H. Examining the facts, the lower court found "no benefit" to appointing counsel for E.H. and denied the motion. The lower court determined that neither the state constitution nor the federal constitution required appointment of counsel for E.H. under the circumstances or as a categorical right. Ms. R. sought discretionary review of the decision, and the Court of Appeals denied review without reaching the state constitutional question. Ms. R. now seeks review of the order denying review. There has been no showing of obvious or probable error. The Court of Appeals noted the trial court's order was thorough and carefully reasoned. As she has not demonstrated probable error, Ms. R.'s motion for discretionary review

should be denied.

## **II. ISSUES PRESENTED**

If the Court were to accept review, the issues on appeal would be:

1. Reviewed in light of the abuse of discretion standard, did the trial court incorrectly weigh the three-part balancing test in *Mathews* to decide against appointment of counsel for E.H.?
2. Does a child in a dependency proceeding have a categorical right to court-appointed counsel under article I, section 3 of the Washington Constitution?

## **III. STATEMENT OF THE CASE**

R.R. 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. R. has been incarcerated since 2013 on weapons and drug charges. App. C<sup>1</sup> at 3. Ms. R.'s parenting history includes several child protective services referrals related to substance abuse, physical neglect, lack of supervision, and criminal involvement. App. F at 2. Ms. R. is scheduled to be released from

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<sup>1</sup> This refers to the appendix attached to Ms. R.'s motion for discretionary review filed with the Court of Appeals. In this response, when references are to a lettered appendix, the reference is to Ms. R.'s motion in the Court of Appeals. If a reference to a numbered appendix, the reference is to the appendix attached to the Department's response filed in the Court of Appeals.

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 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. on a regular basis, she communicates with E.H., and she communicates directly with E.H.'s service providers. *Id.* The CASA 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 guardianship, not termination of parental rights, as a permanent plan for E.H. App. G. at 2.

In August 2016, Ms. R. filed a motion for appointment of counsel for E.H. App. F. The CASA 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. R.’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 categorical 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

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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).

appointing counsel for E.H. *Id.* at 10. The order on revision denied Ms. R.'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. R. filed a motion for discretionary review. Court of Appeals Commissioner Mary Neel denied review, and a motion to modify also was denied.<sup>3</sup> Ms. R. now seeks discretionary review of the order denying discretionary review.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

##### **A. Standard of Review**

The Court of Appeals denied Ms. R.'s motion for discretionary review. After her motion to modify was denied in the Court of Appeals, she filed a motion for discretionary review in this Court. Ms. R. attempts to seek review under RAP 13.4. Motion at 7. RAP 13.4 applies to a "petition for review." However, RAP 12.3, the rule describing forms of decision, indicates that a petition for review involves a "decision terminating review."

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<sup>3</sup> A copy of the order denying discretionary review is attached as Appendix A to Ms. H.'s motion filed in this Court.

“Decision terminating review” is a defined term of art. *Fox v. Sunmaster Prods.*, 115 Wn.2d 498, 798 P.2d 808 (1990), *review denied*, 118 Wn.2d 1029 (1992). “The term does not include every type of decision which can end proceedings in a case in an appellate court, but only those decisions which unconditionally terminate review after review has been accepted.” *Id.* at 501. Because the Court of Appeals never accepted review in this case, there is no “decision terminating review” upon which to premise a review under RAP 13.4(a). Under RAP 13.5(b), discretionary review may be accepted when the Court of Appeals has committed an obvious error which would render further proceedings useless; or if Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act. RAP 13.5(b)(1)(2).

Ms. R.’s motion fails to argue the criteria set forth in RAP 13.5(b). In denying review of a motion for discretionary review, the Court of Appeals determined Ms. R. had not demonstrated probable error. Op. at 6. 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.

Not only has Ms. R. failed to establish probable error under the abuse of discretion standard, she also has failed to demonstrate how the order denying appointment of counsel for E.H. substantially altered the status quo or substantially limited her freedom to act. Thus, review should be denied under both elements of RAP 13.5 – there is no showing of obvious or probable error, and Ms. R.’s freedom to act is not substantially affected by the order.

**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. App. A at 9-10. 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)).

*M.S.R.* 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.

Nor was there evidence that *only* an attorney representing the child's interest could improve the process. Indeed, a judge must exercise discretion because, under some circumstances, appointing an attorney 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 the trial court may properly conclude that it 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. R.'s request to appoint counsel to E.H. Ms. R. has not met the probable error standard warranting discretionary review.

**C. The Court of Appeals relied upon harmless error analysis and did not address the Washington State Constitution when it denied review**

In this case, the Court of Appeals declined to determine whether Art. 1 section 3 requires greater protection than the Fourteen Amendment. Op. at 6. The Court of Appeals decided that even if the Washington Constitution required appointment of counsel for E.H., it is unclear what counsel would accomplish given the posture of the case and the contributions of the conscientious CASA. Op. at 7. The Court of Appeals noted that neither of E.H.'s parents are available to care for him, and there is presently no alternative to him remaining a dependent child. *Id.* The Court of Appeals

referenced that the Art. 1 section 3 question was pending in a Division II case, and it cited *In re S.K.-P. Id.* at 6.

Recently, in *In re S.K.-P.*, No. 48299-1-II, 2017 WL 3392279, at \*1 (Wash. August 8, 2017), the Court of Appeals decided that “children in dependency proceedings do not have a categorical due process right to court-appointed counsel...” After considering the *Gunwall*<sup>4</sup> factors, *S.K.-P.* determined that “liberty interests at stake for children in dependency proceedings are notably different from parents’ liberty interests,” and “appropriate procedural safeguards otherwise exist to protect children’s liberty interests...” *S.K.-P.*, 2017 WL 3392279, at \* 9. Given that *S.K.-P.* has been decided in a manner contrary to Ms. R’s position, Ms. R. cannot demonstrate probable error.

**D. The Court Should Not Accept Review Based on the Claim That the Washington State Constitution Art. 1 section 3 Requires Universal Appointment of Counsel for Dependent Children**

In *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). In *M.S.R.*, this 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.

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<sup>4</sup> *State v. Gunwall*, 109 Wn.2d 54, 720 P.2d 808 (1986).

Constitution, the same result is achieved when applying the Washington State Constitution's nearly identical provision in Const. art. I § 3. *S.K.-P.*, 2017 WL 3392279, at \*9. The due process clause of the state constitution does not mandate appointment of counsel for every child in a dependency proceeding. *S.K.-P.*, 2017 WL 3392279, at \*1. As determined by *S.K.-P.*, a *Gunwall* analysis establishes that the state constitution should be interpreted independently from the federal constitution in this context, but art. 1, section 3 does not compel the appointment of counsel for all children in dependency proceedings. *Id.* at \*9.

The six *Gunwall* factors govern whether a state constitutional 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 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).

**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. R. 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. R. cites *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995). Br. Appellant at 23. However, *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”). 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 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.

**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

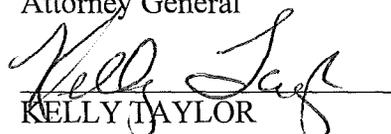
mean that Const. art. I, § 3 provides greater due process protection in this context and Ms. R. offers no sound argument to the contrary.

**V. CONCLUSION**

Ms. R. has failed to establish probable error. The denial of her request to have counsel at public expense for her child violated neither federal nor state constitutional provisions. The Court of Appeals did not reach the question of whether Washington's Art. 1, sec. 3 requires universal appointment of counsel for children in dependency proceedings. The Court of Appeals properly applied a harmless error analysis while noting that neither of E.H.'s parents are available to care for him, and there is presently no alternative to him remaining a dependent child. Ms. R. has failed to meet the criteria for review under RAP 13.5(b), and review should be denied.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August, 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 Supreme Court, under Case No. 94798-8, 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 Appellate Project, [jan@washapp.org](mailto:jan@washapp.org) and [wapoffice@washapp.org](mailto:wapoffice@washapp.org) ;
2. Kathleen Martin, Dependency CASA Program, [kathleen.martin@kingcounty.gov](mailto:kathleen.martin@kingcounty.gov) and [casa.group@kingcounty.gov](mailto:casa.group@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 22<sup>nd</sup> day of August, 2017, at Seattle, WA.

  
\_\_\_\_\_  
PATRICIA A. KELLEY  
Legal Assistant  
Office Identification #91016

**ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE**

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