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NOs. 94798-8, 94970-1

SUPREME COURT OF THE STATE OF WASHINGTON

Consolidated cases of:

In re Dependency of E.H.

and

In re Welfare of S.K.-P.

**STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

Petitioners seek a ruling from this Court that would require appointment of counsel for every child in every dependency proceeding. They contend that a lawyer is constitutionally required no matter the age or development of the child, no matter whether the child is placed in foster care or remains in the home, no matter how effectively the child's interests are otherwise being protected, and no matter even whether the child wishes to have an attorney. This Court unanimously rejected similar arguments in the context of proceedings to terminate parental rights. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). In doing so, this Court recognized that Washington's statute allowing evaluation of the individual facts of each case, and the circumstances of each child, satisfied due process. Although that case addressed counsel for children in a proceeding to terminate parental rights, rather than a dependency proceeding, its analysis encompassed the same interests of a child that are present in a dependency. This Court should follow *M.S.R.* and uphold Washington's dependency statutes, which provide ample due process to children.

Nor does a state constitutional analysis reach a different result. The *Gunwall* (*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)) factors do not show that the state constitution provides broader protection in the context of providing attorneys to children in child welfare

proceedings. Even if the state constitution did provide greater protection, a case-by-case evaluation as required by statute satisfies the state constitution.

II. STATEMENT OF THE ISSUES

1. This Court in *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012), previously and unanimously held that the federal constitution does not require appointment of counsel for every child in every proceeding to terminate parental rights, all the while acknowledging the significant liberty interests at stake for children in such proceedings. Where liberty interests similar or identical to those discussed in *M.S.R.* are implicated in a dependency proceeding, does the constitution require that every child in every dependency proceeding be appointed an attorney?

2. Should the state constitution's due process clause, which is identical in wording to the federal due process clause, be interpreted independently in the context of providing attorneys for children in dependencies?

III. STATEMENT OF THE CASE

A. Dependency Procedures

These consolidated cases involve dependency proceedings under RCW 13.34. Generally, a child is considered dependent where the child has been abandoned, abused, or neglected, or where there is no parent capable of adequately caring for the child. RCW 13.34.030(6). Although it is usually

the Department who files a petition, any person who believes a child is dependent may file a petition in superior court. RCW 13.34.040(1). The court may order a child taken into protective custody if it finds reasonable grounds to believe the child is dependent and that the child's health, safety, and welfare will be seriously endangered. RCW 13.34.050. However, protective custody is not required for a dependency to continue; some children remain in the care of their parents during the dependency.

If a child is found dependent, the court determines, among other things, placement of the child, visitation with parents and siblings, and a plan for services tailored to correct parental deficiencies. RCW 13.34.130. Absent good cause, the Department follows the wishes of the parent in placing the child with a relative or other suitable person. RCW 13.34.260.

The court is required by statute to appoint a guardian ad litem (GAL) for a dependent child, unless it finds good cause that the appointment is not necessary. RCW 13.34.100. Appointment of a Court Appointed Special Advocate (CASA) can satisfy the GAL requirement. RCW 13.34.100(2). Among the statutory duties of a GAL or CASA is to investigate and report to the court factual information about the best interests of the child; to meet with the child and report to the court any views or positions expressed by the child; and to represent and be an advocate for the best interests of the

child. RCW 13.34.105. This Court has also issued rules governing GALs appointed in dependencies. *See* GALR 1-7.

The court may appoint counsel for a child on its own initiative, or at the request of a parent, a child, a GAL, a caregiver, or the Department.¹ RCW 13.34.100(7)(a). Any person may refer the child to an attorney for the purpose of filing a motion to request an attorney at public expense. RCW 13.34.100(7)(b). The Department and the GAL must notify children twelve years or older of their right to request counsel, and ask whether the child wishes to have an attorney. RCW 13.34.100(7)(c). An attorney appointed to represent a child represents the child's expressed interests, not the child's best interests. *E.g.*, Statewide Children's Representation Workgroup, *Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System*, at 5-6.²

B. S.K.-P.'s Dependency Proceedings

S.K.-P. was seven years old when the Department filed a dependency petition based on allegations of abuse and neglect by her

¹ Under certain circumstances not present here, the court is required to appoint counsel for the child, such as where parental rights have been terminated and the child has remained in dependency for six months. RCW 13.34.100(6)(a).

² The report of the Workgroup can be found at <http://www.courts.wa.gov/content/PublicUpload/Commission%20on%20Children%20in%20Foster%20Care/HB%202735%20Full%20Final%20Report%20with%20Appendices.pdf>.

mother. CP 1-6.³ The dependency lasted 16 months, and S.K.-P. was ultimately returned to her mother's care approximately 10 months after the dependency began. CP 1; Order Dismissing Dependency.⁴ In the interim, S.K.-P. was placed with relatives. CP 7-16. The court ordered visitation with both parents. CP 12, 61. But given the lack of relationship between S.K.-P. and her father, visitation with the father was to be supervised and to "begin as recommended by [S.K.-P.'s] therapist." CP 61; CP 57-66.

In July 2015, eight months after the dependency petition was filed, the court ordered that S.K.-P.'s mother could live with her mother-in-law while S.K.-P. was placed there. CP 87-100. On the same day, the court ordered that the father was entitled to one unsupervised visit per week. CP 87-100. On September 3, 2015, the trial court ordered that S.K.-P. was to be returned to her mother's care on a trial return home. Ultimately, the father agreed to the mother's parenting plan, the parenting plan was finalized, and the dependency was dismissed in March 2016. CP 334-36.

A few days after the trial court ordered that S.K.-P. could return to her mother's care, the University of Washington's Children and Youth

³ Citations to Clerk's Papers (CP) are to those designated in *In re Dependency of S.K.-P.* Because of the procedural posture of the case, clerk's papers were never designated for *In re Dependency of E.H.* Instead, the parties have filed a Joint Appendix, and this brief will use JA for citation to the record in *E.H.*

⁴ The Order Dismissing Dependency, dated March 31, 2016, was attached to the Department's Notice of Dismissal of Dependency, Ct. App. No. 48299-1 (filed April 11, 2016). The dependency began on November 19, 2014, and was dismissed March 31, 2016.

Advocacy Clinic filed a motion to appoint an attorney for S.K.-P., arguing among other things that S.K.-P.'s interests of wanting to live with her mother and not wanting to visit with her father were not being adequately protected. CP 112, 115-39. S.K.-P. was then eight years old. In response, the GAL took no position, but reported that S.K.-P.'s therapist had not disclosed any concerns about S.K.-P. visiting with her father, and that S.K.-P. had made equivocal statements about the visits.⁵ CP 83, 142-43.

The trial court denied the motion to appoint an attorney, ruling that a request for counsel could be renewed if circumstances changed, but finding that S.K.-P.'s interests were adequately safeguarded by her mother and the GAL at that time. CP 328. The court noted that S.K.-P. had concerns about visiting with her father, but that the court had been made aware of those concerns by the parties, including the Department and the GAL. CP 327. The Court of Appeals upheld the denial of counsel.

C. E.H.'s Dependency Proceedings

In September 2014, when E.H. was six years old, he and his five siblings were found dependent. JA 18. E.H.'s mother, Ms. R., has been incarcerated since 2013 on weapons and drug charges, with an expected release date in 2019. JA 18. Ms. R's parenting history includes several child

⁵ Specifically, S.K.-P. said that she "did not feel comfortable visiting with her father," but also stated that "she had fun when visiting her father." CP 143.

protective services referrals related to substance abuse, physical neglect, lack of supervision, and criminal involvement. JA 71. Since January 2015, E.H. has lived in a stable foster home. JA 206. The CASA currently assigned to E.H. and his two younger siblings has been working with him since July 2015. JA 196. The CASA has been extremely active on behalf of E.H. and his siblings: she sees E.H. on a regular basis, she communicates with E.H., and she communicates directly with E.H.'s service providers. JA 245; JA 205-43. The CASA is represented by an attorney through the King County CASA program. JA 193, 247. The CASA also filed regular, detailed reports to the trial court, including information the CASA had observed as well as the stated wishes of E.H. JA 205-43.

At a permanency planning hearing in February 2016, the CASA supported a primary plan of adoption for E.H. JA 195. In a report to the court, the CASA conveyed E.H.'s positive thoughts regarding his foster care placement and his desire to avoid talking about his mother. JA 205-07. In light of E.H.'s bond with his mother, the CASA later changed her primary plan recommendation from adoption to guardianship. JA 194.

In August 2016, when E.H. was eight years old, his mother filed a motion to appoint counsel for E.H. JA 53, 69. The CASA opposed the motion, noting that E.H.'s express wish did not include a preference for an attorney, that E.H. does not trust people easily and took time to open up to

her, and that he had developed a trusting relationship with the CASA. JA 205. In rejecting the mother’s motion to appoint counsel, the trial court first determined that the constitution does not demand counsel be appointed in every case, and after conducting a *Mathews* (*Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 19 (1976)) analysis determined that there would be “no benefit” to appointing counsel for E.H. JA 8-11. The Court of Appeals denied a motion for discretionary review.

IV. ARGUMENT

A. Standard of Review

Petitioners’ argument that constitutional due process requires the appointment of counsel for every child in every dependency proceeding amounts to a facial challenge to RCW 13.34.100, which authorizes, but does not require, the appointment of counsel for children. *Cf. M.S.R.*, 174 Wn.2d at 13 (treating similar challenge as constitutional challenge to statute). Statutes are presumed constitutional, and petitioners bear the burden of showing otherwise. *M.S.R.*, 174 Wn.2d at 13.

B. The *M.S.R.* Decision Shows a Case-by-Case Analysis of Each Child’s Circumstances to Determine Whether Counsel Should Be Appointed Satisfies Due Process

This case is governed by *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). In that opinion, this Court recently and unanimously endorsed a case-by-case analysis of whether counsel must be appointed for

children in proceedings to terminate parental rights. In reaching this conclusion, the Court engaged in a lengthy and thorough analysis of the *Mathews* factors. *M.S.R.*, 174 Wn.2d at 15-20. Although the Court was addressing proceedings to terminate parental rights rather than dependency proceedings, the Court's weighing of the *Mathews* factors included virtually all of the constitutional interests implicated in dependency proceedings. *Id.* For example, the Court considered a child's relationship with parents and siblings; removal from a parent's home; potential placements in foster care; change of home, school, and friends; right to reasonable safety; and potential return to abusive parents as among the interests relevant to its *Mathews* analysis. *Id.* at 16-18.

Despite noting in a footnote that the opinion should not foreclose an argument that a different analysis would apply in a dependency proceeding, the Court throughout the opinion grounded its analysis in the interests at stake in both dependency and termination of parental rights proceedings. *E.g.*, *M.S.R.*, 174 Wn.2d at 22 & n.13 ("We hold the due process right of children who are subjects of dependency or termination proceedings to counsel is not universal."); *id.* at 15-17 (repeatedly referring to both dependency and termination of parental rights proceedings in assessing the child's interest in a *Mathews* analysis); *id.* at 17 (relying on the rights identified in a case (*Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003)))

addressing all children in foster care). There is simply no reasoned distinction between dependency and termination of parental rights proceedings in the *M.S.R.* analysis of the *Mathews* factors. Petitioners do not ask this Court to overturn *M.S.R.* Nor do they address the necessary arguments to do so—that the opinion is incorrect and harmful. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (holding that the principle of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned). Thus, *M.S.R.* dictates the answer that the U.S. Constitution does not require appointment of counsel to every child in every dependency proceeding.

C. Application of the *Mathews* Factors Shows that Universal Appointment of Counsel Is Not Required

Application of the *Mathews* factors reinforces the conclusion from *M.S.R.* that a court should determine whether appointment of counsel to children in dependencies is constitutionally required on a case-by-case basis, as Washington statute allows.

1. Factor 1: The Private Interest That Will Be Affected by the Official Action

The first *Mathews* factor is “the private interest that will be affected by the official action[.]” *Mathews*, 424 U.S. at 335. There is no doubt that significant liberty interests of a child may be implicated in a dependency. Family integrity; changes of homes, schools, and friends; the right to be free

from unreasonable risk of harm; possible placement in foster care; and possible return to an abusive home were all considered as potential interests of children in *M.S.R.*, 174 Wn.2d at 16-18. Those are the same interests potentially present in a dependency proceeding. But these interests will be implicated to greater or lesser degree depending on the circumstances in each individual case. *See M.S.R.*, 174 Wn.2d at 15-17 (discussing the potential and varied interests of children in dependency or termination proceedings); *id.* at 22 (holding that judges should apply the *Mathews* factors to each child’s “individual and likely unique” circumstances). In addition, the implicated interests in a dependency, unlike a proceeding to terminate parental rights, are often temporary in nature because a dependency is designed to “mend family ties” rather than permanently sever them. *See In re Dependency of Schermer*, 161 Wn.2d 927, 942-43, 169 P.3d 452 (2007) (quoting *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005)).

Petitioners rely on a characterization of these liberty interests as “fundamental” or affecting the “physical liberty” of a child in arguing for universal appointment of counsel. *E.g.*, S.K.-P. Reply Br. at 18-20 (COA No. 48299-1). But what matters more than these labels is the circumstances in which courts have required universal appointment of counsel. The U.S. Supreme Court has noted that a constitutional right to

universal appointment of counsel has been presumed only where a person's "physical liberty" is threatened. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). But as the Court of Appeals in *S.K.-P.* noted, the physical liberty that requires universal appointment of counsel concerns "incarceration, institutionalization, or other similar restraint of personal liberty." *In re Dependency of S.K.-P.*, No. 48299-1, slip op. at 25 (Wash. Ct. App. Aug. 8, 2017) (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 249 (1989)). By contrast, the U.S. Supreme Court has explicitly addressed the status of children in foster care, holding that "'juveniles, unlike adults, are always in some form of custody' and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)).

Similarly, although identifying a child's interests in a termination of parental rights proceeding as involving "fundamental liberty interests," and potentially a "physical liberty interest," this Court nevertheless rejected the argument that universal appointment of counsel was necessary. *M.S.R.*, 174 Wn.2d at 20, 16.

2. Factor 2: The Government's Interest

The second *Mathews* factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. The government has several important interests at stake in these proceedings. First and foremost, the government has a *parens patriae* interest in the child’s welfare—what the U.S. Supreme Court has characterized as “an urgent interest in the welfare of the child[.]” *Lassiter*, 452 U.S. at 27; *accord Schermer*, 161 Wn.2d at 941.

The State also has fiscal and administrative interests. Appointing counsel for every child in every dependency proceeding, on top of counsel for the parents, counsel for the Department, a GAL, and possibly counsel for the GAL, has obvious fiscal impacts. But it also has administrative impacts.⁶ At the time that dependency was established for E.H., his mother had six children in dependency proceedings. Although not all six were found dependent in the same proceeding, such a scenario is certainly possible. And even though RCW 13.34.100(6) allows attorneys to be

⁶ A fiscal note addressing a recent bill to require appointment of counsel for all children in dependency proceedings estimated the additional cost at \$42-50 million per biennium. Multiple Agency Fiscal Note to H.B. 1251, at 1-2, 65th Leg., Reg. Sess. (Wash. 2017), <https://fortress.wa.gov/FNSPublicSearch/GetPDF?packageID=46978>. The Administrative Office of the Courts also estimated that disposition hearings and fact-finding hearings would take longer to accomplish, possibly causing the courts to fail to meet state and federal standards for optimal handling of dependency cases. *Id.* at 2.

appointed to represent multiple children where appropriate, there could be circumstances in which two, three, or more attorneys for children are appointed in a single case, leading to administrative burdens and less efficient management of cases.

3. Factor 3: The Risk of an Erroneous Deprivation And the Probable Value of Additional Procedural Safeguards

The third *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. Current statutes provide significant procedural safeguards with respect to children in dependencies. By statute, the State must advocate for the child’s best interests. RCW 74.14A.020. Unless good cause is shown, the court must appoint a GAL or other suitable person for the child. RCW 13.34.100(1), (2). The GAL or CASA is required to undergo certain training, and there are procedures for challenging the expertise of a GAL. RCW 13.34.102. The GAL is required to inform the court of any “views or positions expressed by the child on issues pending before the court,” and to advocate for the best interests of the child. RCW 13.34.105(1)(b), (f); GALR 2-3. The GAL must also investigate the child’s situation and report to the court, meet with and interview the child, monitor court orders for compliance, and may participate in court hearings. RCW 13.34.105(1)(a).

With respect to counsel for children, RCW 13.34.100(6) and (7) require appointment of counsel for children in some cases; authorize appointment of counsel for children in all other cases; allow any party, the court, or a caregiver to request counsel for a child; and require children age 12 or over to be advised of their right to request counsel.

The dependency process itself is replete with procedural protections to safeguard against risk of error, providing rigorous standards for the Department's intervention and placement decisions, regular court review, and counsel for parents. *See generally* RCW 13.34. As noted by the Court of Appeals in *S.K.-P.*, unlike a parent in dependency proceedings, a child is not in a traditional, adversarial position to the State. *S.K.-P.*, slip op. at 22. Instead, the State acts in its *parens patriae* capacity for the best interests of the child. *See Schermer*, 161 Wn.2d at 941. To be sure, there may be instances in which the Department's view of the best interests of the child or its statutory duties do not align with a child's stated interest. Nevertheless, a child in a dependency proceeding is in a far different position vis-à-vis the State than is a parent. *See S.K.-P.*, slip op. at 22-23 (quoting *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975)).

The Department acknowledges that in many cases, even if not constitutionally required, an attorney for a child can be of great benefit. *See M.S.R.*, 174 Wn.2d at 21 (citing 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, 61-62 (2000)). But that is not so in every case because “each child’s circumstances will be different.” *M.S.R.*, 174 Wn.2d at 21. Among those differences are the age and developmental ability of the child. *See id.* (noting an infant will not benefit as much from attorney as an older child of 10, 12, or 14). Nearly all of Petitioners’ arguments relating to the benefits of counsel, such as the attorney-client privilege and allowing the child a voice in the proceedings, assume the child’s ability to form and express opinions. In the case of a child unable to do so, appointment of counsel to the child would require the attorney to assess the child’s legal interests without any direction from the child. In such circumstances, the difference between a GAL appointed for a child and an attorney for the child narrows considerably, especially if the GAL or CASA is represented by counsel, as was the case in *E.H.*⁷

Further demonstrating the individualistic nature of the assessment of risk of error is that in some cases, appointing an attorney for a child could even be harmful. Children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”

⁷ The GAL in *S.K.-P.* was also represented by counsel in at least some proceedings. CP 157, 330.

Bellotti v. Baird, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

If one adopts the model of advocating for a child’s stated interest, as Petitioners appear to propose, the result may thus be less likely to be “correct” if it is more likely to result in, for example, return to an abusive home. See 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).

Another example is one of the cases presented for review. In E.H.’s case, he does not trust people easily, and it takes him time to open up about things. JA 206. He has developed a trusting relationship with the CASA, and did not express a wish to have an attorney. JA 205. The lower court noted that E.H. has had many adults in and out of his life since 2013, and does not like being “called out as a foster child.” JA 10. The lower court determined that an “attorney would be one more person that [E.H.] would need to integrate into his life.” JA 10. Thus, appointing counsel given E.H.’s individual circumstances would not benefit him and could even be harmful.

4. RCW 13.34.100, which allows a case-by-case analysis of whether to appoint counsel for a child, satisfies due process

Weighing the *Mathews* factors leads to the same result this Court reached in *M.S.R.*:

We hold the due process right of children who are subjects of dependency or termination proceedings to counsel is not universal. The constitutional protections, RCW 13.34.100(6), and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are subjects of dependency or termination proceedings.

M.S.R., 174 Wn.2d at 22. As the *M.S.R.* Court recognized, a child's liberty interests are substantial, and providing counsel to children can be beneficial, but the existing safeguards and authority to appoint counsel on a case-by-case basis satisfies due process. *M.S.R.*, 174 Wn.2d at 20-22.

Petitioner S.K.-P. argues that a *Mathews* analysis in this case should be contextual rather than individualized. S.K.-P. Pet. Review at 11-12. *M.S.R.* held directly to the contrary, following U.S. Supreme Court authority approving such a case-by-case application of *Mathews* factors. *M.S.R.*, 174 Wn.2d at 21 (citing *Lassiter*, 452 U.S. 18). Tellingly, S.K.-P. cites to the dissent in *Lassiter* as authority for this claim. S.K.-P. Pet. Review at 11-12. S.K.-P. argues that those cases are distinguishable because they involve terminations of parental rights rather than dependencies, claiming that dependencies more directly implicate a child's liberty interests. S.K.-P. Pet. Review at 12.

The State agrees that a termination of parental rights and a dependency involve different considerations, but this distinction does not show the necessity of discarding the case-by-case approach. First, as

discussed above, the analysis and interests considered in *M.S.R.* apply equally to dependency proceedings. Second, due to the narrower issues concerned in a termination of parental rights, the variation from one case to the next is concomitantly narrower than in dependencies. Thus, the value of a case-by-case approach is only magnified when applied to dependencies. Third, a termination of parental rights results in a permanent deprivation of the parent-child relationship, whereas a dependency court's decision is by design temporary and subject to revision. *See* RCW 13.34.138 (requiring review hearings at least every six months).

Petitioners have cited no authority holding that the federal due process clause requires universal appointment of counsel for children in dependencies.⁸ This Court should affirm its *Mathews* analysis from *M.S.R.* and confirm that the statutory safeguard of allowing appointment of counsel on a case-by-case basis satisfies federal due process.

D. The Trial Courts Properly Applied the *Mathews* Factors to Deny Counsel

The reasons supporting the trial court's decision to deny counsel in these two consolidated cases are set forth in more detail in pleadings at the

⁸ Petitioners do cite to a federal district court decision requiring counsel for children in dependencies. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005). That case explicitly relied not on the federal constitution, but the Georgia Constitution for its holding. *Id.* at 1359.

Court of Appeals. In each case, the trial court followed this Court's direction in *M.S.R.* and considered the *Mathews* factors on an individualized basis, explaining their decision to allow for appellate review. CP 327-30; JA 8-11. The factual underpinnings for those decisions are set forth in summary fashion below.

1. The trial court properly denied counsel to S.K.-P.

S.K.-P. was eight years old and already returned to her mother's care when the motion to appoint counsel for her was filed. CP 112, 115-39. For the entire 16-month dependency, she was placed with relatives or in her mother's care. CP 7-16. The primary arguments specific to S.K.-P.'s case argued in the motion to appoint counsel were that S.K.-P.'s wish to live with her mother and not to visit with her father were not being adequately represented. CP 132-34. The trial court properly weighed the *Mathews* factors and determined that counsel was not appropriate at that time. CP 329. Specifically, the Court found: (1) that the child's reluctance to visit with her father had been brought to the attention of the Court by the parties; (2) that the father had never been found to be unfit and no dependency had been established with respect to the father; (3) that the parties were being referred to a court facilitator to complete a parenting plan that would continue S.K.-P.'s residence with her mother; (4) that it was anticipated the

dependency would then be dismissed;⁹ and (5) S.K.-P.'s interests were aligned with her mother, who can and should advocate for S.K.-P.'s interests. CP 327-28. Under these circumstances, the trial court correctly determined that appointing counsel for S.K.-P. was not constitutionally required.

2. The trial court properly denied counsel to E.H.

The trial court's conclusion that providing counsel to E.H. would be of "no benefit" is amply supported by the circumstances of that case. E.H. was eight years old at the time of the request and was residing in a stable placement, where he felt safe and wished to remain. JA 206. The CASA appointed to the case was extremely active, ably advocated for the child's best interests, and was represented by an attorney. JA 9-10. Return home to his mother was not an option because she was in prison until several years into the future, but the CASA, in response to E.H.'s bond with his mother, advocated for guardianship rather than termination of parental rights so he could retain his relationship with his mother to the extent possible. JA 206-07. Finally, the court was able to consider E.H.'s stated wishes because it had been informed of them by the CASA. JA 13 (court

⁹ The dependency was in fact dismissed after a parenting plan had been approved, as anticipated by the Court. Order Dismissing Dependency, Attachment A to Notice of Dismissal of Dependency, Ct. App. No. 48299-1, filed Apr. 11, 2016.

order acknowledging the CASA informs the court); JA 205-43 (CASA reports to court).

E. The Due Process Clause of the Washington Constitution Does Not Require Appointment of Counsel to Every Child in Every Dependency

When assessing whether to independently interpret our state constitution, this Court generally considers the six *Gunwall* factors. *In re Marriage of King*, 162 Wn.2d 378, 392, 174 P.3d 659 (2007). S.K.-P. argues that a *Gunwall* analysis is not necessary, based primarily on an analysis of *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975).¹⁰ In *Luscier*, the Court held that the federal and Washington due process clauses required the court to appoint counsel for indigent parents in a proceeding to terminate parental rights. A year later, in *Myricks*, the Court extended *Luscier* to require appointed counsel in dependency cases. The U.S. Supreme Court later held that, contrary to the holding in *Luscier*, the federal due process clause allowed appointment of counsel to parents in termination

¹⁰ S.K.-P. also argues a *Gunwall* analysis is not necessary because there is no federal case law interpreting the federal constitution directly on point. S.K.-P. Appeal Br. at 15 (COA No. 48299-1). S.K.-P. cites no authority requiring a case directly on point before engaging in a *Gunwall* analysis, and the argument is contradicted by multiple cases in which this Court has engaged in a *Gunwall* analysis despite no federal authority directly on point. *E.g.*, *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 710-14, 257 P.3d 570 (2011); *In re Marriage of King*, 162 Wn.2d at 391-95; *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996).

proceedings on a case-by-case basis. *Lassiter*, 424 U.S. at 26-27. Petitioners argue that since *Luscier* and *Myricks* were based on both the state and federal constitutions, and *Lassiter* reversed only the federal constitutional requirements, *Luscier* and *Myricks* must remain as state constitutional rulings that demonstrate an independent state analysis.

There are at least three fatal flaws in this argument. First, *Luscier* and *Myricks* address appointment of counsel for parents, not children, in dependencies, so even if the state constitutional rulings remained valid, they would not apply here. As this Court has held, context matters in a due process analysis, and a *Gunwall* analysis is necessary if the Court has not previously analyzed the potentially broader scope of the state constitution in that particular context. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011). Second, the Court in *Luscier* and *Myricks* addressed the federal and state constitutional provisions as equivalent, and gave no hint that it was interpreting the state constitution more broadly. *See Id.* at 712 (stating “[i]t remains undetermined” whether the state constitutional underpinnings in *Luscier* have been eroded by *Lassiter* because *Luscier* did not separately analyze the federal and state constitutions). Third, numerous post-*Gunwall* and post-*Luscier* opinions have found there was no greater due process protection provided by the state constitution. *Id.* at 714; *In re Marriage of King*, 162 Wn.2d at 393; *In re Personal Restraint of Dyer*, 143

Wn.2d 384, 20 P.3d 907 (2001); *State v. Ortiz*, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992). These subsequent opinions of course are not conclusive, because state constitutional due process must be examined in each context. They nevertheless suggest that *Luscier* and *Myricks* do not demonstrate a fundamentally different approach to due process in the state and federal constitutions. Accordingly, a *Gunwall* analysis is necessary.

1. Nearly identical text in the state and federal due process clauses does not support an independent state constitutional analysis

The first and second *Gunwall* factors consider the text and textual differences between the state and federal provisions. *Gunwall*, 106 Wn.2d at 61. Due to the nearly identical language in article I, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, this Court has repeatedly held that these two factors do not support a more expansive interpretation of the state constitution. *E.g.*, *In re Marriage of King*, 162 Wn.2d at 392; *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000).

2. There is no justification in legislative history to warrant independent state constitutional interpretation

The third *Gunwall* factor considers whether the state constitutional provision's history reflects "an intention to confer greater protection" than its federal counterpart. *Gunwall*, 106 Wn.2d at 61. Washington's State

Constitutional Convention adopted the due process clause as proposed, without modification or debate. *The Journal of the Washington State Constitutional Convention 1889*, at 495-96 (Beverly Paulik Rosenow ed., Book Publishing Co. 1962). Thus, no legislative history “provide[s] a justification for interpreting the identical provisions differently.” *Ortiz*, 119 Wn.2d at 303.

At the Court of Appeals, Petitioners did not dispute the lack of legislative history supporting an independent analysis, but S.K.-P. argued that the state constitution’s focus on individual liberties and fear of legislative tyranny, along with its provisions for the education of children and care of mentally and physically disabled children, justified an independent analysis. S.K.-P. Appeal Br. at 22 (COA No. 48299-1). As the Court of Appeals pointed out, the federal due process clause had nearly 100 years of history at the time the Washington Constitution was adopted, yet there is no indication in legislative history to support an intention to provide broader protections. *S.K.-P.*, slip op. at 15. As for the constitutional provisions relating to education and the care of physically and mentally disabled children, neither are related to due process rights. *S.K.-P.*, slip op. at 15. Finally, S.K.-P.’s argument about the general focus on individual liberties suggests that the state’s due process clause should be interpreted more broadly than its counterpart in every case. Yet as shown above, this

Court has repeatedly held otherwise. The third *Gunwall* factor does not support an independent analysis.

3. Preexisting state law establishes no analytical foundation to expand state due process for children

Factor four “examine[s] preexisting state law to determine what kind of protection this state has historically accorded the subject at issue.” *State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994). Typically, this involves examining the law around the time the constitution was adopted rather than recent, dramatic changes in the law. *E.g.*, *Grant County Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004); *Malyon v. Pierce County*, 131 Wn.2d 779, 935 P.2d 1272 (1997). Although the Court of Appeals in *S.K.-P.* cited several cases that looked to more recent law, each case examined a thread of law extending from the time of the constitution to the current law rather than relying on new laws arising from shifting societal attitudes. *See State v. Johnson*, 128 Wn.2d 431, 443-46, 909 P.2d 293 (1996) (citing statutes from 1881 through those currently in effect to show a long history of regulating travel); *Gunwall*, 106 Wn.2d at 66 (citing statutes from 1881 through those currently in effect to show history of protecting telephonic and electronic communications).

Here, by contrast, providing counsel to children is a relatively new and evolving law in the state. The statutory right for *parents* to have counsel

in dependency proceedings was not established until 1977. *See* Laws of 1977, 1st Ex. Sess., ch. 291, § 37. And many of the current statute's provisions regarding attorneys for children have been enacted within the last 10 years. *E.g.*, Laws of 2014, ch. 108 (requiring attorneys for children in some circumstances and making other changes related to attorneys for children); Laws of 2010, ch. 180 (requiring children over 12 to be notified that they may request counsel and other attorney-related changes). Although the Petitioners seek to rely more broadly on laws evincing protection for children in dependencies, this Court has cautioned against looking to laws outside the particular context of the case. In *Bellevue School District*, this Court disregarded statutes about appointing counsel for children in civil commitment proceedings when considering whether counsel should be provided to children in truancy proceedings. *Bellevue Sch. Dist.*, 171 Wn.2d at 711-12. The Court reasoned that the failure of the legislature to require counsel at the truancy hearing, but requiring it in other circumstances, actually weakened the argument for an independent state constitutional analysis. *Id.* at 712. Similarly here, even if one looked to more recent law regarding counsel for children, it would show that Washington's legislature, like the U.S. Supreme Court in *Lassiter*, endorses the case-by-case approach to appointing counsel for children in dependencies. The fourth factor does not support broader protection under the state constitution.

4. Structural differences and matters of local concern support an independent analysis

This Court has consistently held that the fifth factor, structural differences between the federal and state constitutions, supports an independent analysis. *E.g., In re Marriage of King*, 162 Wn.2d at 393. Similarly, the sixth factor, whether the issues are of state or local concern, weighs in favor of an independent analysis because family relations are generally matters of state or local concern. *E.g., 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)).

5. RCW 13.34.100 satisfies state constitutional due process

This 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) (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991)). Consideration of the *Gunwall* factors offers no reason to abandon that restraint in the context of appointment for counsel for children in dependencies.

Even if this Court were to determine, as the Court of Appeals in *S.K.-P.* did, that the state constitution should be interpreted independently in this context, it should still hold that RCW 13.34.100 satisfies state constitutional due process. The Court of Appeals appeared to rely on the

significant procedural safeguards already in place and the lack of a truly adversarial relationship between the State and children in dependencies in determining that state due process did not require universal appointment of counsel. *S.K.-P.*, slip op. at 22-24. Absent any guidance on how a state constitutional due process analysis would differ from a federal analysis, the Department agrees that these factors are important to a due process analysis, and that they show that the existing procedural safeguards, including appointment of a GAL and appointment of counsel on a case-by-case basis, are sufficient in the context of a dependency to satisfy the minimum requirements of the state constitution's due process clause.

F. Examination of Other States' Law Supports the Case-by-Case Approach

Petitioners may seek to rely on the statutes of other states to claim that Washington is out of step with the rest of the nation. *E.g.*, *S.K.-P. Pet. Review* at 15 (S. Ct. No. 94970-1). A closer examination of those statutes does not support the Petitioners' argument (either explicit or implicit) that an attorney representing a child's stated interest is constitutionally required. In fact, the majority of states requiring appointment of counsel for a child use the attorney-GAL model. *See Children's Advocacy Inst., A Child's Right to Counsel: A National Report Card on Legal Representation for*

Abused & Neglected Children (3d ed.), http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf.

But attorney-GALs do not represent children in the manner that Petitioners argue is constitutionally required. An attorney-GAL typically advocates for a child's best interest, not the child's stated interest. *See generally National Report Card* at 22, 30, 72 (describing role of attorney-GAL in Alabama, Arkansas, and Michigan). Because they do not represent the child as a client, their communications with the child are likely not subject to the attorney-client privilege. *See, e.g., People v. Gabriesheski*, 262 P.3d 653, 659-60 (Colo. 2011) (holding that attorney-client privilege does not apply to attorney-GAL, citing other jurisdictions' authorities in accord). Thus, the two thematic rationales given by Petitioners for providing counsel to children—providing them a voice and allowing them to speak to their attorneys in confidence—are not satisfied by attorney-GALs. Although a significant minority of states have decided as a policy matter to appoint counsel for children in dependency proceedings to represent their stated interests, it is just that—a minority. The Court should therefore reject any attempt to argue that the laws of other states support their position.

V. CONCLUSION

This Court should follow its recent analysis in *M.S.R.* and uphold RCW 13.34.100, which authorizes appointment of counsel for children in

dependency proceedings on a case-by-case basis. Such a system satisfies the minimum due process standards of the federal and state constitutions. The policy decision of whether appointing counsel for children in dependencies would be beneficial should be left to the legislature. *Cf. Bellevue Sch. Dist.*, 171 Wn.2d at 715 (Madsen, C.J., concurring).

RESPECTFULLY SUBMITTED this 22nd day of January 2018.

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

DATED this 22nd day of January 2017, at Olympia, Washington.

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