

NO. 94970-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Dependency of S.K.P.,

A Minor Child.

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MEMORANDUM OF AMICUS CURIAE  
NORTHWEST JUSTICE PROJECT (NJP) IN SUPPORT OF  
GRANTING REVIEW

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## I. INTRODUCTION

Children in dependency proceedings have a statutory right to an attorney to represent their independent interests upon request. But children are routinely denied the right based on nothing more than the judge's subjective impression or even desire to not incur the expense. Denying a child attorney representation based on no articulable standards or criteria violates Article I, §12 of the Washington constitution.

S.K.-P relies on due process for her claimed universal right to counsel. However, the right to counsel for children in dependencies is not merely procedural, but one that extends to their substantive rights to safety, access to appropriate services, long-term well-being and family integrity. If the Court accepts review, amicus NJP urges the Court to also analyze the claim under the broader protections afforded by Art. I, §12.

## II. INTEREST OF AMICUS

NJP's interest is fully set out in its Motion to Participate as Amicus.

## III. STATEMENT OF THE CASE

The Court of Appeals undertook a *State v. Gunwall* analysis to determine if Washington Const. Article I, § 3 afforded broader protection than the federal Due Process Clause.<sup>1</sup> Though S.K.-P demonstrated that children in dependency variously receive counsel depending on the county where the case is pending, the court did not address the *de facto* policy of *justice by geography* that makes the case-by-case approach so problematic.

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<sup>1</sup> *Matter of Dependency of S.K.-P.*, \_\_\_ Wn. App. \_\_\_, 2017 WL 3392279 (2017).

While S.K.P does not rely on Art. I, §12, the policy considerations that compel a universal right to counsel for children in dependencies arise under that provision. Nor did the court below look to the actual statutes granting children a right to counsel in dependencies for guidance in its analysis. Amicus NJP focuses on these provisions and otherwise relies on S.K.-P.'s Statement of the Case.

#### IV. ARGUMENT

##### A. **Art. I, § 12 Requires That All Indigent Children Subject To Dependencies Be Provided Counsel Upon Request.**

Under Washington's unique privileges and immunities provision, any right granted to one resident must necessarily extend to all such similarly situated residents. Art. I, §12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens." Because the Washington courts and Legislature have recognized that some children have a right to counsel in dependency proceedings, the right must apply upon the same terms to all persons within the class protected by the law granting such rights. Hence, deciding whether to appoint counsel to represent children in dependency proceedings on a case-by-case basis using no specific criteria cannot withstand constitutional muster under Art. I, §12.

**1. Art. I, §12 is subject to independent application.**

This Court has already determined that Art. I, §12 is subject to an independent analysis from the federal Equal Protection Clause.<sup>2</sup> Thus, a *Gunwall* analysis is not necessary to establish that Art. I, §12 extends broader rights than its federal counterpart.<sup>3</sup> The Court still may use *Gunwall* criteria,<sup>4</sup> among others, to determine the scope of protection Art. I, §12 affords in a particular context.<sup>5</sup>

**2. Art. I, §12 Requires that Statutory Privileges Apply Equally to All Persons Within the Benefitted Class.**

Under Art. I, §12, it must first be established that there is a privilege or immunity subject to the constitutional protections. The Court has defined “privileges” in Art. I, §12 as “those fundamental rights which belong to the citizens of the state....”<sup>6</sup> The right to counsel, when granted, is a fundamental right that the state cannot deny; it can be waived only through procedural requirements that ensure the waiver is based on the informed and

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<sup>2</sup> *Grant County Fire Protection District, No. 5 v. City of Moses Lake (Grant County II)*, 150 Wn.2d 791, 805, 83 P.3d 419 (2004).

<sup>3</sup> See *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007) (“Once this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, it is unnecessary to engage repeatedly in further *Gunwall* analysis.... Thus, *Grant County II*’s determination satisfies the first step of our inquiry.”)

<sup>4</sup> The six *Gunwall* criteria are: (1) the textual language of the state constitution; (2) textual differences between parallel provisions of the state and federal constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and, (6) state or local concerns. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

<sup>5</sup> *Madison v. State*, 161 Wn.2d at 96.

<sup>6</sup> *Id.* at 95.

voluntary consent of the holder of that right.<sup>7</sup> Both statute<sup>8</sup> and case law<sup>9</sup> govern appointment of counsel for children in juvenile court proceedings. Both this Court and the Legislature have long granted the right to counsel at public expense to indigent parents in all aspects of dependency proceedings.<sup>10</sup> Hence, applying *Gunwall* criteria 3 and 4, the constitutional history, the common law and pre-existing state law recognize that the right to counsel, when granted, is a fundamental right and “privilege” under both state constitutional law and RCW 13.34.100.

### **3. All Children Subject to Dependency Proceedings Are Entitled to the Same Rights.**

It is fundamental to our system of justice that all persons be subject to the same rights and responsibilities as any other person similarly situated. This is the essential premise of Art. I, §12. RCW 13.34.100 sets out the rights of children in a dependency, including appointment of an attorney to represent the child's position either on the court's own initiative, or upon

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<sup>7</sup> See, e.g., *State v Phillips*, 94 Wn. App. 313, 318, 972 P.2d 932 (1999) (“A [juvenile’s] waiver of the right to counsel must be knowingly, voluntarily, and intelligently made... We indulge in every reasonable presumption against waiver of fundamental constitutional rights, including the right to counsel... The waiver must affirmatively appear in the record.”; see also, *in re Welfare of G.E., et. al.*, 116 Wn. App. 326, 332-34, 65 P.3d 1219 (2003) (requirements for waiver of constitutional right to counsel similarly apply to parents waiver of the statutory right to counsel under RCW 13.34.090).

<sup>8</sup> RCW 13.34.100(6)(a) and (7).

<sup>9</sup> *In re M.S.R.*, 174 Wn.2d 1, 5, 271 P.3d 234 (2012)

<sup>10</sup> *In re Welfare of Myricks*, 85 Wn.2d 252, 253–54, 533 P.2d 841 (1975);

*In re Welfare of Luscier*, 84 Wn.2d 135, 136-39, 524 P.2d 906 (1974); RCW 13.34.090; see also *In re Dependency of E.H.*, 158 Wn. App. 757, 768, 243 P.3d 160, 165 (2010) (parents entitled to appointment of counsel when a non-parental custody action is “inextricably linked” with the dependency issue of whether a child can return home.)

the request of a parent, the child, a guardian ad litem, a caregiver, or the department. RCW 13.34.100(7)(a).<sup>11</sup>

In 2014, the Legislature amended RCW 13.34.100.<sup>12</sup> At minimum, there is now a presumptive right to an attorney for all children regardless of age *upon request*.<sup>13</sup> The 2014 act mandated that juvenile courts appoint counsel for children no later than six months after termination of their parents' rights.<sup>14</sup> The 2014 act also significantly restructured the statute, clearly setting out for the first time the authority of a court on its own initiative or upon the request of any party to appoint an attorney to represent the independent interests of a child of any age.<sup>15</sup> Other than using “may” in the new subsection (7)(a) versus “must” in the subsection (6)(a) (related to children whose parents' rights have been terminated), there is nothing in the structure of the statute that would deem it purely discretionary. Indeed, legislative intent dictates whether a statute is mandatory or discretionary

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<sup>11</sup> RCW 13.34.100(7)(a) provides: “The court may appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.”

<sup>12</sup> Laws 2014, ch. 108 § 1, effective July 1, 2014.

<sup>13</sup> The court in *M.S.R.* observed that “[b]oth our current statutory law and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are the subjects of dependency or termination proceedings,” citing RCW 13.34.100(6)(f) and JuCR 9.2(c)(1), but it did not engage in an interpretive analysis of the then existing statute. Even though the court's decision was based on this premise, the observation itself is *dicta*. 174 Wn.2d at 13. The 2014 amendments changed both the language and structure of RCW 13.34.100 and the Court should construe the statute in its current light.

<sup>14</sup> RCW 13.34.100(6)(a), Laws 2014, ch. 108 § 2.

<sup>15</sup> *Id.* § 2 (RCW 13.34.100(7)(a)).

and not the mere use of the words “shall” or “may.”<sup>16</sup> This is particularly true when applying the literal meaning of terms would be unconstitutional.<sup>17</sup>

The current statutory scheme now presumes that the child will receive an attorney *upon request*.<sup>18</sup> In 2010, the Legislature enacted a requirement that a child over age 12 be affirmatively notified of their right to request an attorney by DSHS and the child’s guardian ad litem.<sup>19</sup> The 2014 amendments restructured the language by clearly providing all children (not just those who are 12 and older): (1) the right to request appointment of an attorney; and, (2) for the child to be referred to an attorney for help in making the request.<sup>20</sup> There would be no point in either notifying a child of their right to request appointment of an attorney or mandating referral of a child to an attorney for help in making the request, if the child had no reasonable expectation that the appointment will be made

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<sup>16</sup> *State ex. rel. Blume v. Yelle*, 52 Wn.2d 158, 161-162, 324 P.2d 247 (1958) (“‘shall’ and ‘may’ ... are often used interchangeably ... in order to determine in a particular case whether the one chosen ... is to be construed as mandatory or merely permissive, depends upon the legislative intent in each instance.”); cf. *Niichel v. Lancaster*, 97 Wn.2d 620, 625, 647 P.2d 1021 (1982) and *State v. Rice*, 174 Wn.2d 884, 896, 279 P.3d 849 (2012) (“This court recognized long ago that “[t]he words ‘may’ and ‘shall’ [are] used according to the context and intent found in the statute....”)

<sup>17</sup> *In re Matter of Elliott*, 74 Wn.2d 600, 608-09, 446 P.2d 347 (1968)(construing “shall” to mean “may” with respect to the authority of a court to render advisory opinion to avoid unconstitutional limits on judicial power: “The rule has developed that the courts, in applying rules of statutory construction of legislation which is under constitutional attack, must do so with a view to bringing the legislation into line with constitutional requirements.”; and, *State v. Rice*, 174 Wn.2d at 896 (holding statute to be permissive when construing it as mandatory would be unconstitutional.)

<sup>18</sup> See *In re the Welfare of G.E., et.al*, 116 Wn. App. 326, 333, 65 P.3d 1219 (2003)(“the parent’s appearance triggers the court’s duty to provide counsel; no request for appointment is required.”). In contrast, the statutory right to counsel for children is triggered upon request.

<sup>19</sup> Laws 2010, ch. 180, § 2, effective July 1, 2010. RCW 13.34.100(7)(c).

<sup>20</sup> Laws 2014, ch. 108, § 2(7)(a). The amendment further expanded who can request the child be appointed an attorney to include the “parent, child, guardian ad litem, caregiver or the department.” RCW 13.34.100(7)(a).

upon request. This expectation is underscored by the fact that the Legislature excuses the provision of notice and judicial inquiry if the child already has been appointed counsel.<sup>21</sup>

A primary motivation for the recent changes to RCW 13.34.100 was the lack of consistency in children receiving notice of their right to request counsel.<sup>22</sup> While the Legislature enacted no criteria on which to provide appointed counsel, the lack of criteria also does not suggest that the Legislature intended to provide juvenile courts with unfettered discretion to *deny* an attorney when a request has been affirmatively made.<sup>23</sup> Rather the language is a clear grant of authority to make the appointment upon request. Presumably, if the Legislature intended juvenile courts to exercise authority to deny appointment, they would have identified when such authority should be exercised. Instead, the Legislature imposed the affirmative presumption that a court should appoint an attorney *upon request* and, in the absence of a request, the discretion to make the appointment on its own initiative. In reading the statute as a whole and considering the intent of the

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<sup>21</sup> RCW 13.34.100(7)(b)(1) and (e).

<sup>22</sup> The legislative findings expressly recognized “that inconsistent practices in and among counties in Washington have resulted in few children being notified of their right to request legal counsel in their dependency and termination proceedings under RCW 13.34.100.” Laws 2010, ch. 180 § 1.

<sup>23</sup> Courts may not exercise unfettered discretion to infringe a fundamental right. See *In re Custody of A.C.*, 124 Wn. App. 846, 853-54, 103 P.3d 226 (2005), *review granted and remanded* 155 Wn.2d 1011 (2005) in light of *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005); see also, *Johnson v. U.S.*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 2560, 192 L.Ed.2d 569 (2015) (lack of clear criteria of when the “residual clause” of Armed Career Criminal Act applies to require a mandatory 15-year sentence enhancement for violent crimes is unconstitutionally vague as demonstrated by the “pervasive disagreement about the nature of the inquiry [a court] is supposed to conduct and the kinds of factors one is supposed to consider,” resulting in inconsistent application throughout the country.)

Legislature to mitigate inconsistency in appointing counsel for children, this is the only logical way to read the current statute.

Hence, under current RCW 13.34.100(6), a child in a dependency proceeding has at least a presumptive right to counsel, if not an absolute right to counsel *upon request*. In either event, the right constitutes a statutory “privilege” for purposes of Art. I, §12.

**4. Granting Statutory Rights Various Throughout the State Violates Art. I, §12.**

Art. I, §12 prohibits the allocation of the privilege to some children and not others similarly situated.<sup>24</sup> As stated above, the Legislature was concerned about the “inconsistent practices in and among counties” in notifying children of their right to request attorney appointment.<sup>25</sup> This was based, in part, on reported experience of courts throughout the state.<sup>26</sup>

Children in dependencies throughout the state fall into two classifications: those who live in a county that provides an attorney at public expense and

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<sup>24</sup> In enacting the notice requirement, the Legislature recognized that an attorney affords a child a specific benefit: “Well-trained attorneys can provide legal counsel ... on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care. [They] (a) Ensure the child's voice is considered...; (b) Engage the child in [the] legal proceedings; (c) Explain ...his or her legal rights; (d) Assist the child...to consider the consequences of different decisions; and (e) Encourage accountability...among the different systems that provide services to children.” Laws 2010, ch. 180, §1(2).

<sup>25</sup> *Id.* §1(1).

<sup>26</sup> In 2008, OCLA surveyed courts about their practices of appointing counsel in dependencies, specifically for children aged 12-17, noting Benton-Franklin appoints an attorney for every child eight (8) or older; King County appoints for all children who are 12 and older. The report states “there is very little uniformity of practice and no universal standard” juvenile courts employ in considering whether to appoint an attorney for children in dependencies.” OCLA, Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington (Dec. 2008). See Erin Shea McCann and Casey Trupin, *Kenny A. Does Not Live Here: Efforts in Washington State to Improve Legal Representation for Children in Foster Care*, 36 *Nova Law Rev.* 363, 368-69 (2012).

those who do not. Even within the counties that regularly appoint attorneys, disparate practices favor some children and disfavor others who are similarly situated.<sup>27</sup> Art. I, §12 does not tolerate the disparate, standardless implementation of statutory rights. Art. I, §12 compels a uniform application of a child's right to an appointed attorney upon request.

**5. Case-by-Case Determination of a Child's Right to Counsel in Dependencies Violates Art. I, §12.**

The right to counsel, be it statutory or constitutional, is fundamental and cannot be subject to arbitrary determinations based on where one lives or other subjective factors such as maturity, procedural complexity, positional conflict, the stage of proceedings, or an individual caseworker's, GAL's or judge's perception of "benefit" to the child of representation. Case-by-case determinations of whether to grant the right to an attorney are generally disfavored and unworkable.<sup>28</sup> This concern led the Court to grant the right to an attorney to all persons facing civil contempt that could lead to incarceration in *Tetro v. Tetro*.<sup>29</sup> These same reasons and the disparate practices across the state demonstrate the failure of a case-by-case approach to protect the acknowledged value of independent representation for

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<sup>27</sup> *Id.*

<sup>28</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 337-40, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

<sup>29</sup> 86 Wn.2d 252, 253-54, 544 P.2d 17 (1975), citing *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (right to counsel for all juveniles subject to civil commitment proceedings noting that is not sufficient that the Wyoming statute provides that the proposed patient 'may be represented by counsel'); and *Lessard v. Schmidt*, 349 F.Supp.1078 (E.D.Wis.1972) (right to counsel for children in mental commitment proceedings as neither courts in the exercise of their *parens patriae* responsibilities or guardians ad litem are sufficient to satisfy the right). See also, *Marriage of King*, 162 Wn.2d 378, 174 P.3d 659, n. 11 (2007) where the Court noted both the inefficiencies and complexities of deciding when to appoint counsel under a case-by-case approach.

children in dependencies to assert and secure their fundamental rights to safety, security and long-term well-being - the central focus of the dependency process.<sup>30</sup>

## V. CONCLUSION

All children in dependencies are entitled to have their interests and perspectives on the most important relationship in their young lives fully considered. No clearly objective criteria have been articulated as to grant or deny an attorney for a child in dependency. The decision is often based on grounds that are not legitimate (*e.g.*, cost, age, intellect) and are not constitutionally defensible. RCW 13.34.100(6) provides all children the presumptive right to an attorney upon request in dependency proceedings. All children in dependency should be entitled to an attorney either upon request or on the court's own initiative. Art. I, §12 requires no less.

Dated: October 11, 2017

Respectfully submitted,

NORTHWEST JUSTICE PROJECT



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<sup>30</sup> See n. 24 *supra* and *In re M.S.R.*, 174 Wn.2d at 21.

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