

NO. 94970-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of:

S.K-P.,

Minor Child.

**ANSWER TO MOTION FOR DISCRETIONARY REVIEW
OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

There is neither a universal right to counsel for children in every dependency proceeding, nor a basis for appointing counsel for S.K-P. under the facts of this case. This Court has held that the discretionary nature of the statute governing appointment of counsel for children comports with federal due process. No Washington case has held that children have a state constitutional right to counsel in all dependency proceedings.

The trial court did not abuse its discretion when it denied S.K-P.'s motion for appointment of counsel under RCW 13.34.100(7). The trial court carefully evaluated the facts and circumstances specific to S.K-P.'s needs, balanced the interests at stake under *Mathews v. Eldridge*,¹ and determined that an attorney for S.K-P. would not aid the trial court in reaching a just resolution of the case or in understanding S.K-P.'s desires.

The Motion for Discretionary Review should be denied.

II. IDENTITY OF THE ANSWERING PARTY

Respondent, the Department of Social and Health Services, asks this Court to deny review of the order designated in Part III.

III. COURT OF APPEALS DECISION BELOW

Petitioner, S.K-P., seeks review of the published opinion of the

¹ *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Washington State Court of Appeals, Division II, issued on August 8, 2017, which held that Washington's statutory scheme of appointing counsel for dependent children on a case-by-case basis is constitutionally adequate.

IV. ISSUE PRESENTED

S.K-P. fails to meet the standard of review set forth in Rule of Appellate Procedure (RAP) 13.4(b). If review were accepted, the issues would be:

1. Did the trial court abuse its discretion in denying S.K-P.'s motion for appointment of counsel under RCW 13.34.100(7), where the discretionary nature of the statute is constitutional under *In re Dependency of MSR*, and the trial court weighed the *Mathews v. Eldridge* factors?
2. Does article I, section 3 of the Washington State Constitution provide a categorical right to the appointment of counsel for children in dependency proceedings despite existing procedural safeguards and given the reality that children in dependency proceedings are not in an adversarial position to the State?
3. Is a child's involvement in dependency proceedings akin to that of proceedings that carry the threat of incarceration so as to warrant appointment of counsel under a "physical liberty" interest theory?

V. RESTATEMENT OF THE CASE

The Department filed a dependency petition on November 19, 2014, in response to allegations of abuse and neglect to Petitioner, S.K-P., and her two half siblings while in their mother's care.

CP at 1-6. All three children were removed from their mother's care and were ordered to be placed with S.K-P.'s grandmother. CP at 7-16. At the shelter care hearing, the trial court also ordered visitation for both of S.K-P.'s parents, including visitation for the father that consisted of one supervised visit per week for two hours. CP at 7-16.

On January 6, 2015, the mother entered an agreed order of dependency, which continued placement of S.K-P. with her paternal grandmother. CP at 57. On April 7, 2015, the trial court entered an extended shelter care order finding that S.K-P. "was removed from [her] mother's care [and that the] father's home is suitable for placement, as he [and] S.K-P. develop a relationship." CP at 57-66. The trial court also ordered that the father was to have visits "begin as recommended by [S.K-P.'s] therapist" and that "[v]isits can expand in time [and] decrease in level of supervision upon approval of [the social worker and the Guardian ad Litem] to include overnights." CP at 57-66. No order of dependency, and therefore no court finding of parental unfitness, has been entered in the dependency action as to the father. CP at 328.

On July 23, 2015, the trial court ordered that the mother could live with her mother-in-law while S.K-P. was placed there. CP at 87-100. On the same day, the trial court ordered that the father was entitled to one

unsupervised visit per week, to occur on Saturday from ten o'clock in the morning to six o'clock in the evening. CP at 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. CP at 111. At that hearing, the trial court found that visits with S.K-P. and her father had been "going well" and that S.K-P. could start staying overnight if the parties agreed. CP at 111. As of the date of this brief, the father agreed to the mother's parenting plan, the parenting plan was finalized, and the dependency was dismissed in March 2016. CP at 334-36.

On September 8, 2015, even though S.K-P. was back in her mother's care, the University of Washington's Children and Youth Advocacy Clinic filed a motion to intervene for the limited purpose of arguing that S.K-P. was entitled to her own attorney. CP at 112-39. It claimed that S.K-P.'s stated interests of wanting to live with her mother and not wanting to visit with her father were not being adequately protected. CP at 112, 115-39.

In response, the Guardian ad Litem (GAL) filed a declaration indicating that he did not take a position on whether the trial court should appoint an attorney; however, he did provide the trial court with information relevant to S.K-P.'s request, stating that S.K-P.'s therapist, Marshall Johnson, had not reported or disclosed anything concerning visits

between S.K-P. and her father. CP at 142-43. The GAL also stated that he had asked S.K-P. why she requested an attorney, to which S.K-P. “reported that she knew that an attorney would make sure she gets what she wants.” CP at 142-43. The GAL also stated that S.K-P. told him that she did not feel comfortable visiting with her father, but also that “she had fun when visiting her father.” CP at 142-43.

The Pierce County Prosecutor also moved to intervene as a party to be heard on the issue of whether S.K-P. should be appointed counsel. CP at 149-52. After the Prosecutor was allowed to intervene, S.K-P. moved to transfer venue of her motion to appoint an attorney to another county. CP at 164-70. The trial court declined to transfer venue. CP at 197-98.

The hearing on S.K-P.’s motion for an attorney took place on October 12, 2015. CP at 327. S.K-P. was not present for the hearing. CP at 327. The Department, Pierce County, and the father of S.K-P. all opposed appointment of counsel for the child, but the mother supported the motion. CP at 140-41, 199-216, 217-32, 233-35. The GAL was neutral. CP 142-43.

Following the hearing, the trial court declined to appoint an attorney for S.K-P., and an order was issued on October 26, 2015.

CP at 327-30. S.K-P. appealed, arguing that automatic appointment of counsel is required for every child in every dependency proceeding.

After considering the briefing of the parties and amici, a panel of the Washington State Court of Appeals, Division II, unanimously held that Washington's statutory scheme for appointing counsel for children in dependency proceedings is constitutionally adequate under both the Fourteenth Amendment and article I, section 3 of the Washington State Constitution.

S.K-P. now seeks review by this Court.

VI. DISCRETIONARY REVIEW SHOULD BE DENIED

This Court has previously determined that the discretionary nature of the statute governing appointment of counsel for children in dependency and termination proceedings meets federal constitutional due process requirements. The due process clause of the Washington State Constitution does not provide additional protections. S.K-P. has failed to establish a basis for this Court to grant review under RAP 13.4(b).

A. This Appeal is Moot Because S.K-P.'s Dependency Case has Been Dismissed

The dependency of S.K-P. has been dismissed. She can no longer be appointed an attorney. As a general rule, the Court does not consider cases that are moot or present only abstract questions. *State v. Hunley*,

175 Wn.2d 901, 907, 287 P.3d 584 (2012) (citation omitted); *see also Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). “A case is technically moot if the court can no longer provide effective relief.” *Hunley*, 175 Wn.2d at 907 (citation omitted).

Even if a case is moot, the Court can exercise discretion to decide an appeal if the question presented is one of continuing and substantial public interest. *Sorenson*, 80 Wn.2d at 558. In making that determination, the Court considers three factors: “(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.” *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015) (brackets and citation omitted). This substantial public interest exception is not used in cases that are limited by their specific facts. *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). These factors are discussed in turn.

1. The question of whether S.K-P. should be appointed an attorney presents a more private than public issue

S.K-P. was an eight-year-old dependent child placed with her mother when she requested an attorney. Her dependency was in a unique procedural posture at the time of S.K-P.’s request for counsel, in that her father had not been found by the trial court to be unfit; no order of

dependency had been entered as to him. In fact, the parents were working toward resolving parenting plan issues through the family court system. Ultimately the parents agreed on a parenting plan that the family court entered on March 31, 2016, the date of dismissal.²

This Court has recognized that the public interest in “the care of children and the workings of the foster care system” may be sufficient to warrant review by the Court even if a case is moot. *In re Dependency of A.K.*, 162 Wn.2d 632, 643-44, 174 P.3d 11 (2007). However, this case is distinguishable. S.K-P. resided with a parent who had rehabilitated her deficiencies to the point of successful reunification. Her dependency was to be dismissed once S.K-P. had been in the home of her mother for six months and a parenting plan was entered. No dependency order was entered against S.K-P.’s father. S.K-P. was not a child in the foster care system.

The basis of S.K-P.’s request for counsel was to address her desire to remain with her mother, maintain contact with her half siblings who were not the subject of dependency proceedings, and advocate for her preferred visit schedule with her father. These are all private interests

² It is interesting to note that the father’s joinder in the mother’s petition for the parenting plan was signed on October 27, 2015, and filed with the family court on November 4, 2015, just days after the trial court denied S.K-P.’s request for counsel.

appropriately addressed by the family court and were in fact addressed by the family court in the parenting plan action for S.K-P.

Even where it appears that there may be a public issue, if the issue is actually private in nature, then the public interest exception should not apply. *Hart*, 111 Wn.2d at 450-51. In *Hart*, the Court was asked to consider the Department's denial of certification to an emergency health provider. *Id.* The provider argued that the denial of certification violated her right to due process. *Id.* at 451. While the case involved interpretation of statutes and regulations, and potential issues of constitutional magnitude, ultimately it turned on a fact specific inquiry that the Court determined would be unlikely to provide future guidance. *Id.* at 451-52.

This case is similarly situated. S.K-P. was using her position as a dependent child to seek appointment of counsel to advocate for her in an essentially private dispute—the issue of custody and placement in a family law matter. *See e.g. King v. King*, 162 Wn.2d 378, 397-98, 174 P.3d 659 (2007) (no right to counsel in dissolution proceedings). This case presents a private question and is not appropriate for continued review, now that the case is moot.

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2. There is no need for an additional authoritative determination, as current guidance through statute and case law is clear

RCW 13.34.100 governs the appointment of GALs and attorneys in dependency and termination cases. The statute requires appointment of a GAL for every child who is the subject of action under RCW Title 13, unless the court finds for good cause the appointment unnecessary. RCW 13.34.100(1). A GAL, either through an attorney or as authorized by the court, has the right to present evidence, examine and cross examine witnesses, and be present at all hearings. RCW 13.34.100(5). The statute requires appointment of an attorney for a dependent child who has continued to be dependent for six months or longer after parental rights have been terminated. RCW 13.34.100(6)(a). The statute also grants the court discretion to appoint an attorney to represent a child's position on its own initiative or as requested by the child, the child's parents, the GAL, or the Department. RCW 13.34.100(7)(a).

The Court upheld discretionary appointment of counsel for children in dependency cases as constitutional for children in dependency and termination cases in *In re Dependency of MSR*, 174 Wn.2d 1, 22-23, 271 P.3d 234 (2012). While *In re Dependency of MSR* arose in a termination of parental rights trial, the plain language of *In re Dependency of MSR* shows that the Court analyzed the needs of children in both

dependency and termination proceedings. *In re Dependency of MSR*, 174 Wn.2d at 11-22. In fact, the Court uses the phrase, “dependency or termination proceeding” repeatedly in analyzing children’s rights of and interest in court appointed counsel. *Id.*

The specific holding of the *In re Dependency of MSR* decision states:

We hold the due process right of children who are subjects of dependency and 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.

Id. at 22.

There is no need for the Court to speak again on this issue. The Court has already spoken and provided clear guidance that must be followed by all lower courts. The Washington State Court of Appeals, Division II, appropriately followed that guidance in this case.

B. Not All Juveniles are Entitled to Automatically-Appointed Legal Counsel Under the Federal Due Process Clause Just Because Some Children Have Liberty Interests at Stake in Their Dependencies

Petitioner’s overarching argument is that the fundamental nature of children’s liberty interest at stake in a dependency proceeding gives rise to

the need for constitutionally adequate procedures, including appointment of counsel.

The Department agrees that children sometimes have liberty interests at stake in dependency proceedings. However, S.K-P. has not shown that her physical liberty interests (or any liberty interest) have been threatened in her dependency proceedings, or that the liberty interest question is properly before this Court. She has not shown that this case is distinguishable from *Lassiter* and *In re Dependency of MSR*. Nor has she shown that the procedural safeguards already in place are constitutionally inadequate to protect the due process rights of children. Without proving these elements, Petitioner's argument fails.³

1. A right to counsel exists under the Fourteenth Amendment only where a person's physical liberty is in jeopardy

In *Lassiter*, the United States Supreme Court found that a presumptive right to appointed counsel "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *see also King v. King*, 162 Wn.2d at 393 ("Under federal law, the right to counsel attaches only where physical liberty is at

³ Doubtless, there are cases where dependencies do threaten a juvenile's liberty interests. *See In re Dependency of MSR*, 174 Wn.2d at 16 ("the child in a dependency or termination proceeding may well face the loss of a physical liberty interest"). This is not such a case.

stake, unless a different result is necessary under the balancing test set out in *Mathews v. Eldridge*.”). Petitioner confuses the broader category of “liberty interests” with the smaller subset of “physical liberty interests.” Only the latter justifies the automatic appointment of counsel; parties do not have a presumptive right to counsel under federal law for other kinds of liberty interests. *Lassiter*, 452 U.S. at 26-27.

Moreover, juveniles are not generally entitled to the same degree of physical liberty as adults in the first place: “[J]uveniles, 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)). Even when a proceeding contemplates moving a child into or out of custody, that is not a direct threat to the child’s physical liberty interest; the child will be in custody regardless. It is rarer for a juvenile’s physical liberty interests to be at stake in a proceeding, and therefore, rarer for a juvenile to need appointed counsel.

Petitioner below listed a host of interests, which she characterizes as “liberty interests,” that allegedly are possessed by juveniles: family integrity, access to and continuity of education, freedom of speech,

freedom of religion and culture, privacy, healthcare, and speedy permanency decisions. Petitioner does not argue that any of these interests are physical liberty interests, nor has she demonstrated that any of these interests provide a basis for this Court to appoint counsel.

C. The Due Process Clause of Article I, Section 3 of the Washington State Constitution Does Not Mandate Appointment of Counsel for Every Child in Every Dependency Proceeding

“Washington’s due process clause does not afford broader due process protection than the Fourteenth Amendment.” *In re Personal Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). S.K-P. nevertheless asks for an expansion of the state due process clause in this case. Significantly, this Court has rejected such expansion regarding right to counsel claims in civil cases. *See King v. King*, 162 Wn.2d at 397-98 (no right to appointed counsel for parent in dissolution proceeding); *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 714, 257 P.3d 570 (2011) (no right to appointed counsel for youth at initial truancy hearing). 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) (citation omitted). Such restraint should be applied here.

1. The case-by-case appointment of counsel provided by RCW 13.34.100(7) is constitutionally sufficient to protect the interest of juveniles in dependency proceedings

There is neither a universal right to counsel for every child in every dependency proceeding, nor a basis for appointing counsel for S.K-P. under the facts of this case. RCW 13.34.100(7) and Juvenile Court Rule 9.2(c) give trial judges the discretion to decide on a case-by-case basis whether to appoint counsel for children who are subject to dependency and termination proceedings. In *In re Dependency of MSR*, 174 Wn.2d at 5, 22-23, this Court held that the Fourteenth Amendment due process rights of children in dependency and termination proceeding are adequately protected by former RCW 13.34.100(6).⁴ The Court also held that the analysis of whether due process requires court-appointed counsel should be determined on a case-by-case basis by applying the considerations identified in *Mathews v. Eldridge*. *In re Dependency of MSR*, 174 Wn.2d at 21-22.

Similarly, in *Lassiter*, the United States Supreme Court held that case-by-case appointed counsel was enough to protect an indigent parent's federal due process rights in a termination proceeding. *Lassiter*, 452 U.S. at 31-32.

⁴ Former RCW 13.34.100(6) was recodified as RCW 13.34.100(7) in a 2014 amendment. Laws of 2014, ch. 108, § 2.

Petitioner argues that *In re Dependency of MSR and Lassiter* are distinguishable because termination proceedings present less of a threat to a juvenile’s liberty interest than dependency proceedings. However, Petitioner concedes that terminations are “very serious.” Mot. for Discretionary Review at 12. Petitioner’s concession is correct—if anything, terminations are more serious than dependencies, and more likely to threaten the liberty interests of a child.

Terminations deprive children of their liberty interests with much more finality and surety than a dependency proceeding. In a dependency, a child’s loss of contact with her family is presumptively temporary; children are typically provided visitation with their parents throughout the dependency, and are often placed back in the same home as their parent, as was the case here with S.K-P. In contrast, after a termination, a child will presumptively never see her family again. Thus, in that respect, terminations constitute a more intense and immediate threat to a juvenile’s liberty interests and therefore, the rationale behind *In re Dependency of MSR and Lassiter* properly applies in the dependency context as well.

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2. The current procedural safeguards adequately protect juveniles' interest in dependencies, rendering the appointment of counsel unnecessary in the substantial majority of cases

Procedural safeguards can render appointed counsel unnecessary, even where there is a physical liberty interest at stake and counsel would otherwise be required under *Lassiter*. In *Turner v. Rogers*, 564 U.S. 431, 443-49, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011), the United States Supreme Court decided that a father facing civil contempt charges for failure to comply with a child support order does not have a due process right to counsel at his hearing, even though the charge carries a possible twelve-month sentence, if the State has in place “substitute procedural safeguards” that adequately protect the unrepresented defendant. *Id.* (quoting *Mathews*, 424 U.S. at 335). In doing so, the United States Supreme Court further qualified the physical liberty interest requirement for presumed appointed counsel established in *Lassiter*.

Furthermore, juveniles are generally entitled to fewer due process rights than adults because “the State has ‘a parens patriae interest in preserving and promoting [their] welfare.’” *Schall*, 467 U.S. at 263 (citation omitted). Because juveniles do not have the capacity to look out for their own interests, “the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s ‘parens patriae interest[.]’”

Schall, 467 U.S. at 265 (citation omitted). Juveniles—unlike adults—are presumed not to have the capacity to take care of themselves. *Id.* When making important life decisions, juveniles need the protective guidance of their parents or, if parental control falters, the State. *Id.* It is not that the liberty interests of juveniles are fewer or less important than those of adults; the difference is that the liberty interests of juveniles are looked after by the State while the liberty interests of adults are not.

The rights of juveniles are well-protected in dependency proceedings by four layers of protection. First, the State is obligated to advocate for the juvenile’s best interests and to provide services to both the juvenile and her family as required. RCW 13.34.025; RCW 74.14A.020(3) (the Department is charged with “[e]nsuring that the safety and best interests of the child are the paramount considerations when making placement and service delivery decisions”).

Second, the court must appoint a GAL to represent every dependency child, unless, for good cause, a judge concludes it is not necessary (which almost never happens). RCW 13.34.100(1). The GAL is required to advocate for the child’s interests and is required to inform the court of any “views or positions expressed by the child on issues pending before the court” and to “represent and be an advocate for the best interests of the child.” RCW 13.34.105(1)(b), (f).

Third, the parents, through their appointed counsel, are necessary parties to the dependency. Though some dependency parents are ill-equipped to fight for their child's best interest, that is not always the case. Parents may sometimes advocate for a particular relative placement or placement at home when it is appropriate. In this case, for instance, the Court of Appeals Commissioner observed: "There is no indication that the mother is not capable of advocating for S.K-P." Ruling Granting Review and Accelerating Review at 11. In these circumstances, the child typically has at least three advocates in the trial court: the State, the GAL, and at least one parent. They may not agree, but they all presumptively look out for the child's best interest.

Fourth and most importantly, the trial court itself is charged with looking out for the child's best interest: "The paramount consideration for the court shall be the health, welfare, and safety of the child." RCW 13.34.065(4). To this end, judges can—and frequently do—appoint counsel to juveniles. RCW 13.34.100(7). Any caregiver can ask that counsel be appointed, or the court can do it sua sponte. RCW 13.34.100(7)(b)(i)(A). Furthermore, every child over the age of twelve must be annually informed of her right to request counsel. RCW 13.34.100(7)(b)(i)(B).

The present statutory system provides sufficient “procedural safeguards” to ensure that children’s liberty interests are properly protected.

VII. CONCLUSION

Petitioner fails to establish a basis for review under RAP 13.4(b). The dependency has been dismissed and this case is moot. She has not established any requisite physical liberty interest that could justify the mandatory appointment of counsel for every child in every dependency proceeding under either article I, section 3 of the Washington State Constitution or the Fourteenth Amendment to the United States Constitution. The Washington State Court of Appeals, Division II, correctly concluded that the Washington statutory scheme allowing for the appointment of counsel on a case-by-case basis through application of the *Mathews v. Eldridge* factors sufficiently protects children’s due process rights in dependency proceedings. This Court should deny S.K-P.’s Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 9th day of October, 2017.

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DECLARATION OF SERVICE

I, BETHANY KENSTOWICZ, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On October 9, 2017, I caused a true and correct copy of the Answer to Motion for Discretionary Review to be filed electronically with the Washington State Supreme Court, and to be served via the Court's online filing system as indicated below:

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SIGNED in Tacoma, Washington, this 9th day of October, 2017.



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