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Supreme Court No. 94970-1

Court of Appeals No. 48299-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of S.K.-P., a Minor Child,
Appellant,

PETITION FOR REVIEW

COLUMBIA LEGAL SERVICES
Attorneys for Appellant

Candelaria Murillo, WSBA #36982
7103 W. Clearwater Ave., Suite C
Kennewick, WA 99336
Telephone: (509) 374-9855
Candelaria.Murillo@columbialegal.org

Sujatha Jagadeesh Branch, WSBA #51827
101 Yesler Way, Suite 300
Seattle, WA 98104
Telephone: (206) 287-9665
Sujatha.Branch@columbialegal.org

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I. INTRODUCTION

S.K.-P. is a little girl who filed this appeal requesting appointment of counsel because she wanted to have a voice in decisions that the state made about her life after it removed her from her mother and put her in foster care. She requests universal appointment of counsel for children whom the state places in dependency due to allegations of parental abuse or neglect. Without counsel, children in dependencies are left “vulnerable[,] ... powerless and voiceless” in the proceedings that affect every aspect of their lives. *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005).

This case raises issues of first impression: specifically, whether a child in a dependency proceeding has a universal constitutional right to appointed counsel under the due process clauses of the Washington State and federal constitutions. These constitutional issues merit review under RAP 13.4(b)(3).

In addition, this case raises issues of substantial public interest, as evidenced by the national trend toward appointment of counsel for children in dependency, the adoption of a resolution by the Washington State Bar Association, and support of this case by amici curiae. Thirty-two states and the District of Columbia provide children a categorical right to counsel in dependency proceedings. The Washington State Bar

Association adopted a resolution in favor of universal appointment of counsel to children in dependency proceedings. The five amici curiae briefs filed in the Court of Appeals all supported a universal right to counsel for children in dependency proceedings. The diverse amici curiae included local and national civil rights organizations, foster parent associations, public defenders, scholars, and others. Review is warranted under RAP 13.4(b)(4).

The Court of Appeals wrongly decided a case involving a significant question of law under the Washington and federal constitutions that addresses issues of substantial public interest. This Court should accept review under RAP 13.4(b)(3) and (4).

II. IDENTITY OF PETITIONER

Petitioner, S.K.-P., is a child who was subject to a dependency in 2014 and was denied appointment of counsel.

III. COURT OF APPEALS' DECISION

The Court of Appeals affirmed the dependency court's denial of S.K.-P.'s request for appointment of counsel, holding that children do not have a universal constitutional right to counsel in dependency proceedings and that "a case-by-case application of the *Mathews* [*v. Eldridge*, 424 U.S. 19,

96 S. Ct. 893, 47 L. Ed. 18 (1976)¹] factors sufficiently protects children’s due process rights.” *In the Matter of the Dependency of S.K.-P.*, Published Opinion, No. 48299-1-II (WA Ct. App., Div. II, August 8, 2017) attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals’ decision holding that children have no universal right to counsel in dependency proceedings raises a significant question of law under the Washington State Constitution, meriting review under RAP 13.4(b)(3).
2. Whether the Court of Appeals’ decision declining to apply a contextual *Mathews v. Eldridge supra* analysis to require universal appointment of counsel in dependency proceedings raises a significant question of law under the United States Constitution, meriting review under RAP 13.4(b)(3).
3. Whether the universal right to counsel in dependency proceedings involves issues of substantial public interest that should be determined by this Court, meriting review under RAP 13.4(b)(4).

¹ The three-part test in *Mathews* weighs: (1) the private interest at stake; (2) the risk of error involved under the current procedures and the probable benefits of additional or substitute procedural protections; and, (3) the government’s interest in the proceeding, including fiscal and administrative burdens. 424 U.S. at 335.

V. STATEMENT OF THE CASE

In 2014, when S.K.-P. was seven years old, Appellee, Department of Social and Health Services (Department), brought her into state custody and filed a dependency petition. Clerk's Papers (CP) 1-6. By doing so, the Department commenced a complex legal proceeding. *See* Appendix A at 3-4 (Court of Appeal's overview of a dependency proceeding: summarizing the multiple hearings where the juvenile court determines, among other things, a child's placement, family visitation, education, and services, including mental health). As a result, S.K.-P.'s life was changed and controlled by the state: she was separated from her mother, her half-siblings, and other relatives; required to visit with her estranged father; forced to change schools; and compelled to participate in mental health counseling without having the opportunity to weigh in about its effectiveness. CP 21, 25-29, 61-62, 68, 83, 116-18. Both the Department and the Guardian ad Litem (GAL) observed that S.K.-P. was "reluctant" to visit with her father and presented "elevated anxiety," "behavioral outbursts," and "additional anxiety" regarding her visits with him. CP 68, 83. Despite clear signals that S.K.-P. was distressed by the visitation, and despite S.K.-P.'s ongoing mental health therapy, neither the Department nor the GAL consulted with her therapist about visitation. CP 20, 83, 67.

In 2015, an attorney appeared in dependency court on behalf of S.K.-P

for the limited purpose of moving for appointment of counsel. CP 115-39. S.K.-P., through pro bono counsel, expressed that she felt powerless and voiceless, submitting a declaration to the court that an attorney “will help me...and help tell the judge what I want” and that one of the things she wanted the most was to spend more time with her brother and sister. CP 138.

The dependency court held a hearing on S.K.-P.’s request for counsel. The Department opposed S.K.-P.’s request. CP 199. The volunteer GAL remained neutral. CP 142. Respondent Pierce County was allowed to intervene, arguing that “[i]f an attorney is appointed, the funding for that attorney ultimately comes out of the budget of the juvenile court, and there is not a budget for appointed attorneys in dependency matters.” Report of Proceedings (RP) at 9 (Sept. 17, 2015). During oral argument, S.K.-P.’s mother shared her concerns about S.K.-P.’s visitation with her father. RP at 22-23 (Oct. 12, 2015).

The dependency court denied S.K.-P.’s request for counsel. CP 327-30. Applying an incorrect legal standard, the court found that S.K.-P.’s situation did not meet the “extreme circumstances that would necessitate appointment of counsel.” CP 329. The dependency court’s “extreme circumstances” standard has no basis in *Mathews*, 424 U.S. 319.

In 2016, S.K.-P. petitioned for and was granted discretionary review

by the Court of Appeals, Division II. *See In the Matter of the Dependency of S.K.-P.*, Ruling Granting Review and Accelerating Review, No. 48299-1-II (WA Ct. App., Div. II, March 31, 2016), attached as Appendix B.

The same day the Court of Appeals granted discretionary review—and two years after S.K.-P. was placed in dependency—she was returned to the custody of her mother and the dependency was dismissed. Appendix A at 2.

Despite the dismissal of the dependency, the Court of Appeals agreed that review was still warranted because the case involved matters of substantial public interest. *Id.* The Court of Appeals undertook to determine “whether [the Washington]... state constitution mandates appointment of counsel” and “whether the *Mathews* test that *M.S.R.* applied to juvenile counsel requests in terminations is the test that juvenile courts should use when evaluating a *dependent* juvenile’s request for counsel.” *In the Matter of the Dependency of S.K.-P.*, Ruling Denying Court-Initiated Motion to Dismiss, No. 48299-1-II (WA Ct. App., Div. II, May 25, 2016), attached as Appendix C.

The Court of Appeals affirmed the decision of the dependency court. It found that although all children have a fundamental liberty interest at stake in dependency proceedings, not all children would benefit from having counsel in these proceedings. Appendix A at 24-28. The Court of

Appeals concluded that “a case-by-case application of the *Mathews* factors is sufficient to protect children’s procedural due process rights.” Appendix A at 24-28.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of this case concerning children’s universal constitutional right to counsel in dependency proceedings because it raises state and federal constitutional questions and is an issue of substantial public interest likely to affect thousands of children in Washington State. As demonstrated below, review is appropriate and should be granted under RAP 13.4(b)(3) and (4).

A. THE COURT OF APPEALS’ DECISION INVOLVES CHILDREN’S UNIVERSAL RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS, RAISING A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON STATE CONSTITUTION (RAP 13.4(b)(3))

Dependency proceedings affect every aspect of children’s lives, yet without counsel, children are the only parties with no meaningful voice in the proceedings. Children need counsel in dependency proceedings because they are at risk of losing liberty interests that should be protected by the greatest due process protections our constitution affords. The Court of Appeals acknowledged that children in dependency proceedings have a liberty interest at stake, but denied that all children in dependency proceedings have the right to counsel. Appendix A at 24-25, 28.

S.K.-P. sought to establish a categorical right to counsel for children in dependency proceedings under the due process provision of the Washington State Constitution, article 1, section 3, stating “No person shall be deprived of life, liberty, or property, without due process of law.” This case poses a significant yet unanswered constitutional question regarding a proceeding where children are at risk of losing a “liberty” interest. *See Braam v. State*, holding that “foster children possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect... [and] foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety.” 150 Wn.2d 689, 698-700, 81 P.3d 851 (2003). Five years ago, in *M.S.R.*, this court re-affirmed its holding in *Braam*, by recognizing that the court has held that

“foster children have a substantive due process right ‘to be free from unreasonable risks of harm ... and a right to reasonable safety.’ *Braam*, 150 Wn.2d at 699. [And that] [f]oster children have the right to basic nurturing, including a safe, stable, and permanent home. RCW 13.34.020.”

174 Wn.2d 1, 17-18, 271 P. 3d 234 (2012), *as corrected* (May 8, 2012).²

This Court has long recognized that the right to counsel attaches to cases in which “a fundamental liberty interest ... is at risk”. *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P. 2d 1252 (1995). It is

² For a more expansive list of a child’s liberty interest under the Washington State Constitution, see *In re Dependency of S.K.-P.*, Brief of Appellant, at 9-13.

under this constitutional protection that parents in dependency proceedings have a right to counsel. The right was first articulated in *In re the Welfare of Luscier* when the Washington Supreme Court held that due process required appointment of counsel for parents in termination of parental rights cases. 84 Wn.2d 135, 138, 524 P. 2d 906 (1974) (“[T]he parent’s right to counsel in this matter is mandated by the constitutional guaranties of due process...”). The Court then clarified that the parents hold the same right in dependency proceedings. *In re the Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P. 2d 841 (1975).

The Court of Appeals acknowledged that parents in dependency proceedings have a universal right to counsel given their liberty interests at stake. Appendix A at 14-15. However, it denied the relevance of *Luscier* and *Myricks* to children in dependency proceedings, concluding that a child’s liberty interests are “notably different.” Appendix A at 18. Although the differences are notable, they should be no less protected by due process because, as *M.S.R.* held, a “child’s liberty interest in a dependency proceeding is very different from, *but at least as great as*, the parent’s.” *In re Dependency of M.S.R.*, 174 Wn.2d at 17-18 (emphasis added). But the fact is that children have a greater stake in dependency

proceedings than parents do, and risk losing more.³ The Court of Appeals erred by disregarding this precedent and undervaluing a child's liberty interests.

The task before this Court is to determine whether this case raises a significant question of law under the Washington state constitution, meriting review under RAP 13.4(b)(3). This case addresses the due process protection afforded to children in dependency proceedings given their fundamental liberty interests at stake. This Court thus bears the responsibility to define the procedural due process necessary to protect children's liberty interests. *See, e.g., McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (judiciary has primary responsibility for interpreting the constitution). The exercise of such a responsibility merits review under RAP 13.4(b)(3).

B. THE COURT OF APPEALS' DECISION INVOLVES CHILDREN'S UNIVERSAL RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS, RAISING A SIGNIFICANT QUESTION OF LAW UNDER THE UNITED STATES CONSTITUTION (RAP 13.4(b)(3))

Whether children in dependency proceedings have a universal

³ For example, "a child, unlike a parent...is at risk of being returned by the State to an abusive or neglectful home." *M.S.R.*, 174 Wn.2d at 17. And "[i]t is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *Id.* at 16 (citations omitted). Additionally, "the parent is at risk of losing the parent child relationship, but the child is at risk of not only losing a parent but also relationships with sibling(s), grandparents, aunts, uncles, and other extended family." *Id.* at 15-16 (relying on *In re Custody of Shields*, 157 Wn.2d 126, 151-52, 136 P.3d 117 (2006) (Bridge, J., concurring)).

right to counsel is an issue of first impression under the federal constitution, Fourteenth Amendment, due process clause. As the Court of Appeals acknowledges, *Mathews v. Eldridge*⁴ establishes the standard for making decisions about whether counsel is constitutionally mandated in a civil proceeding. Appendix A at 22. The three-part test in *Mathews* requires the weighing of: (1) the private interest at stake; (2) the risk of error involved under the current procedures and the probable benefits of additional or substitute procedural protections; and (3) the government's interest in the proceeding, including fiscal and administrative burdens. 424 U.S. at 335. The Court of Appeals acknowledges that *Mathews* is the proper analysis. Appendix A at 24. However, it finds that a case-by-case application of the *Mathews* factors is "sufficient." Appendix A at 28.

S.K.-P. contends that this Court should apply the *Mathews* factors *contextually*, as related to the collective experience of children in dependencies, rather than *individually*, as related to the individual circumstances of the child before the court. In his *Lassiter* dissent, Justice Blackmun asserted that the flexibility of due process requires a "case-by-case consideration of different decision-making *contexts*, not of different

⁴ 424 U.S. 319. Furthermore, in *M.S.R.*, this Court applied the *Mathews* factors to children in termination proceedings, but recognized the limited nature of its holding when it amended its decision to specifically hold: "We recognize that this is an appeal of a termination order. Nothing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependency [sic] stages." 174 Wn.2d at 22, n.13.

litigants within a given context.” *Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C.*, 452 U. S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (emphasis in original).

The Court of Appeals declined to use a contextual analysis, finding that the situation of each child is “unique,” following *M.S.R.* However, in contrast with *M.S.R.*, this case addresses children in dependency proceedings, not termination proceedings, which are distinguishable. For example, a dependency proceeding more directly implicates the child’s fundamental liberty interests. While a termination is very serious, it is the dependency proceeding that initially transfers custody to the state and determines “the welfare of the child and his best interest.” *In re Welfare of Becker*, 87 Wn.2d 470, 476, 553 P.2d 1339 (1976). Termination proceedings are much more discrete and focused exclusively on parental fitness. Brief of Appellant, at 32. In contrast, the dependency system is a complicated civil process that involves every aspect of a child’s life. For example, courts determine the placement of the child, the child’s contact with family members, and the school the child will attend. RCW 13.34.130. The Court of Appeals erred in not weighing the importance of this distinction in its analysis.

A proper contextual analysis would find that the case-by-case approach is unworkable. As Justice Blackmun predicted, a case-by-case

approach creates an impossible standard. *See Lassiter*, 452 U.S. at 50 (Blackmun, J. dissenting). This Court, in *In re Marriage of King*, refused to require a case-by-case approach in family law actions, observing that “[the] approach would be unwieldy, time-consuming, and costly. The proceeding might itself require appointment of counsel...” 162 Wn.2d 378, 390 n.11, 174 P.3d 659 (2007). That very same scenario occurred here: S.K.-P. obtained a pro bono attorney to initiate a complicated legal process to ask for appointment of an attorney so she could have a voice in the decisions affecting every aspect of her life.

This Court recognized children’s limitations in representing themselves in court proceedings. In *DeYoung v. Providence Med. Ctr.*, this Court observed that by law, children lack capacity and “the experience, judgment, knowledge and resources to effectively assert their rights.” 136 Wn.2d 136, 146, 960 P.2d 919 (1998). It is thus not reasonable to expect a child to present his or her case (e.g., bringing motions, filing briefs, and presenting arguments) in a complex proceeding such as a dependency without the assistance of counsel. The Court of Appeals acknowledges that a child in a dependency proceeding is faced with these limitations and that counsel can help a child overcome them. Appendix A at 26-27. The Court of Appeals then concluded “that not all children will be able to equally benefit from appointed counsel.” *Id.* at 28. However, the

limitations articulated by *DeYoung* encompass all children, not just a select few.

Additionally, a case-by-case approach compels a child to remain at the mercy of adults to assert his or her constitutional rights. These adults are her technical, and sometimes real, adversaries in the proceeding.

A proper contextual analysis would also find that all children are similarly situated in the context of a dependency proceeding. All children in dependencies confront allegations of abuse and neglect by their parents in an adversarial proceeding that implicates their constitutionally protected liberty interests. The Court of Appeals acknowledged that parents cannot adequately mitigate the risk of harm to the child in a dependency proceeding; however, it undervalued S.K.-P.'s contextual arguments, supported by sound law. *See* Appendix A at 26. The decision to uphold the dependency court's case-by-case approach based on the individual circumstances of the child pits children against one another, requiring them to prove they are more traumatized than others to justify appointment of counsel; such a requirement unfairly diminishes the real struggles and humanity of each child.

The Court of Appeals also undervalued the added benefits of additional procedural protections that counsel for a child brings in dependency proceedings. As the *M.S.R.* court recognized, unlike GALs,

“lawyers maintain confidential communications, which are privileged in court, may provide legal advice on potentially complex and vital issues to the child, and are bound by ethical duties. Lawyers can assist the child and the court by explaining to the child the proceedings and the child's rights. Lawyers can facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders.”

174 Wn.2d at 21 (relying on 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 then the Court of Appeals dismissed the universal value of this authority by concluding that each child's ability to benefit from appointed counsel is different. Appendix A at 28. This Court of Appeals finding is also contrary to studies that have found that a child's attorney has the added benefit of expediting permanency of the child's placement, regardless of the individual circumstances of the child. Brief of Appellant, at 49 n.28 (citing Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, Chicago, IL: Chapin Hall Center for Children (2008)).

The Court of Appeals also undervalued the growing trend towards appointment of counsel. Recent developments include the fact that,

“[t]hirty-two states and the District of Columbia provide children a categorical right to court-appointed counsel in dependency proceedings. Additionally, the American Bar Association has promulgated a ‘Model Act Governing the

Representation of Children in Abuse, Neglect, and Dependency Proceedings,’ which recommends independent counsel to children in every child welfare case. Last year the Washington State Bar Association adopted a resolution supporting the same...[and] [i]n 2015, the Washington State Bar Association Board of Governors adopted a resolution in support of attorney representation for children in all dependency proceedings.”

Appendix A at 17 n.15.

Whether a contextual *Mathews* analysis is necessary raises a “significant question of law” under the Fourteenth Amendment of the U.S. Constitution, meriting review under RAP 13.4(b)(3).

C. THE COURT OF APPEALS’ DECISION ADDRESSES AN ISSUE OF SIGNIFICANT PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT (RAP 13.4(b)(4))

This case meets the three standards regarding whether a case involves a continuing and substantial public interest: “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” *In re Dependency of A.K.*, 162 Wn.2d 632, 643, 174 P.3d 11 (2007) (citations omitted).

First, the Court of Appeals recognized what this Court held in *A.K.*, that “[a]lthough the due process rights of juveniles are individual rights, the public has a great interest in the care of children and the workings of the foster care system.” 162 Wn.2d at 643-44 (citing *In re Interest of M.B.*, 101 Wn. App. 425, 433, 3 P.3d 780 (2000)). In other words, cases

involving questions of public concern transcend the facts of the individual case. As identified by the Court of Appeals, whether children in a dependency proceedings have a universal right to counsel under the state constitution and how the lower courts should apply the *Mathews* factors when making such a determination are “untethered from the particular facts of [the] dependency and, consequently, do not appear to be private.” Appendix C at 3-4. The Court of Appeals also found that “child welfare matters historically have been of public interest. *See generally State v. G.A.H.*, 133 Wn. App. 567, 573, 137 P. 3d 66 (2006) (placement of juvenile offender involved matter of public interest)...” Appendix C at 4.

The public nature of this issue is also evidenced by the numerous local and national amici curiae briefs filed in support of a categorical right to counsel of children in dependency proceedings. The Court of Appeals allowed sixteen amici curiae to file briefs,⁵ presenting a wide range of arguments in support of appointment of counsel for children in dependency proceedings. To highlight some examples: Legal Counsel for Youth & Children and TeamChild both lay out why the current case-by-

⁵ Center for Children and Youth Justice, Children’s Rights Inc., First Star Institute, Fred T. Korematsu Center for Law and Equality, Juvenile Law Center, Lawyers for Children, Legal Counsel for Youth and Children, Mockingbird Society, National Association of Counsel for Children, Northwest Justice Project, Professor Michael J. Dale of the Nova Southeastern University Law Center Children and Families Clinic, TeamChild, Washington Defender Association, Disability Rights Washington, American Civil Liberties Union of Washington, Foster Parent Association of Washington State. Appendix A at 2.

case system creates an unjust standard burdening vulnerable children (*Amici Curiae* Brief of Legal Counsel for Youth and Children and of TeamChild); the Washington Defender Association provides extensive analysis focused on a parent's inability to protect the interest of her children (*Amicus Curiae* Brief of Washington Defender Association); and multiple national organizations share numerous studies and growing state trends that have found that only counsel for children can truly protect a child's liberty interests (National *Amici Curiae* Brief in Support of S.K.-P.'s Right to Counsel).

Second, an authoritative determination of the universal right to counsel for children in dependency is sorely needed. As the Court of Appeals acknowledged, the questions presented in S.K.-P. are issues of first impression and thus "[t]here is no present guidance on this issue." Appendix C at 3. It held, in agreement with S.K.-P., that "*M.S.R.* addressed only the federal constitution...and earlier cases cited...do not conclusively resolve the issue." Appendix C at 3. And it also held that "a conclusive ruling as to whether a juvenile has a categorical right to counsel in a dependency and, if not, whether some 'different analysis' applies to evaluate a juvenile's request for counsel in a dependency will provide future guidance to the Department and dependency courts..." Appendix C at 4. These holdings are consistent with decisions from other

courts that do not address issues surrounding the universal right to counsel for children in dependencies, but do support the general notion that guidance is much needed in cases involving due process in matters of child welfare. *See e.g. In re the Dependency of A.K.*, 162 Wn.2d at 644 (a “determination of how the courts’ inherent power interacts with the statutory contempt scheme will provide useful guidance to judges.”).

There is also an urgent need for guidance since the lack of jurisprudence on this issue has led to inconsistent practices regarding appointment of counsel to children in dependencies. Some counties, including King, appoint attorneys for all children starting at age 12. King Co. LJuCR 2.4(a). Benton/Franklin County appoints attorneys for all children starting at age eight. Benton Co. LJuCR Rule 9.2(A)(1). Other counties never automatically appoint attorneys. As a result, children in one county are represented by counsel, while children in neighboring counties are not, despite there being no relevant difference between the circumstances of their dependency proceedings.

Third, the issues raised in this case are likely to recur. Washington courts have found there is a substantial likelihood that legal questions regarding the rights of children will recur. *See, e.g. A.K.*, 162 Wn.2d at 644 (use of contempt likely to recur); *In Re Silva*, 166 Wn.2d 133, 137, 206 P.3d 1240 (2009). Additionally, this Court has found that issues

regarding constitutional matters are also inherently more likely to recur. *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (cases dealing with constitutional or statutory interpretation issues are more “likely to arise again”). The issues in this case have a high chance of recurring because these issues involve the rights of children and implicate constitutional rights. The Court of Appeals held, in agreement with S.K.-P., that “the appointment of counsel issue is likely to recur,” and pointed to a previous unpublished decision *In re Dependency of J.A.*, No. 45134-4-11 slip op. (June 10, 2014) stating “this court has already addressed a juvenile’s request for counsel in a dependency...” once before. Appendix C at 4.

This case meets the criteria laid out in *A.K.* and represents an issue of substantial public interest pursuant to RAP 13.4(b)(4), meriting review.

VII. CONCLUSION

The Court of Appeals’ decision in this case raises a significant issue of first impression: whether children in dependency proceedings have a categorical right to counsel under the state and federal constitution due process clause. The decision also raises questions that are of substantial public interest that are likely to affect thousands of children who are or will be placed in dependency proceedings. S.K.-P. respectfully requests that this Court accept review pursuant to RAP 13.4(b)(3) and (4).

RESPECTFULLY SUBMITTED this 7th day of September, 2017.

COLUMBIA LEGAL SERVICES
Attorneys for Appellant

By: /s Candelaria Murillo
CANDELARIA MURILLO, WSBA #36982
7103 W. Clearwater Ave., Suite C
Kennewick, WA 99336
Telephone: (509) 374-9855
Candelaria.Murillo@columbialegal.org

SUJATHA JAGADEESH BRANCH, WSBA #51827
101 Yesler Way, Suite 300
Seattle, WA 98104
Telephone: (206) 287-9665
Sujatha.Branch@columbialegal.org

APPENDIX TO
PETITION FOR REVIEW

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APPENDIX A

August 8, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Dependency of
S.K-P.

No. 48299-1-II

PUBLISHED OPINION

WORSWICK, P.J. — SK-P asks us to determine (1) whether children in dependency proceedings have a categorical procedural due process right to court-appointed counsel under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, and (2) if not, whether a case-by-case application of the *Mathews*¹ balancing test is appropriate to evaluate a dependent child’s request for the appointment of counsel. We hold that children in dependency proceedings do not have a categorical due process right to court-appointed counsel and that juvenile courts should use the *Mathews* balancing test when evaluating a dependent juvenile’s request for court-appointed counsel. We affirm.

¹ *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 18 (1976) (applying a three-factor balancing test to a claim of a violation of procedural due process).

FACTS

I. PROCEDURAL FACTS

SK-P entered foster care when she was seven years old. During her dependency proceedings, SK-P requested legal representation, and Pierce County intervened for the limited purpose of opposing SK-P's request for the appointment of counsel based on Pierce County's financial interests. The juvenile court denied SK-P's request after applying the *Mathews* test. SK-P sought, and we granted, discretionary review.

The same day we granted review, the Department of Social and Health Services (the Department) dismissed SK-P's dependency. Although this appeal is moot due to the dependency's dismissal, it involves matters of continuing and substantial public interest. We agreed to review two issues: first, whether the Washington Constitution mandates the appointment of counsel for all children in dependency proceedings; and second, if children do not have a categorical right to court-appointed counsel in dependency proceedings, whether the juvenile court should apply the *Mathews* test when evaluating a dependent child's request for court-appointed counsel.² Ruling Den. Court-Initiated Mot. to Dismiss, *In re Dependency of S.K.-P.*, No. 48299-1-II, at 3 (Wash. Ct. App. May 25, 2016).

² We also allowed the following parties to submit briefing as amicus curiae: Center for Children and Youth Justice, Children's Rights Inc., First Star Institute, Fred T. Korematsu Center for Law and Equality, Juvenile Law Center, Lawyers for Children, Legal Counsel for Youth and Children, Mockingbird Society, National Association of Counsel for Children, Northwest Justice Project, Professor Michael J. Dale of the Nova Southeastern University Law Center Children and Families Clinic, TeamChild, Washington Defender Association, Disability Rights Washington, American Civil Liberties Union of Washington, Foster Parent Association of Washington State.

II. DEPENDENCY PROCEEDINGS GENERALLY

When the Department receives a report that a child is alleged to have been abused, neglected, or abandoned it is required to investigate. RCW 26.44.050. If the Department determines that the “child’s health, safety, and welfare will be seriously endangered if [he or she is] not taken into custody” and there is potential “imminent harm” to the child, the Department may take the child into protective custody under RCW 13.34.050. If the child is taken into protective custody, the Department then files a petition for dependency of the child. WAC 388-15-041. The juvenile court is required to hold a shelter care hearing within 72 hours to determine whether, under the Department’s petition, it is in the “best interests of the child” to return home or remain in state custody. RCW 13.34.065(1)(a).

At the initial shelter care hearing, the juvenile court determines the child’s placement and whether the child can be safely returned home in an in-home placement conditioned on certain services being provided to the child and parent or in an out-of-home placement with a suitable relative, guardian, or foster care provider. RCW 13.34.065(4). A child who has been removed from his or her home has a right to preferential placement with a relative or known suitable adult. RCW 13.34.130(5). The court also determines the nature of any contact the child may have with his or her parents and siblings under RCW 13.34.065(5)(a).

If a parent contests whether a child is “dependent,” the juvenile court must hold an evidentiary “fact-finding hearing” to determine whether a continued dependency is warranted. RCW 13.34.110. At the hearing, the State bears the burden of establishing by a preponderance

of the evidence that the child meets one of the statutory definitions of dependency.³ *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007).

If the court finds the child to be dependent, it must enter an order determining, among other things, placement of the child, visitation with parents and siblings, the school the child will attend, and a plan for services tailored to correct any identified parental deficiencies. RCW 13.34.130. Typically, the juvenile court also determines the needs of the child, the parents' ability to meet those needs, and what services can be provided to assist the parents in meeting the needs of the child. RCW 13.34.130(1).

A dependency proceeding includes ongoing review hearings to assess the status of the case and whether the needs of the child are being met, whether the parental deficiencies are being addressed, and what progress each parent has made or is required to make in order for the court to allow the child to safely return home. RCW 13.34.138(1). The review hearings occur until either the court orders that the child return home and dismisses the dependency, orders a guardianship for the child, enters an order terminating parental rights and the child is legally adopted, or the child ages out of the foster care system. RCW 13.34.138(1).

If the Department determines that termination of parental rights is appropriate, it files a petition seeking termination under a new cause number. RCW 13.34.132. Assuming the termination goes to trial, the Department must prove the parent is unfit such that the legal right of

³ A "dependent" child is defined as any child who (a) has been abandoned; (b) is abused or neglected by a person legally responsible for the care of the child; (c) has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances that constitute a danger of substantial damage to the child's psychological or physical development; or (d) is receiving extended foster care services. RCW 13.34.030(6).

a parent to the care, custody, and control of her child should be terminated. RCW 13.34.180(1), .190.

III. HISTORICAL RIGHT TO APPOINTED COUNSEL IN DEPENDENCY & TERMINATION PROCEEDINGS

Currently in Washington, children do not have a categorical due process right to court-appointed counsel in dependency or termination proceedings. Statutory law and court rules grant juvenile courts the discretion to decide whether to appoint counsel to a child during dependency proceedings. RCW 13.34.100(7); JuCR 9.2(c)(1).⁴ In 2010, the legislature specifically required that children 12 years and older subject to dependency proceedings be informed of their right to request counsel and that the children be asked every subsequent year whether they wish to exercise that right. RCW 13.34.100(7).⁵ Additionally, some counties routinely appoint counsel

⁴ JuCR 9.2(c) states,

Dependency and Termination Proceedings. The court shall provide a lawyer at public expense in a dependency or termination proceeding as follows:

(1) Upon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family. The ability to pay part of the cost of a lawyer shall not preclude assignment. A juvenile shall not be deprived of a lawyer because a parent, guardian, or custodian refuses to pay for a lawyer for the juvenile. If the court has appointed a guardian ad litem for the juvenile, the court may, but need not, appoint a lawyer for the juvenile.

⁵ RCW 13.34.100(7) states,

(c) Pursuant to this subsection, the department or supervising agency and the child's guardian ad litem shall each notify a child of his or her right to request an attorney and shall ask the child whether he or she wishes to have an attorney. The department or supervising agency and the child's guardian ad litem shall notify the child and make this inquiry immediately after:

- (i) The date of the child's twelfth birthday;
- (ii) Assignment of a case involving a child age twelve or older; or
- (iii) July 1, 2010, for a child who turned twelve years old before July 1, 2010.

(d) The department or supervising agency and the child's guardian ad litem shall repeat the notification and inquiry at least annually and upon the filing of any

for children in dependency proceedings.⁶ Moreover, all Washington juvenile courts must appoint counsel for every child whose parents' parental rights have been terminated for six months, regardless of the child's age. RCW 13.34.100(6).

In 2012, our Supreme Court addressed whether the Fourteenth Amendment compels the appointment of counsel to children in *termination* proceedings.⁷ *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012). The court recognized that children involved in termination proceedings⁸ have vital liberty interests at stake and may be constitutionally entitled to court-appointed counsel to protect those interests, but it held that whether a child is constitutionally entitled to court-appointed counsel must be decided on a case-by-case basis. *M.S.R.*, 174 Wn.2d at 5.

On the other hand, Washington has long recognized parents' fundamental liberty interests in the right to parent their children, which compels a constitutional due process right to court-appointed counsel for all parents in dependency and termination proceedings. *See In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974); *see also In re Welfare of Myricks*, 85

motion or petition affecting the child's placement, services, or familial relationships. Additionally, the court is to inquire whether the child wants counsel.

⁶ For example, King County appoints attorneys for all children starting at age 12. King County LJuCR 2.4(a). Benton/Franklin County appoints attorneys for all children starting at age 8. Benton County LJuCR 9.2(A)(1).

⁷ The court expressly declined to consider whether the Washington State Constitution compelled the appointment of counsel.

⁸ The *M.S.R.* opinion discussed dependency and termination proceedings throughout the opinion but included a footnote stating, "Nothing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependency stages." 174 Wn.2d at 22 n.13.

Wn.2d 252, 254, 533 P.2d 841 (1975). In *Luscier*, our Supreme Court held that both article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution required appointment of counsel for parents subject to termination of parental rights proceedings. 84 Wn.2d at 138.

The following year, in *Myricks*, 85 Wn.2d at 254-55, our Supreme Court extended the right to court-appointed counsel for parents in dependency proceedings on the same grounds. Two years later, in 1977, the legislature codified parents' right to counsel during dependency and termination proceedings. RCW 13.34.090. In 1981, the United States Supreme Court decided *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), which held that parents facing termination of their parental rights do *not* have a categorical right to the court-appointed counsel under the Fourteenth Amendment. Our Supreme Court has since recognized that *Lassiter* "overruled the federal constitutional component" of *Luscier* and *Myricks*. *In re Dependency of M.H.P.*, 184 Wn.2d 741, 759, 364 P.3d 94 (2015).

Although the federal constitutional underpinnings of *Luscier* and *Myricks* were abrogated by *Lassiter*, 452 U.S. at 31, our courts, without conducting a *Gunwall*⁹ analysis, have recognized their continued validity on state constitutional grounds.¹⁰ See *In re Dependency of G.G. Jr.*, 185 Wn. App. 813, 826 n.18, 344 P.3d 234, *review denied*, 184 Wn.2d 1009 (2015) (Stating, "Our

⁹ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹⁰ We note, however, that no Washington court has directly held that *Luscier* and *Myricks* remain good law. See *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 712, 257 P.3d 570 (2011) (noting that "it remains undetermined whether the *Lassiter* decision by the United States Supreme Court has eroded the constitutional underpinnings of this court's decision in *Luscier*," but nonetheless assuming its continued viability).

courts have recognized that ‘the full panoply of due process safeguards applies to deprivation hearings’ and that the right to counsel in parental termination proceedings derives from constitutional due process provisions. . . . *Lassiter* does not diminish the vitality of the due process based right to counsel in termination proceedings.”) (internal quotation marks omitted) (quoting *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005)); see also *In re Marriage of King*, 162 Wn.2d 378, 386, 174 P.3d 659 (2007) (citing *Myricks* to distinguish between the “fundamental parental liberty interest at stake in a termination or dependency proceeding” and the liberty interest at stake in a dissolution proceeding); see also *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (citing *Luscier* and *Myricks* as examples of “fundamental liberty interest” protected by due process); see also *M.H.P.*, 184 Wn.2d at 759; see also *In re Welfare of Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) (holding that the right to counsel in child deprivation proceedings finds its basis in state law). Given the consistency with which our courts have continued to affirmatively cite *Luscier* and *Myricks*, we assume their continued validity.

It is against this background that we consider SK-P’s claims.

ANALYSIS

SK-P argues that children in dependency proceedings have a categorical right to appointed counsel under the due process clauses of both the Washington and United States Constitutions. We disagree and hold that neither the Washington nor the United States Constitutions require juvenile courts to appoint counsel for children who are the subject of dependency proceedings.

SK-P, supported by amici, contends that the current dependency system is constitutionally inadequate because it does not guarantee court-appointed counsel to all children

in dependency proceedings.¹¹ Whether a statutory scheme is constitutional is a question of law that we review de novo. *M.S.R.*, 174 Wn.2d at 13. “We presume that statutes are constitutional, and the challenger bears the burden of showing otherwise.” *M.S.R.*, 174 Wn.2d at 13.

I. *GUNWALL*

In *Gunwall*, our Supreme Court responded to critiques that state appellate courts’ frequent reliance on individual rights provisions of state constitutions was leading to result-oriented decisions. *See also* Hugh D. Spitzer, *New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall is Dead—Long Live Gunwall!”*, 37 RUTGERS L. J. 1169 (2006). The *Gunwall* court explained, “The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.” *Gunwall*, 106 Wn.2d at 60. The court continued, “[S]tate courts should be sensitive to developments in federal law. Federal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive.” 106 Wn.2d at 60.

In *Gunwall*, the court articulated six nonexclusive neutral factors relevant in determining whether, in a given context, the Washington Constitution should be given an interpretation independent from that given the United States Constitution: (1) the textual language, (2)

¹¹ SK-P argues that she is not asking us to declare RCW 13.34.100 unconstitutional, referencing *In re Interest of T.M.*, 131 Haw. 419, 436 n.26, 319 P.3d 338 (2014), where the Supreme Court of Hawaii explained, “[O]ur decision does not render [state law], which allows courts the discretion to appoint counsel on a case-by-case basis, unconstitutional. Rather, our decision augments [state law] in recognition of the due process protection in the Hawai’i Constitution afforded to parents.” But the Department’s characterization of SK-P’s argument as a facial challenge to the statutory scheme is consistent with our Supreme Court’s approach to similar arguments. *See M.S.R.*, 174 Wn.2d at 12-13. Thus, we analyze this issue under constitutional principles.

differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. 106 Wn.2d at 58.

When presented with a claim that a provision of the Washington Constitution provides different protection than is provided under a provision of the United States Constitution, we first determine whether the state provision should be given an independent interpretation from the federal provision by analyzing the six nonexclusive, neutral *Gunwall* factors. *Madison v. State*, 161 Wn.2d 85, 93, 163 P.3d 757 (2007). If we determine that an independent analysis is warranted, we then analyze “whether the provision in question extends greater protections for the citizens of this state.” *Madison*, 161 Wn.2d at 93 (quoting *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)).

SK-P argues that we need not conduct a *Gunwall* analysis before engaging in a state constitutional analysis because there is no federal jurisprudence addressing a child’s right to counsel in the dependency context. She argues that a *Gunwall* analysis is reserved for situations where there is already federal jurisprudence on point forcing the question of whether the parallel Washington constitutional provision affords greater protection.

SK-P correctly notes that the United States Supreme Court has not addressed a child’s right to counsel in the dependency context. But Washington courts have never required that there be federal precedent precisely on point before engaging in a *Gunwall* analysis, and we decline to take such an approach for the first time here. *See King*, 162 Wn.2d at 392; *see also Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 710, 257 P.3d 570 (2011); *see also Spitzer*, *supra* at 1170 (“[*Gunwall*] has proven to be a useful step-by-step process for briefing and analyzing any state constitutional provision, regardless of whether that provision has a federal analog.”). Moreover, when properly and thoroughly applied, a *Gunwall* analysis assists courts in viewing

an issue from all angles, taking into consideration related federal jurisprudence and our state's statutory, common, and constitutional law. "[T]he *Gunwall* factors parallel inquiries made when interpreting a state constitutional provision to determine the extent of the protection it provides in a particular context." *Madison*, 161 Wn.2d at 95-96.

Because the parties have adequately briefed the *Gunwall* factors, we consider whether we should analyze article I, section 3 independently from the Fourteenth Amendment in this context. See *Malyon v. Pierce County*, 131 Wn.2d 779, 791, 935 P.2d 1272 (1997). We hold that an independent state constitutional analysis is appropriate here.

A. *Factors 1 & 2: Text of the Parallel Provisions*

We generally examine the first two *Gunwall* factors, the textual language and any differences in text, together because they are closely related. *State v. Jorgenson*, 179 Wn.2d 145, 152-53, 312 P.3d 960 (2013). The Washington Constitution's due process clause provides, "No person shall be deprived of life, liberty, or property, without due process of law." WASH. CONST. art. I, § 3. The parallel provision in the federal constitution provides in pertinent part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Because there is no significant difference between the language used in the parallel provisions of the state and federal due process clauses, these factors do not support an independent state constitutional analysis.¹² *State v. Foster*, 135 Wn.2d 441, 459, 957 P.2d 712 (1998).

¹² SK-P's argument that despite the identical language, our state constitution should be interpreted independently unless historical evidence shows the framers intended otherwise, is based on a dissent from *State v. Ortiz*, 119 Wn.2d 294, 315-19, 831 P.2d 1060 (1992) (Johnson, J., dissenting), which is unpersuasive.

B. *Factor 3: State Constitutional History*

The “third *Gunwall* factor directs the court to determine whether state constitutional history and common law reflect an intention to confer greater protection from the state government than has been afforded by the federal constitution.” *Foster*, 135 Wn.2d at 459-60.

SK-P argues that protecting individual rights lies at the heart of our state constitution and that it has historically provided greater protections for the welfare of children than the federal constitution. She contrasts the Washington Constitution’s two references to the care of children, in article IX, section 1 and article XIII, section 1, with the federal constitution’s silence on the welfare of children. Article IX, section 1 provides that it is the “paramount duty of the state to make ample provision for the education of all children residing within its borders.” Article XIII, section 1 requires the state to foster and support institutions for the benefit of youth with physical or developmental disabilities or mental illness and “such other institutions as the public good may require.” Although these provisions address children’s needs, they are unrelated to children’s due process rights.

Moreover, article I, section 3 was adopted without modification or debate. *Journal of the Washington State Constitutional Convention, 1889*, (Beverly Paulik Rosenow ed. 1962). At the time, the federal due process clause had a nearly 100-year history. As it pertains specifically to article I, section 3, there is little constitutional history supporting an independent state constitutional analysis.

Ultimately, this third factor does not weigh in favor of an independent state constitutional analysis.

C. *Factor 4: Preexisting State Law*

In applying factor four of the *Gunwall* criteria, we focus on the context in which the issue involving the state constitutional right is raised. *Foster*, 135 Wn.2d at 461. Here, we examine preexisting state law relevant to a child's right to court-appointed counsel in dependency proceedings.

Washington case law is unclear as to the meaning of "preexisting" for the purposes of this factor. Some courts have focused exclusively on state law that existed at the time the Washington Constitution was adopted. *See Malyon*, 131 Wn.2d at 797 (noting that the preexisting state law factor usually pertains to state law preexisting ratification). Other courts have considered the entire body of law in existence before the present controversy to see what kind of protection has historically been accorded in that context.

For example, in *State v. Johnson*, 128 Wn.2d 431, 443-46, 909 P.2d 293 (1996), our Supreme Court conducted a *Gunwall* analysis to determine whether article I, section 7 provided greater protection for privacy rights for items found in a vehicle than the Fourth Amendment. Applying factor four, the court looked to the Code of 1881, adopted before statehood, as well as Washington's statutory law existing at the time of the case to conclude that Washington's "long history of regulating travel in this state strongly supports independent state constitutional analysis." *Johnson*, 128 Wn.2d at 446. Indeed, in *Gunwall* itself, our Supreme Court traced the history of relevant law from territorial days to the present. 106 Wn.2d at 61-62. Therefore, we examine not only the law preceding the adoption of the Washington Constitution but also

examine the current law to fully assess Washington's approach to children's due process rights in dependency proceedings.¹³

Before the early 1800s, homeless or neglected children were housed in adult prisons because no alternatives existed. Mary Kay Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289 (1979). The social reform movement of the 19th century "responded by establishing refuge houses and reform schools" for children, and the courts severed parental ties and committed children to reform schools without legal process. Becker, *supra* at 289. In 1905 and 1909, the legislature created juvenile courts. Becker, *supra* at 290. In 1913, chapter 13.04 RCW became effective establishing a wide range of powers, duties, and procedural guidelines and giving courts the authority to intervene in cases where a child was found to be dependent. Becker, *supra* at 290.

Over a century ago in *State v. Rasch*, 24 Wash. 332, 335, 64 P. 531 (1901), Washington recognized, "It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent." More recently, in *In re Parentage of L.B.*, 155 Wn.2d 679, 712-13 n.29, 122 P.3d 161 (2005), our Supreme Court explained that when "adjudicating the 'best interests of the child,' we must . . . remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless."

Our Supreme Court recognized long ago that parents subject to dependency and termination proceedings have a fundamental liberty interest in the right to parent their children

¹³ Including post-ratification state law in our consideration of factor four alters our conclusion on this factor's impact. Exclusively relying on preratification law would likely result in this factor not supporting an independent state constitutional analysis.

and a constitutional right to court-appointed counsel when the State seeks to terminate that right. *Myricks*, 85 Wn.2d at 253-54; *Luscier*, 84 Wn.2d at 136-39. In contrast, the United States Supreme Court held that the federal constitution does not require court-appointed counsel in every parental termination proceeding. *Lassiter*, 452 U.S. at 31.

Moreover, under federal constitutional law, the right to court-appointed counsel attaches only where physical liberty is at stake, unless a different result is necessary under the balancing test set out in *Mathews*. On the other hand, the Washington Constitution extends the right to court-appointed counsel to cases in which “a fundamental liberty interest . . . is at risk.” *Grove*, 127 Wn.2d at 237.

Federal statutory law does not address the appointment of counsel for children in dependency proceedings, but Washington law has become increasingly protective of children’s due process rights, particularly in the dependency context. In its 2010 amendments to RCW 13.34.100, .105, and .215, the legislature specifically found that “inconsistent practices in and among counties in Washington . . . resulted in few children being notified of their right to request legal counsel.” LAWS OF 2010, ch. 180, § 1. The 2010 amendments require that both the State and the guardian ad litem (GAL)¹⁴ notify a child age 12 or older of the right to request appointed counsel and ask the child if she wants appointed counsel. RCW 13.34.100.

In 2014, the legislature again amended RCW 13.34.100, establishing a right to court-appointed counsel for dependent children of any age when both parents’ rights have been terminated and more than six months has passed. The amendments also permit juvenile courts to

¹⁴ A GAL is a person appointed by the juvenile court to represent the best interests of a child in court proceedings. RCW 13.34.030(11).

appoint counsel to children in *any* dependency action, either sua sponte or upon request of the parent, child, GAL, caregiver, or the Department. RCW 13.34.215(2) allows for children to petition for reinstatement of parental rights and be appointed counsel in such a proceeding. RCW 13.34.267(6) requires counsel be appointed for youth in extended foster care. RCW 13.34.020 requires that children’s rights take precedence, including their basic rights to nurturing, to physical and mental health, to a safe, stable and permanent home, and to speedy resolution of the proceeding.

Washington’s long history and tradition of protecting children in dependency proceedings lends support to our decision to conduct an independent state constitutional analysis. *See Gunwall*, 106 Wn.2d at 66.

D. *Factor 5: Structural Differences Between State and Federal Constitutions*

The fifth *Gunwall* factor requires us to analyze structural differences between the state and federal constitutions. 106 Wn.2d at 66. “Our consideration of this factor is always the same; that is that the United States Constitution is a grant of limited power to the federal government, while the state constitution imposes limitations on the otherwise plenary power of the state.” *Foster*, 135 Wn.2d at 458-59 (emphasis omitted). Consequently, the fifth *Gunwall* factor always supports an independent state constitutional analysis.

E. *Factor Six: Matters of Particular State Interest or Local Concern*

In considering factor six of the *Gunwall* criteria, we focus specifically on the context in which the issue involving the state constitutional right is raised. *Foster*, 135 Wn.2d at 461. Factor six requires us to determine whether the children’s right to court-appointed counsel in dependency proceedings is a matter of such singular state interest or local concern that our constitution should be interpreted independently of the federal constitution. *Foster*, 135 Wn.2d

at 461. The impact on children’s liberty interests in dependency proceedings depends on our state laws, and our state has a particularly strong interest—much stronger than any federal interest—in protecting children’s liberty and ultimately coming to the best decisions through dependency proceedings. Consequently, factor six weighs in favor of an independent state constitutional analysis.

F. *Other Considerations*

SK-P urges us to consider trends among the states and international law. She notes that the *Gunwall* factors are deliberately nonexclusive. Although we recognize the trend toward court-appointed counsel for children in dependency proceedings,¹⁵ such a consideration is not helpful in determining the difference between our state constitution and federal constitution.

Considering the *Gunwall* factors together, we hold that they weigh in favor of an independent state constitutional analysis. Although we conclude that article I, section 3 should be read independently from the Fourteenth Amendment in the dependency context, where that independence leads is a separate question.¹⁶ Because a thorough *Gunwall* analysis here reveals

¹⁵ Thirty-two states and the District of Columbia provide children a categorical right to court-appointed counsel in dependency proceedings. Additionally, the American Bar Association has promulgated a “Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings,” which recommends independent counsel to children in every child welfare case. Last year the Washington State Bar Association adopted a resolution supporting the same. In 2015, the Washington State Bar Association Board of Governors adopted a resolution in support of attorney representation for children in all dependency proceedings.

¹⁶ Courts’ application of *Gunwall* has evolved over the years. For example, the lead opinion in *State v. Gocken*, 127 Wn.2d 95, 102-05, 896 P.2d 1267 (1995), assumed that federal jurisprudence is the starting point and used *Gunwall* as a tool to determine *whether* the state constitution provides greater protection compelling “access” to a state constitutional analysis. However, later opinions moved away from the treatment of *Gunwall* as a high bar over which parties advocating state constitutional issues must overcome and toward using *Gunwall* as an interpretive tool to assure more thoughtful development of state constitutional jurisprudence.

that the state constitution should be interpreted independently from the federal constitution in this context, the next inquiry is ““what the state’s guarantee means and how it applies to the case at hand.”” *Malyon*, 131 Wn.2d at 798 n.30 (quoting *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 50 (1992)). Consequently, we next examine whether article I, section 3 compels appointed counsel for all children in dependency proceedings.

II. ARTICLE I, SECTION 3 DOES NOT COMPEL THE APPOINTMENT OF COUNSEL TO ALL CHILDREN IN DEPENDENCY PROCEEDINGS

SK-P argues that children have more liberty interests at stake in dependency proceedings than the involved parents, and therefore, because our Supreme Court has determined that parents are constitutionally entitled to court-appointed counsel, children must also have a constitutional right to court-appointed counsel. Because the liberty interests at stake for children in dependency proceedings are notably different from parents’ liberty interests, and because appropriate procedural safeguards otherwise exist to protect children’s liberty interests, we disagree.

Procedural due process prohibits the State from depriving an individual of protected liberty interests without appropriate procedural safeguards. *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704, 193 P.3d 103 (2008). Procedural due process “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Washington’s constitution extends the right to counsel to cases in which a “fundamental liberty interest . . . is at risk.” *Grove*, 127 Wn.2d at 237. “[T]he key issue in determining whether counsel should be present in a proceeding is whether the individual is being deprived of ‘liberty.’” *Myricks*, 85

Wn.2d at 255 (stating, “[T]he nature of the rights in question and the relative powers of the antagonists, necessitate the appointment of counsel.”).

A. *Children’s Liberty Interests in Dependency Proceedings*

Washington has long recognized parents’ fundamental liberty interest in the right to parent their children, which compels a constitutional due process right to counsel for parents in dependency and termination proceedings. *See Luscier*, 84 Wn.2d 138; *see also Myricks*, 85 Wn.2d at 253-55; *see also* RCW 13.34.090. Although our Supreme Court has stated that children’s liberty interests are equal to those of parents’, the court has also noted that children’s interests are “very different” from parents’ interests. *M.S.R.*, 174 Wn.2d at 17-18. A child’s liberty interests at stake in dependency proceedings include

a child’s interest in being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the integrity of the family relationships, including the child’s parents, siblings, and other familiar relationships; and in not being returned to (or placed into) an abusive environment over which they have little voice or control.

M.S.R., 174 Wn.2d at 20. The threat to children is notably different from the threat to the parents’ liberty interests during dependency proceedings.

A parent in a dependency proceeding often sits in a markedly adversarial position to the State:

The full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.

Myricks, 85 Wn.2d at 254. Essentially, a parent’s ability to parent is “on trial.” In contrast, a child in dependency proceedings is in no way “on trial”; rather, the State has an “urgent interest in the welfare of the child.” *Lassiter*, 452 U.S. at 27.

B. *Procedural Safeguards Protect Children’s Liberty Interests*

Another important consideration is that significant procedural safeguards have been built into dependency proceedings to protect a child’s liberty interests. Importantly, the State is obligated to advocate for the child’s best interests. RCW 74.14A.020. 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.” RCW 74.14A.020(3).

Additionally, RCW 13.34.100(1) requires a GAL be appointed unless “for good cause” shown the juvenile court concludes it is not necessary. 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 “represent and be an advocate for the best interests of the child.” RCW 13.34.105(1)(b), (f). But we recognize that a GAL’s role is limited. For instance, it is not a GAL’s role to summarize or paraphrase pleadings and court orders, explain the legal implications of these documents, or give legal advice, because a GAL does not represent the child as an attorney represents a client. RCW 2.48.180. Additionally, the juvenile court does not assign a GAL until after the initial shelter care hearing. RCW 13.34.065(4)(g).

Our legislature has recognized the potential benefits of legal representation for some children in dependency proceedings and has provided for the same. RCW 34.100(7) allows judges to appoint counsel to children on its own initiative, or upon the request of a parent, the child herself, a guardian ad litem, a caregiver, or the Department. Under RCW 13.34.100(7)(c), children must be notified on their 12th birthday, and at least annually thereafter, of their right to

request an attorney. Additionally, all Washington juvenile courts must appoint counsel for children whose parents' rights were terminated for six months, regardless of their age. RCW 13.34.100(6).

Given the built in procedural safeguards and the reality that children in dependency proceedings are not in an adversarial position to the State, we hold that the Washington Constitution does not provide a categorical right to the appointment of counsel for children in dependency proceedings.

III. THE RIGHT TO COUNSEL UNDER THE FOURTEENTH AMENDMENT

SK-P argues that because dependency proceedings directly implicate children's physical liberty interests, children have a categorical right to court-appointed counsel under the Fourteenth Amendment of the United States Constitution. SK-P argues in the alternative that under *Mathews*,¹⁷ court-appointed counsel is required for all children in dependency proceedings. The Department argues that the Fourteenth Amendment does not compel a blanket rule that counsel be appointed for children in all dependency proceedings and contends that a case-by-case analysis of the *Mathews* factors is sufficient to determine whether federal due process requires the appointment of counsel for a child in a specific case. We agree with the Department.

A. *Standard of Review*

"[D]ue process 'is not a technical conception with a fixed content unrelated to time, place, and circumstances.'" *Lassiter*, 452 U.S. at 24 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)). Where an individual's liberty interest

¹⁷ 424 U.S. at 335.

assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness. *In re Application of Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). “[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Lassiter*, 452 U.S. at 26-27. “[A]s a litigant’s interest in personal liberty diminishes, so does his right to appointed counsel.” *Lassiter*, 452 U.S. at 26. Where an individual’s physical liberty is not at stake, courts evaluate three elements in deciding what due process requires: (1) the private interests at stake, (2) the government’s interests, and (3) the risk that the procedures used will lead to erroneous decisions. *See Mathews*, 424 U.S. at 335. First, courts balance these elements against each other. Second, courts set the elements’ net weight against the presumption against a right to appointed counsel. *Lassiter*, 452 U.S. at 27.

B. *Child’s Physical Liberty Interests*

The United States Supreme Court has described a threat to physical liberty as the State affirmatively acting to curtail “the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Consistent with such a characterization, the Court has recognized that procedural due process requires appointment of counsel in juvenile delinquency proceedings and in the involuntary transfer of prisoners to mental hospitals. *Gault*, 387 U.S. at 37-38; *see also Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). Due process requires that in proceedings to determine delinquency, a juvenile has a right to court-appointed counsel

even though proceedings may be styled “civil” and not “criminal” because the determination “may result in commitment to an institution in which the juvenile’s freedom is curtailed.” *Gault*, 387 U.S. at 41.

Our Supreme Court examined the limits of federal due process in *M.S.R.*, 174 Wn.2d at 16. In that case, our Supreme Court recognized that a child’s physical liberty interests may be at stake in dependency and termination proceedings. It explained,

[T]he child in a dependency or termination proceeding may well face the loss of a physical liberty interest both because the child will be physically removed from the parent’s home and because if the parent-child relationship is terminated, it is the child who may become a ward of the State. It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another.

M.S.R., 174 Wn.2d at 16. However, our Supreme Court nonetheless determined that any potential physical liberty interest did not rise to the level of requiring court-appointed counsel in every termination case.

Similarly here, even though a dependency may implicate a child’s physical liberty interest insofar as the child’s residence may change, such a consequence does not rise to the level of being “committed to an institution in which the juvenile’s freedom is curtailed.” *Gault*, 387 U.S. at 41. A child who is removed from her home during dependency proceedings is not placed in an institution such as a juvenile detention center or a mental health facility; her daily routine may certainly change, but her personal freedom is not curtailed. Consequently, the physical liberty interests at stake for children in dependency proceedings are insufficient to compel the appointment of counsel in every dependency proceeding.

C. *Mathews Factors*

SK-P argues that even if we hold that a child's liberty interests are not implicated in dependency proceedings, under the three-part *Mathews* test, the Fourteenth Amendment nonetheless compels appointment of counsel in every dependency case. Traditionally, courts have balanced the *Mathews* factors to determine on a case-by-case basis whether individual children are entitled to court-appointed counsel. However, SK-P urges us to apply the *Mathews* factors to dependency proceedings *contextually* rather than on a case-by-case basis and hold that the appointment of counsel for children is required in all dependency proceedings.

Here, we address the private interests at stake, the State's interests, and risk of erroneous decision in dependency proceedings generally, and hold that because the *Mathews* factors will weigh differently from case to case, a case-by-case application of the *Mathews* factors is sufficient to protect children's procedural due process rights.

1. *Private Interests*

In *M.S.R.*, our Supreme Court acknowledged the substantial private interests of children in dependency proceedings. *See* 174 Wn.2d at 15-19. In a dependency proceeding, the child may be at risk of not only losing a parent but also relationships with siblings, grandparents, aunts, uncles, and other extended family. *M.S.R.*, 174 Wn.2d at 15. The legislature has recognized the importance of these relationships. *See generally* chapter 13.34 RCW.

As discussed above, the child may be physically removed from her parent's home and be put in the custody of the State, "powerless and voiceless, to be forced to move from one foster home to another." *M.S.R.*, 174 Wn.2d at 16. Foster home placement may result in multiple changes of homes, schools, and friends over which the child has no control. Washington courts and the legislature have noted that frequent moves may cause children significant harm. *M.S.R.*,

174 Wn.2d at 16; *Braam v. State*, 150 Wn.2d 689, 694, 81 P.3d 851 (2003) (“Some children in foster care are moved frequently, which may create or exacerbate existing psychological conditions, notably reactive attachment disorder.”); RCW 74.13.310 (“Placement disruptions can be harmful to children by denying them consistent and nurturing support.”).

Children in dependency proceedings also have an interest in being free from harm. Despite the State’s best and sincere efforts, children are not always free from harm once the State orders their placement. In a dependency, a child may be at risk of being returned to an abusive or neglectful home, or placed in a dangerous foster care setting. Although children have no constitutional right to State intervention to protect them from their own parents, once the State does intervene, rights attach. *M.S.R.*, 174 Wn.2d at 17. Children have a right to basic nurturing, including a safe, stable, and permanent home. RCW 13.34.020.

2. *Government’s Interests*

The parties here do not articulate the State’s interest. However, in *M.S.R.*, our Supreme Court acknowledged that the State’s interest is also very strong. 174 Wn.2d at 18. There, the court described the State’s interest as “an urgent interest in the welfare of the child,” and accepted the proposition that the State has a compelling interest in both the welfare of the child¹⁸ and in “an accurate and just decision” in the dependency proceedings. *M.S.R.*, 174 Wn.2d at 18 (quoting *Lassiter*, 452 U.S. at 27). The *Lassiter* Court also commented on the State’s potential pecuniary interest:

[I]nsofar as the State wishes the . . . decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State’s pecuniary

¹⁸ The State’s determination as to “the welfare of the child” may often diverge from the child’s liberty interest.

interest is legitimate, it is hardly significant enough to overcome private interests as important as those here.

Lassiter, 452 U.S. at 28.

3. *Risk of Erroneous Deprivation & Value Added*

The third *Mathews* factor looks to the risk of erroneous deprivation and the value added if all children were appointed counsel in dependency proceedings. *M.S.R.*, 174 Wn.2d at 18.

Current Washington law provides significant protections for children throughout the dependency process.¹⁹ Nonetheless, court-appointed counsel could provide benefits to children throughout the proceedings.

Appointed counsel could help children navigate the complex process of dependency proceedings in order to safeguard their rights throughout the entire process. As our Supreme Court has noted, minors “generally lack the experience, judgment, knowledge and resources to effectively assert their rights.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998).

¹⁹ The Department suggests that parents may sufficiently protect the interests of children in dependency proceedings. We disagree. Parents have their own goals within the proceedings, and although their desired placement outcomes may be aligned with the child’s wishes, there are inherent conflicts of interest throughout the proceeding. The very nature of a dependency often pits a parent’s interest against the child’s. See *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1358 (N.D. Ga. 2005). Often, a dependency proceeding is initiated as a result of neglect or abuse of the child by the parent. Parents may oppose placement with anyone but themselves and, therefore, be reluctant to disclose other potentially suitable placements with family members or adults in the child’s community. Parents may withhold or mitigate any special needs of their children in an attempt to try and obtain placement. And some parents willingly agree to a dependency placing their children outside of their home. Often the parents’ interest in a dependency proceeding will diverge from those of the child, and parents cannot be expected to sufficiently protect their children’s interests in dependency proceedings.

Also, appointed counsel may be particularly valuable at the initial shelter care hearing. Amici contend that a finding of shelter care at the initial hearing often determines whether or not a dependency is later established. Indeed, Legal Counsel for Youth and Children (LCYC) found that children with attorneys at the first hearing were more likely than children without counsel to reside with parents, relatives, or other caring adults they know throughout their dependencies. LCYC, *Impact Report* (2015).²⁰

A child who has been removed from her home has a right to preferential placement with a relative or known suitable adult. RCW 13.34.130(5). If a social worker is unable to identify relative or suitable adult caregivers, the state typically proposes foster care while it investigates relatives. A parent who is arguing for return home will not be inclined to propose any other potential caregivers. Counsel can gather information from a child, contact adults who can testify as witnesses, and help to identify transportation to school, the courthouse, etc., for the child.

Appointed counsel also may provide confidential communication with the child, help explain the processes to the child, answer the child's questions, ascertain what position, if any, the child would like to take on the issues, and discuss potential consequences. Attorneys may help the child decide how to present information and whether to testify. If the child decides to testify, her attorney can prepare the child and ensure the testimony is elicited in a manner that will safeguard the child's emotional well-being and legal interests.

²⁰ <https://static1.squarespace.com/static/533dcf7ce4b0f92a7a64292e/t/56a0b181be7b96af3e180665/1453371782325/Legal+Counsel+for+Youth+and+Children+Impact+Report.++Dated+December+1%2C+2015.pdf> (last visited July 24, 2017).

4. *Case-by-Case Application is Sufficient*

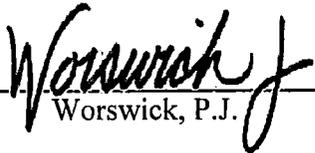
Despite the aforementioned potential benefits of court-appointed counsel, the fact remains that not all children will be able to equally benefit from appointed counsel. How the three *Mathews* factors weigh against each other will necessarily vary from case to case. Each child's circumstances will be different and their need for an attorney will vary accordingly.

For example, the child is not removed from the home in every dependency proceeding because the State can file a dependency and allow the child to remain in her home during the pendency of the proceedings. And each child's ability to benefit from appointed counsel is different. Indeed, an infant's need for, and ability to benefit from, appointed counsel is significantly different from a 15-year-old's. Our legislature has recognized the differing needs of children in dependency hearings in its adoption of RCW 13.34.100(6), providing for the appointment of counsel for the children in some, but not all, cases. A case-by-case application of the *Mathews* factors allows a juvenile court to consider each child's individual and unique circumstances to determine whether due process requires the appointment of counsel in dependency proceedings.

CONCLUSION

In conclusion, neither article I, section 3 of the Washington Constitution nor the Fourteenth Amendment to the United States Constitution compel the appointment of counsel for all children in dependency proceedings. Rather, a case-by-case application of the *Mathews* factors sufficiently protects children's due process rights. Ultimately, although we recognize the

potential benefits of court-appointed counsel, whether appointment for all children would be good policy is a question best left to our legislature. We affirm.


Worswick, P.J.

We concur:


Lee, J.


Sutton, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE
DEPENDENCY OF:

S.K-P.,

A minor child.

No. 48299-1-II

RULING GRANTING REVIEW
AND ACCELERATING
REVIEW

FILED
COURT OF APPEALS
DIVISION II
2016 MAR 31 AM 11:30
STATE OF WASHINGTON
BY DEPUTY

S.K.-P., a girl born in 2007, seeks discretionary review of the juvenile court's order denying her motion to appoint counsel at public expense. RAP 2.3(b)(2). This court grants her motion for discretionary review in part and includes her remaining issues in the grant of review pursuant to RAP 2.3(e).

FACTS

T.C. and J. K-P. are the mother and father, respectively, of S.K.-P. A dependency petition as to S.K-P. and her half-siblings (who share a mother, T.C.) was filed on November 19, 2014 due to concerns of abuse and neglect of S.K-P.'s older half-sibling H.W.¹

¹ S.K-P.'s two half-siblings, H.W. and J.W., have been placed with their biological father and their dependencies have been dismissed.

An agreed order of dependency as to T.C. was entered on January 6, 2015, and S.K.-P. was placed with her maternal grandmother. After dependency was established as to T.C., J.K.-P. came forward to be a party to the dependency with the intention of reestablishing a relationship with S.K.-P. J.K.-P. had not had an ongoing relationship with S.K.-P. since she was an infant. A dependency as to J.K.-P. has not been established, although a shelter care order is in place.

In April 2015, the juvenile court entered an order extending shelter care as to J.K.-P. The order noted that J.K.-P.'s home is a suitable placement for S.K.-P. if he and S.K.-P. establish a relationship.² The order provided that visitation between J.K.-P. and S.K.-P. would begin as recommended by S.K.-P.'s therapist and could expand upon approval of the social worker and Guardian ad Litem (GAL).

During the dependency, S.K.-P. has had supervised weekly visits with J.K.-P. S.K.-P. has expressed reluctance to visit her father and has experienced elevated anxiety and some behavioral outbursts following visits. The GAL has reported that even though S.K.-P. seems reluctant to visit J.K.-P., the GAL has observed S.K.-P. being affectionate and very interactive with J.K.-P. during visits. And, although S.K.-P. is quick to say she does not want to visit with J.K.-P., she appears to have fun once the visits start. The GAL has further reported that J.K.-P. appropriately engages with S.K.-P. during visits and is eager to introduce S.K.-P. to his extended family members. The GAL has expressed support for expanding J.K.-P.'s visits with S.K.-P. to include J.K.-P.'s mother, significant other, and their three-year-old daughter.

² J.K.-P. is employed full time and has a significant other who also has children.

In July 2015, T.C. asked to move into her mother's home and resume parenting S.K.-P. in an in-home dependency. On July 23, 2015, the juvenile court entered a permanency planning order permitting T.C. to reside with S.K.-P. in her maternal grandmother's home. The order established a primary permanent plan of return home to T.C. or J.K.-P., with an alternative plan of long term relative foster care. The order also stated that J.K.-P.'s visitation could include overnights if the social worker and GAL agreed.

On September 9, 2015, however, S.K.-P. filed a motion for appointment of an attorney at public expense to represent her legal rights and stated interests in the dependency. In support of her motion, S.K.-P. filed a declaration which stated:

2. I don't feel comfortable at visits with my dad and I don't want to have any more visits with him.
3. I want to see my brother and sister more.
4. I want to live with my mom, my sister and my brother forever.
5. I want an attorney to help me with these things and help tell the judge what I want.

Mot. for Disc. Rev., App. J, Ex. A at 1 (Declaration of Minor Child at 1).

The GAL did not take a position on S.K.-P.'s motion, but reported that she met with S.K.-P., who stated that she knew an attorney would make sure she gets what she wants. S.K.-P. also told the GAL that she did not feel comfortable visiting with J.K.-P. but she also reported she has fun when visiting with J.K.-P. The GAL also reported that S.K.-P.'s therapist did not disclose any concerning information regarding S.K.-P.'s efforts to re-connect with J.K.-P.

The Department opposed S.K.-P.'s motion. Pierce County intervened in the case and also opposed S.K.-P.'s motion. At the time S.K.-P. filed her motion, a family court had

concurrent jurisdiction for the purposes of developing a parenting plan between T.C. and J.K.-P.

A hearing on S.K.-P.'s motion was held on October 12, 2015. In its oral ruling, the court stated:

I look at the statute and clearly it says that it's under the Court's discretion as to whether or not counsel is appointed. And this particular case I think is extremely unique and, if anything, does not represent the kind of extreme case that might justify appointment of counsel. This case does not justify appointment of counsel and that's based on the Mathews factors.

Mot. for Disc. Rev., App. Y at 31 (Report of Proceedings (RP) Oct. 12, 2015 at 31) (underscore theirs). Accordingly, the juvenile court entered an order denying S.K.-P.'s request for an attorney.

The court found that S.K.-P.'s concerns regarding visits with her father had been brought to the court's attention by the parties in the case. The court also found that the government's interest is primarily financial because it will bear the costs of administration. The court further found that S.K.-P.'s interests are aligned with T.C., with whom she now resides, and that T.C. can and should advocate for S.K.-P.'s interest. The court additionally found that S.K.-P.'s interests are adequately protected by T.C. and the GAL. Finally, the court found that the case had been referred to a court facilitator to assist T.C. and J.K.-P. in developing a parenting plan for S.K.-P., and that once the parenting plan was entered, the dependency would be dismissed, which the court estimated could happen in the next few months. Based on its findings, the court entered the following conclusions of law:

1. In determining whether to appoint an attorney for [S.K.-P.], the Court does not need to reach a Constitutional Issue[.]

2[.] The decision to appoint [S.K.-P.] is one that is properly analyzed using the test set forth in *Mathews v. Eldridge*, 424 U[.]S[.] 319,

96 S[.] Ct[.] 893, 47 L. Ed[.] 2d 18 (1976), balancing “[t]he private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.”

3. The decision to appoint an attorney for [S.K.-P.] is one that should be considered on a case by case basis, consistent with RCW 13.34.100.

4. Balancing the *Mathews* factors, [S.K.-P.’s] interest are in line with her mother’s interests, and therefore the risk of error is minimal[.]

5. This case does not present the extreme circumstances that would necessitate appointment of counsel for the child[.]

Mot. for Disc. Rev., App. Z at 3. S.K.-P. appeals the denial of her request for an attorney.

ANALYSIS

This court may grant discretionary review only if:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). S.K.-P. seeks discretionary review under RAP 2.3(b)(2). Under RAP 2.3(b)(2), “there is an inverse relationship between the certainty of error and its impact” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462-63, 232 P.3d 591, 594, *review denied*, 169 Wn.2d 1029 (2010).³

³ S.K.-P. appears to argue that because the dependency counsel issue can only be raised in a motion for discretionary review, that appellate review is warranted in all such cases. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 5, 15, 271 P.3d 234 (2012). This court does not read *M.S.R.* as abrogating RAP 2.3(b)’s requirements. In addition,

The Effect Prong

In the present case, S.K.-P. fails to make a strong showing of harm. S.K.P. argues that the juvenile court's decision limits her freedom to act because every decision of her life is made by judges, social workers, and care providers with no permanent or lasting connection to her, including where she lives and goes to school. She asserts that her failure to comply with these decisions could lead to her contempt and incarceration.

However, the limitations on S.K.-P.'s freedom to act are not as significant as she asserts. S.K.-P. already resides with T.C., one of her desires, and the primary plan is return home. S.K.-P.'s parents are already involved in developing a parenting plan and the dependency is headed towards dismissal, thus, S.K.-P.'s concerns about the dependency system making decisions for her and the threat of incarceration will no longer be present. In addition, one of her other wishes, not to see her father, will ultimately be determined by the family court, where S.K.-P. has no right to counsel.⁴ Similarly, her third stated desire, to see her half siblings, has already been allowed by the dependency court and the other parties to this visitation—the half-siblings and their father—are not under the jurisdiction of the dependency court, thus its power to enforce visitation is limited, particularly in light of the fact that the half siblings want no contact with T.C. Thus, under

M.S.R. involved a termination, which is reviewed as a matter of right pursuant to RAP 18.13A.

⁴ It is important to note that the Department never obtained a dependency as to J.K.-P. With respect to parents not involved in the child welfare system, generally, the family court is the best place to determine issues of visitation and/or custody. See generally *In re Marriage of Rich*, 80 Wn. App. 252, 258, 907 P.2d 1234, review denied, 129 Wn.2d 1030 (1996); *In re Marriage of Perry*, 31 Wn. App. 604,608-09, 644 P.2d 142 (1982). Here, at the time the dependency court heard S.K.-P.'s motion, the family court had concurrent jurisdiction to work on a parenting plan.

these particular circumstances, this court determines that S.K.-P. has not made a strong showing that the juvenile court's decision limits her freedom to act. Nevertheless, because a dependency materially affects all aspects of a child's life, see *M.S.R.*, 174 Wn.2d at 16, this court accepts that S.K.-P. satisfies the effect prong of RAP 2.3(b)(2).

Probable Error

S.K.-P. argues that she has a categorical right to counsel under both the federal and state constitutions, and that the juvenile court erred by failing to rule on S.K.-P.'s right to counsel under the Washington State Constitution. S.K.-P. asserts that because a child's liberty interest in a dependency is at least as great as a parent's right, and parents have a state constitutional right to counsel, then so too must children. S.K.-P. additionally argues that *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) should be applied contextually rather than individually. She further argues that the juvenile court erred in its application of the *Mathews* factors to her individual case.

The Federal Constitutional and State Statutory Right to Counsel

In actions under chapter 13.34 RCW, by statute the juvenile court may, but is not required to, appoint counsel for children. RCW 13.34.100(7).⁵ Although RCW 13.34.100 makes appointment of counsel for children in dependency proceedings discretionary, our State Supreme Court held in *In re Dependency of M.S.R.*, 174 Wn.2d 1, 22-23, 271 P.3d 234 (2012), that under the due process clause of the federal constitution,⁶ "children of

⁵ On the other hand, the juvenile court must appoint a GAL for children subject to proceedings under chapter 13.34 RCW, unless it finds good cause that such appointment is unnecessary. RCW 13.34.100(1).

⁶ See *M.S.R.*, 174 Wn.2d at 20 n.11 (not addressing state constitutional claims).

parents subject to dependency and termination proceedings have due process rights that must be protected and, *in some cases*, must be protected by appointment of counsel.” (Emphasis added.) In *M.S.R.*, our Supreme Court held that RCW 13.34.100(7)⁷ is constitutionally adequate to protect the right of counsel for children, provided the dependency court properly exercises its discretion. *M.S.R.*, 174 Wn.2d at 22-23.

Under *M.S.R.*, in deciding whether to appoint counsel in termination proceedings, the juvenile court must conduct a case-by-case analysis using the factors set forth in *Mathews*, 424 U.S. 319, to determine both what RCW 13.34.100 and federal due process requires. *M.S.R.*, 174 Wn.2d at 22. Specifically, the court stated:

[T]he *Mathews* factors may be applied by the trial court case by case in order to determine if due process is satisfied in any given case. The constitutional due process right to counsel is also protected by case by case appellate review. Indeed, each child’s circumstances will be different. An infant who cannot yet form, articulate, or otherwise express a position on any relevant issue will not benefit as much from the attorney/client privilege or from counsel’s advocacy for the right to be heard at hearing as would a 10, 12, or 14 year old; there are, of course, many circumstances in between.

M.S.R., 174 Wn.2d at 21. The court later amended its opinion to state: “We recognize that this is an appeal of a termination order. Nothing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependency [sic] stages.” *M.S.R.*, 174 Wn.2d at 22 n.13.

Although this is a dependency proceeding and S.K.-P. seems to argue a different analysis should apply, she does not demonstrate that it was probable error for the juvenile court to rely on *M.S.R.* and apply the *Mathews* factors to her request for counsel. See

⁷ *M.S.R.* references former RCW 13.34.100(6) which was amended and recodified as RCW 13.34.100(7) in Laws of 2014, ch. 108 § 2.

M.S.R., 174 Wn.2d 22 (“When the issue is properly raised under the statute, the trial judge, subject to review, should apply the *Mathews* factors to each child’s individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel.”). Although *M.S.R.* involved a termination proceeding, the *M.S.R.* court recognized the risks to unrepresented children in both dependencies and terminations:

Unlike the parent, the child in a dependency or termination proceeding may well face the loss of a physical liberty interest both because the child will be physically removed from the parent’s home and because if the parent-child relationship is terminated, it is the child who may become a ward of the State. It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another. Foster home placement may result in multiple changes of homes, schools, and friends over which the child has no control. Amicus Columbia Legal Services informs us that 11.3 percent of children are moved three or more times in the first two years in the State’s care.

M.S.R., 174 Wn.2d at 16 (internal citations omitted); *Post-M.S.R.*, no court has issued a published opinion indicating that the *Mathews* balancing test is inappropriate in a dependency.

Moreover, as recognized by our Supreme Court, different children have different abilities and needs, making an individualized determination of the right to counsel appropriate. *M.S.R.*, 174 Wn.2d at 21-22. The variability among children is present regardless whether the juvenile court is presiding over a dependency or a termination. Consequently, because *M.S.R.* supports that a child’s “right to appointment of counsel is not universal,”⁸ this court cannot find probable error in the dependency court’s decision

⁸ S.K.-P. argues that a child has a categorical right to counsel in a dependency under the federal constitution because of the threat to her physical liberty. Mot. for Disc. Rev. at 11 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26-27, 101 S. Ct. 2153, 68 L.

to analyze S.K.-P.'s request under *Mathews*, despite that *M.S.R.* involved a termination. *M.S.R.*, 174 Wn.2d at 23.

Additionally, S.K.-P has not shown that the juvenile court probably erred in its application of the *Mathews* factors. *Mathews* requires weighing: (1) the private interest at stake; (2) the risk of erroneous deprivation by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹ *Mathews*, 424 U.S. at 335; *M.S.R.*, 174 Wn.2d at 14.

The juvenile court properly considered S.K.-P.'s interests at stake. As identified by the juvenile court, S.K.-P. expressed concern regarding visits with her father. These concerns were adequately reported. S.K.-P. also wants to live with her mother, and she is presently in her mother's care.

Ed. 2d 640 (1981)). As stated, *M.S.R.* did not find a categorical right to counsel for a child in termination. Because both a dependency and a termination can result in a child becoming either a temporary or permanent ward of the state, this court cannot conclude the juvenile court committed probable error declining to conclude that children in dependency have an automatic or presumed right to counsel due to the impact that child welfare proceedings have on their physical liberty, when it refused to find such a categorical right in *M.S.R.*

⁹ RCW 13.34.100 makes the appointment of counsel discretionary, which would typically require this court to review the juvenile court's decision for abuse of discretion. See *In re the Welfare of J.H.*, 75 Wn. App. 887, 894, 880 P.2d 1030 (1994) ("Orders in dependency cases are reviewed for abuse of discretion."), *review denied*, 126 Wn.2d 1024 (1995). However, appointment of counsel is mandatory where, after balancing the *Mathews* factors, the statute and due process require it. *M.S.R.*, 174 Wn.2d at 22 (stating that the juvenile court should apply the *Mathews* factors to each child's individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel). Constitutional questions of law are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Also, as identified by the juvenile court, the risk of erroneous deprivation is low. S.K.-P. has been returned to her mother's care. There is no indication that the mother is not capable of advocating for S.K.-P. Indeed, she is involved in establishing a parenting plan in the family court. And, the mother's interests largely align with S.K.-P.'s interests. See *M.S.R.*, 174 Wn.2d at 180 (stating that whether there is a significant risk of erroneous deprivation may turn on whether there is someone in the case who is able to represent the child's interests or whose interest align with the child).

Finally, the juvenile court correctly found that appointment of counsel would place a financial burden on the government. Although this alone might not tip the balance in favor of the denial of counsel, *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003), in light of all of the *Mathews* factors, S.K.-P. fails to demonstrate that the juvenile court committed probable error in denying her request for an attorney.

State Constitutional Protection

M.S.R. declined to reach the issue whether RCW 13.34.100(7) is constitutionally adequate to protect a child's due process rights under our state constitution. 174 Wn.2d at 21 and n.11. S.K.-P. argues that the due process clause of the Washington State Constitution provides greater protection. She also contends that the dependency court erred in failing to conduct a *Gunwall*¹⁰ analysis. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Because this court reviews constitutional issues de novo, the juvenile

¹⁰ *Gunwall*, 106 Wn.2d 54 (setting forth factors to determine whether state constitution provides broader protection than federal constitution). The six *Gunwall* factors are: (1) the state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern. 106 Wn.2d at 61-62.

court's alleged error of failing to conduct a *Gunwall* analysis does not automatically warrant a grant of review for remand to the trial court. Rather, for the purpose of this motion, this court will treat the juvenile court's determination that it did not need to reach the state constitutional issue as a decision the *Gunwall* factors do not weigh in favor of an independent interpretation of the state's due process clause. See *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011).

S.K.-P. initially argues that article 1, section 3, of the Washington State Constitution has already been recognized to mandate appointment of counsel for parents in dependency proceedings and, as recognized by *M.S.R.*, the same right should extend to children in similar circumstances. Mot. for Disc. Rev. at 14 (relying on *M.S.R.*'s statement, 174 Wn.2d at 20, that children have at least the same due process rights as do indigent parents). The threshold issue, then, is whether our state constitution has already been held to mandate counsel for parents in dependency actions.

This requires an overview of state and federal decisions addressing appointment of counsel in child welfare cases. In *In re the Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), our courts held that both state and federal due process required appointment of counsel for parents in termination proceedings. *Luscier*, 84 Wn.2d at 138 ("[T]he parent's right to counsel in this matter is mandated by the constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution and Art. 1, s 3 of the Washington Constitution."); see also *In re Dependency of Grove*, 127 Wn.2d 221, 237 897 P.2d 1252 (1995) (indicating that *Luscier* held "the right to one's children is a 'liberty' interest protected by the due process clauses of the federal and state

constitutions"). *In re the Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975) (relying on *Luscier*), extended the same protections to parents in dependency actions.

However, six years after *Myricks*, in *Lassiter v. Department of Soc. Servs.*, the United States Supreme Court held that parents facing termination of their parental rights do *not* have a right to appointed counsel under the 14th Amendment. 452 U.S. 18, 32-34, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). It found a federal due process right to appointed counsel only in circumstances in which a person's physical liberty is at risk.¹¹ *Lassiter*, 452 U.S. at 26-27.

S.K.-P., however, relies on now-Chief Justice Madsen's dissent in *In re Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (2007), which stated (with respect to state constitutional protections), "No Washington case has ever held that *Luscier* or *Myricks* was wrongly decided or is no longer valid."¹² 162 Wn.2d at 414. Other recently-decided cases support the chief justice's position that the state due process protections of *Luscier* and *Myricks* may remain in force post-*Lassiter*. See *In re Dependency of M.H.P.*, 184 Wn.2d 741, 759, 364 P.3d 94 (2015) (in *Lassiter*, "the Supreme Court overruled the

¹¹ *M.S.R.* recognized the line of past decisions on the right to counsel in child welfare proceedings. It noted that post-*Myricks*, the legislature passed RCW 13.34.090, which grants a parent the statutory right to counsel. *M.S.R.*, 174 Wn.2d at 13. It also recognized that although *Luscier* and *Myricks* recognized a state constitutional right to counsel: "Both *Myricks* and *Luscier* predated *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), by more than a decade, so not surprisingly, the court did not specifically consider what process was due under the United States Constitution as opposed to the Washington Constitution." *M.S.R.*, 174 Wn.2d at 13-14.

¹² *King* concerned the right of parents to appointed counsel in dissolution proceedings and concluded that no such right exists under the state or federal constitutions. It, however, distinguished dissolution proceedings from terminations and concluded, "The interest at stake here is not commensurate with the fundamental parental liberty interest at stake in a termination or dependency proceeding." *King*, 162 Wn.2d at 394-95.

federal constitutional component of our opinion in *In re [the] Welfare of Luscier*, in which we held that indigent parents in termination proceedings have a due process right to counsel at public expense under both the state and federal constitutions"); *Bellevue Sch. Dist.* 171 Wn.2d at 712-13 ("It remains undetermined whether the *Lassiter* decision by the United States Supreme Court has eroded the [state] constitutional underpinnings of this court's decision in *Luscier*."); see also *In re Dependency of G.G.*, 185 Wn. App. 813, 826, 344 P.3d 234 (referencing article I, section 3 of the Washington State Constitution and the Fourteenth Amendment), *review denied*, 184 Wn.2d 1009 (2015).

In light of post-*Lassiter* decisions that support that a state due process right to counsel for parents has already been recognized and may remain in force and the *M.S.R.* statement that children have "at least the same due process rights" as their parents, *S.K.-P.* demonstrates that review of the issue whether the due process clause of the Washington State Constitution requires appointment of counsel for children in dependency proceedings is warranted. 174 Wn.2d at 20; RAP 2.3(b)(2). The parties are directed to address whether such a right presently exists and/or whether a *Gunwall* analysis¹³ supports the existence of such a right.

In addition, although this court does not conclude that the trial court committed probable error in applying the *Mathews* balancing test to *S.K.-P.*'s request for counsel (under the federal constitution and RCW 13.34.100(7)), because *M.S.R.* ultimately confined itself to terminations and recognized a different test could apply to a child's

¹³ See *M.S.R.*, 174 Wn.2d at 13-14 (noting that neither *Luscier* nor *Myricks* conducted a *Gunwall* analysis to determine the scope of the state constitutional right to counsel).

request for counsel in a dependency, this court extends its grant of review to include all issues presented in S.K.-P.'s motion for discretionary review.¹⁴ RAP 2.3(e).

CONCLUSION

S.K.-P. demonstrates that her motion for discretionary review should be granted in part. RAP 2.3(b)(2). The remainder of the motion is granted pursuant to RAP 2.3(e).

Accordingly, it is hereby

ORDERED that S.K.-P.'s motion for discretionary review is granted. It is further

ORDERED that because this matter involves a dependent child, review is accelerated. RAP 18.12; RAP 18.13A. Upon completion of briefing, this matter will be scheduled for consideration by a panel ahead of all other perfected matters.

The clerk of court will issue a perfection notice.

DATED this 31st day of March, 2016.



Aurora R. Bearse
Court Commissioner

cc: Hillary Madsen
Candelaria Murillo
Alicia M. Burton
Mary C. Ward
Bailey E. Zydek
Fred Thorne
Joyce L. Frost (GAL)
Hon. Susan Serko

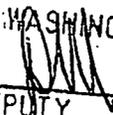
¹⁴ In the event dismissal of the dependency is warranted while this appeal is pending, pursuant to RAP 7.2(e), this court grants the dependency court the authority to enter an order of dismissal. If the dependency is dismissed, the Department has 10 days to notify this court.

APPENDIX C

FILED
COURT OF APPEALS
DIVISION II

2016 MAY 25 AM 8:16

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE
DEPENDENCY OF:

S.K.-P.,

A minor child.

No. 48299-1-II

RULING DENYING COURT-
INITIATED MOTION TO
DISMISS

This court heard and granted S.K.-P.'s motion for discretionary review regarding appointment of counsel for a juvenile involved in a dependency. After this court granted review, the juvenile court dismissed the dependency. On April 18, 2016, this court requested the parties to address whether the appeal was now moot. This court now hears the motion as a court-initiated motion to dismiss the appeal. The motion is denied.

This court may, at its discretion, address a moot issue where "matters of continuing and substantial public interest are involved." *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). "This exception to the general rule obtains only where

the real merits of the controversy are unsettled and a continuing question of great public importance exists." *Sorenson*, 80 Wn.2d at 558. Three factors determine whether a moot issue warrants review: "(1) whether the issue is of a public or private nature, (2) whether an authoritative determination is desirable to provide future guidance to public officers, and (3) whether the issue is likely to recur." *State v. Veazie*, 123 Wn. App. 392, 397, 98 P.3d 100 (2004). This court may also "consider the likelihood that the issue will escape review because the facts of the controversy are short-lived." *In re Marriage of Homer*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067(1994) (quoting *Seattle v. State*, 100 Wn.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting))).

S.K.-P. acknowledges the matter is moot but requests this court find that her case involves "matters of continuing and substantial public interest." Appellant's Resp. to Ruling at 1, 2. Amici Mockingbird Society, Disability Rights Washington, American Civil Liberties Union of Washington, Foster Parent Association of Washington State, Center for Children & Youth Justice, and Children's Rights, Inc., present a similar argument.¹ Amicus Curiae Brief at 1-3.

The State responds that S.K.-P.'s interest in appointment of counsel does not satisfy the exception to the mootness doctrine because the nature of the issue presented is more private than public, in that her request for counsel was very fact-specific and similar circumstances are unlikely to arise again.² The State also takes the position that

¹ With this ruling, this court grants their motion to file their brief. RAP 10.6.

² This ruling relies on the facts set out in the ruling granted discretionary review. Court Spindle, Ruling Granting Mot. for Disc. Rev. at 1-5 (Mar. 31, 2016).

clear guidance in this issue already exists, citing RCW 13.34.100, and *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). State's Resp. to Ruling at 6.

This court agrees with the State in part. Specifically, assuming that the *M.S.R.* standard governing appointment of counsel for juveniles in terminations also extends to dependencies, *cf. M.S.R.*, 174 Wn.2d at 22 n.13 ("We recognize that this is an appeal of a termination order. Nothing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the depende[n]cy stages."), there is likely no continuing and substantial public interest in addressing whether the juvenile court properly applied the *Mathews v. Eldridge* three-factor test to the particular facts of this dependency. *M.S.R.*, 174 Wn.2d at 14-15 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Nevertheless, because two remaining issues within the grant of discretionary review are largely legal issues unrelated to the particular circumstances of S.K.-P.'s dependency, this court will not dismiss the appeal.

The first issue is whether our state constitution mandates appointment of counsel for children in dependency actions. There is no present guidance on this issue. *M.S.R.* addressed only the federal constitution, 174 Wn.2d at 20 n.11, and earlier cases cited in the ruling on discretionary review do not conclusively resolve the issue. See Ruling Granting Mot. for Disc. Rev. at 13-14.

The second remaining issue is, assuming a juvenile does not have a categorical right to counsel, whether the *Mathews* test that *M.S.R.* applied to juvenile counsel requests in *terminations* is the test that juvenile courts should use when evaluating a *dependent* juvenile's request for counsel. Ruling Granting Mot. for Disc. Rev. at 14-15 (including this issue in grant of review pursuant to RAP 2.3(e)). As previously noted, the

M.S.R. court did not conclusively resolve this issue. *M.S.R.*, 174 Wn.2d at 22 n.13; Ruling Granting Mot. for Disc. Rev. at 8-9.

These two issues are untethered from the particular facts of S.K.-P.'s dependency and, consequently, do not appear to be private. In addition, child welfare matters historically have been of public interest. See generally *State v. G.A.H.*, 133 Wn. App. 567, 573, 137 P.3d 66 (2006) (placement of juvenile offender involved matter of public interest); *In re the Welfare of B.D.F.*, 126 Wn. App. 562, 569-70, 109 P.3d 464 (2005) (challenge to guardian ad litem's authority in a shelter care proceeding).

Further, the appointment of counsel issue is likely to recur. For example, this court has already addressed a juvenile's request for counsel in a dependency in an unpublished opinion. *In re Dependency of J.A.*, No. 45134-4-II slip op (June 10, 2014).³ And a conclusive ruling as to whether a juvenile has a categorical right to counsel in a dependency and, if not, whether some "different analysis" applies to evaluate a juvenile's request for counsel in a dependency will provide future guidance to the Department and dependency courts. *M.S.R.*, 174 Wn.2d at 22 n.13.

Finally, because of the potentially short duration of a dependency and the fact that the only path available to obtain review of a juvenile court's denial of a juvenile's request for counsel in a dependency is through a motion for discretionary review, this court notes that these issues have the potential to escape review. *B.D.F.*, 126 Wn. App. at 569. Accordingly, it is hereby

³ This case is not cited as "authority." GR 14.1(a). The outcome of that appeal is immaterial.

ORDERED that the Amicus Curiae Brief is accepted. It is further,

ORDERED that the court-initiated motion to dismiss the appeal is denied without prejudice.

DATED this 25th day of May, 2016.



Aurora R. Bearse
Court Commissioner

cc: Hillary A. Madsen
Candelaria Murillo
Alicia M. Burton
Mary C. Ward
Bailey E. Zydek
Fred Thorne
Joyce L. Frost (GAL)
Hon. Susan Serko
Laura K. Clinton

APPENDIX D

- 1 Equality not denied because of sex.
- 2 Enforcement power of legislature.

Article XXXII — SPECIAL REVENUE FINANCING

Sections

- 1 Special revenue financing.

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

**ARTICLE I
DECLARATION OF RIGHTS**

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

APPENDIX E

RIGHTS GUARANTEED

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the states. The Civil War had been fought over issues of states' rights, particularly the right to control the institution of slavery.¹ In the wake of the war, the Congress submitted, and the states ratified the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of these three "Reconstruction Amendments."

CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a state or nation were citizens thereof. In the *Dred Scott* case,² however, Chief Justice Taney, writing for the Court, ruled that

¹ "Since the 1950s most professional historians have come to agree with Lincoln's assertion that slavery 'was, somehow, the cause of the war.'" James M. McPherson, *Southern Comfort*, *THE NEW YORK REVIEW OF BOOKS* (Apr. 12, 2001), quoting Lincoln's second inaugural address.

² *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. KUTLER, *THE DRED SCOTT DECISION: LAW OR POLI-*

APPENDIX F

RCW 13.34.020**Legislative declaration of family unit as resource to be nurtured—Rights of child.**

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

[1998 c 314 § 1; 1990 c 284 § 31; 1987 c 524 § 2; 1977 ex.s. c 291 § 30.]

NOTES:

Finding—Effective date—1990 c 284: See notes following RCW 74.13.250.

Effective dates—Severability—1977 ex.s. c 291: See notes following RCW 13.04.005.

APPENDIX G

RCW 13.34.130**Order of disposition for a dependent child, alternatives—Petition seeking termination of parent-child relationship—Placement with relatives, foster family home, group care facility, or other suitable persons—Placement of an Indian child in out-of-home care—Contact with siblings.**

If, after a fact-finding hearing pursuant to RCW 13.34.110, it has been proven by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030 after consideration of the social study prepared pursuant to RCW 13.34.110 and after a disposition hearing has been held pursuant to RCW 13.34.110, the court shall enter an order of disposition pursuant to this section.

(1) The court shall order one of the following dispositions of the case:

(a) Order a disposition that maintains the child in his or her home, which shall provide a program designed to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future. In determining the disposition, the court should choose services to assist the parents in maintaining the child in the home, including housing assistance, if appropriate, that least interfere with family autonomy and are adequate to protect the child.

(b)(i) Order the child to be removed from his or her home and into the custody, control, and care of a relative or other suitable person, the department, or a supervising agency for supervision of the child's placement. If the court orders that the child be placed with a caregiver over the objections of the parent or the department, the court shall articulate, on the record, his or her reasons for ordering the placement. The court may not order an Indian child, as defined in RCW 13.38.040, to be removed from his or her home unless the court finds, by clear and convincing evidence including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(ii) The department or supervising agency has the authority to place the child, subject to review and approval by the court (A) with a relative as defined in RCW 74.15.020(2)(a), (B) in the home of another suitable person if the child or family has a preexisting relationship with that person, and the person has completed all required criminal history background checks and otherwise appears to the department or supervising agency to be suitable and competent to provide care for the child, or (C) in a foster family home or group care facility licensed pursuant to chapter 74.15 RCW.

(iii) The department may also consider placing the child, subject to review and approval by the court, with a person with whom the child's sibling or half-sibling is residing or a person who has adopted the sibling or half-sibling of the child being placed as long as the person has completed all required criminal history background checks and otherwise appears to the department or supervising agency to be competent to provide care for the child.

(2) Absent good cause, the department or supervising agency shall follow the wishes of the natural parent regarding the placement of the child in accordance with RCW 13.34.260.

(3) The department or supervising agency may only place a child with a person not related to the child as defined in RCW 74.15.020(2)(a), including a placement provided for in subsection (1)(b)(iii) of this section, when the court finds that such placement is in the best interest of the child. Unless there is reasonable cause to believe that the health, safety, or welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered, the child shall be placed with a person who is willing, appropriate, and available to care for the child, and who is: (I) Related to the child as defined in RCW 74.15.020(2)(a) with whom the child has a relationship and is comfortable; or (II) a suitable person as described in subsection (1)(b) of this section. The court shall consider the child's existing relationships and attachments when determining placement.

(4) When placing an Indian child in out-of-home care, the department or supervising agency shall follow the placement preference characteristics in RCW 13.38.180.

(5) Placement of the child with a relative or other suitable person as described in subsection (1)(b)

of this section shall be given preference by the court. An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home, specifying the services, including housing assistance, that have been provided to the child and the child's parent, guardian, or legal custodian, and that preventive services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home, and that:

(a) There is no parent or guardian available to care for such child;

(b) The parent, guardian, or legal custodian is not willing to take custody of the child; or

(c) The court finds, by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home and an order under RCW 26.44.063 would not protect the child from danger.

(6) If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child's best interest to be placed with, have contact with, or have visits with siblings.

(a) There shall be a presumption that such placement, contact, or visits are in the best interests of the child provided that:

(i) The court has jurisdiction over all siblings subject to the order of placement, contact, or visitation pursuant to petitions filed under this chapter or the parents of a child for whom there is no jurisdiction are willing to agree; and

(ii) There is no reasonable cause to believe that the health, safety, or welfare of any child subject to the order of placement, contact, or visitation would be jeopardized or that efforts to reunite the parent and child would be hindered by such placement, contact, or visitation. In no event shall parental visitation time be reduced in order to provide sibling visitation.

(b) The court may also order placement, contact, or visitation of a child with a stepbrother or stepsister provided that in addition to the factors in (a) of this subsection, the child has a relationship and is comfortable with the stepsibling.

(7) If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section and placed into nonparental or nonrelative care, the court shall order a placement that allows the child to remain in the same school he or she attended prior to the initiation of the dependency proceeding when such a placement is practical and in the child's best interest.

(8) If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court may order that a petition seeking termination of the parent and child relationship be filed if the requirements of RCW 13.34.132 are met.

(9) If there is insufficient information at the time of the disposition hearing upon which to base a determination regarding the suitability of a proposed placement with a relative or other suitable person, the child shall remain in foster care and the court shall direct the department or supervising agency to conduct necessary background investigations as provided in chapter 74.15 RCW and report the results of such investigation to the court within thirty days. However, if such relative or other person appears otherwise suitable and competent to provide care and treatment, the criminal history background check need not be completed before placement, but as soon as possible after placement. Any placements with relatives or other suitable persons, pursuant to this section, shall be contingent upon cooperation by the relative or other suitable person with the agency case plan and compliance with court orders related to the care and supervision of the child including, but not limited to, court orders regarding parent-child contacts, sibling contacts, and any other conditions imposed by the court. Noncompliance with the case plan or court order shall be grounds for removal of the child from the relative's or other suitable person's home, subject to review by the court.

[2013 c 254 § 1. Prior: 2011 c 309 § 27; 2011 c 292 § 1; 2010 c 288 § 1; prior: 2009 c 520 § 27; 2009 c 491 § 2; 2009 c 397 § 3; prior: 2007 c 413 § 6; 2007 c 412 § 2; 2003 c 227 § 3; 2002 c 52 §

5; 2000 c 122 § 15; prior: 1999 c 267 § 16; 1999 c 267 § 9; 1999 c 173 § 3; prior: 1998 c 314 § 2; 1998 c 130 § 2; 1997 c 280 § 1; prior: 1995 c 313 § 2; 1995 c 311 § 19; 1995 c 53 § 1; 1994 c 288 § 4; 1992 c 145 § 14; 1991 c 127 § 4; prior: 1990 c 284 § 32; 1990 c 246 § 5; 1989 1st ex.s. c 17 § 17; prior: 1988 c 194 § 1; 1988 c 190 § 2; 1988 c 189 § 2; 1984 c 188 § 4; prior: 1983 c 311 § 5; 1983 c 246 § 2; 1979 c 155 § 46; 1977 ex.s. c 291 § 41.]

NOTES:

Severability—2007 c 413: See note following RCW 13.34.215.

Intent—2003 c 227: "It is the intent of the legislature to recognize the importance of emotional ties formed by siblings with each other, especially in those circumstances which warrant court intervention into family relationships. It is the intent of the legislature to encourage the courts and public agencies which deal with families to acknowledge and give thoughtful consideration to the quality and nature of sibling relationships when intervening in family relationships. It is not the intent of the legislature to create legal obligations or responsibilities between siblings and other family members whether by blood or marriage, step families, foster families, or adopted families that do not already exist. Neither is it the intent of the legislature to mandate sibling placement, contact, or visitation if there is reasonable cause to believe that the health, safety, or welfare of a child or siblings would be jeopardized. Finally, it is not the intent of the legislature to manufacture or anticipate family relationships which do not exist at the time of the court intervention, or to disrupt already existing positive family relationships." [2003 c 227 § 1.]

Intent—2002 c 52: See note following RCW 13.34.025.

Findings—Intent—Severability—1999 c 267: See notes following RCW 43.20A.790.

Short title—Purpose—Entitlement not granted—Federal waivers—1999 c 267 §§ 10-26: See RCW 74.15.900 and 74.15.901.

Severability—1999 c 173: See note following RCW 13.34.125.

Finding—Effective date—1990 c 284: See notes following RCW 74.13.250.

Severability—1990 c 246: See note following RCW 13.34.060.

Legislative finding—1983 c 311: See note following RCW 13.34.030.

Effective date—Severability—1979 c 155: See notes following RCW 13.04.011.

Effective dates—Severability—1977 ex.s. c 291: See notes following RCW 13.04.005.

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- shstacappeals@atg.wa.gov
- sujatha.branch@columbialegal.org
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