No. 45134-4

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In Re the Dependency of J.A., Minor Child

MOTION FOR DISCRETIONARY REVIEW

Jill Malat, WSBA #23727
Columbia Legal Services
101 Yesler Way, Ste. 300
Seattle, WA 98104
Jill.Malat@columbialegal.org
Attorney for Petitioner

Candelaria Murillo, WSBA #36982
Columbia Legal Services
418 N Kellogg St., Ste. F
Kennewick, WA 99336-4947
candelaria.murillo@columbialegal.org
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

APPENDIX

INTRODUCTION

J.A. is a [redacted] young man in foster care. He wants to go home to his mother who is successfully raising his half-sister. His foster mother, with whom he has lived for over a year, agrees that he should be returned home. Neither J.A's case worker nor the Court Appointed Special Advocate (CASA) is willing to argue for J.A. returning to his mother and so J.A. asked that counsel be appointed to represent him. The University of Washington Children and Youth Advocacy Clinic ("the Clinic") appeared for the limited purpose of helping him obtain representation at public expense. In denying the motion, the trial court misapplied the test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), and prejudged the very issue on which J.A. wants to litigate, return home, and used it as the basis for denial of the motion.

J.A. needs counsel to protect his legal rights and interests, counsel him on his legal options, and help him understand the proceedings. J.A. needs a lawyer to advocate for where he wants to live and for what he believes he needs while in the state's custody.

> 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.

In re Dependency of MSR, 174 Wn.2d 1, 16, 271 P.3d 234 (2012), reconsideration denied (May 9, 2012), as corrected (May 8, 2012).

As the case stands now there is a real risk that J.A. will languish in the foster care system for years and turn 18 without ever being restored to his family or finding a new one—left forever in limbo and moving into adulthood without a support system.

The standards of *Mathews*, 424 U.S. 319 and The Washington State Constitution mandate the appointment of counsel for the child in all cases where the child's physical and familial placement is at issue, but at a minimum the *Mathews* standard requires appointment of an attorney in this case.[1] This Court has recognized that appointment of counsel in child welfare cases is an issue deserving of discretionary review. *In re Dependency of E.H.*, 158 Wn. App. 757, 243 P.3d 160 (2010). J.A. requests that this Court grant discretionary review and order that J.A. be appointed counsel now while he can still influence the outcome of his placement and before his childhood is lost to him.

I. IDENTITY OF PETITIONER

J.A. asks this court to accept review of the decisions designated in Part B of this motion.

II. DECISION

Under RAP 2.3(b)(2), J.A. seeks review of the Pierce County Superior Court Juvenile Division's orders filed on May 9, 2013 and June 17, 2013,

[1] If a child lives in King County, an attorney is appointed when that child turns 12. In Benton and Franklin counties, attorneys are appointed for children over eight. Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State, Submitted by the Washington State Office of Civil legal Aid, Prepared for the Washington State House Judiciary Committee, Dec. 1, 2008.

attached as Appendices A and B, denying the appointment of counsel at public expense for J.A.

III. ISSUES PRESENTED

1. Did the Superior Court commit probable error and substantially limit J.A.'s freedom to act by misapplying the *Mathews* factors when it denied J.A's motion to appoint counsel at public expense such that review is warranted under RAP 2.3(b)(2)?
2. Did the Superior Court commit probable error and substantially limit J.A.'s freedom to act by failing to appoint counsel for J.A. in violation of the Washington State Constitution such that review is warranted under RAP 2.3(b)(2)?

IV. STATEMENT OF THE CASE

1. J.A., [redacted] Old Dependent Child, Wishes To Return Home To His Mother

J.A. is a [redacted] young man who has been in foster care since 2010. He has an Independent Education Plan at Centralia Middle School to accommodate his learning and developmental disabilities. He receives Behavior Rehabilitative Services and services from the Division of Developmental Disabilities (DDD). He takes medications for his disabilities. App. C.

J.A. has lived in multiple foster homes in the past and since June 2012 has been living in the home of [redacted] App. C. He has both a DSHS case worker assigned to his case and a Court Appointed Special Advocate (CASA), a lay person appointed by the court to make a

recommendation regarding the CASA's opinion of what is in J.A.'s best interest. His biological mother is raising his half-sister and his father is currently in prison though he is scheduled to be released later this year. RP 24, May 9, 2013. J.A. visits with his mother once per week for two hours. These visitations have been very successful. He has a strong relationship with his mother and half-sister and they interact positively with one another. App. C. His mother also calls him on the phone. App. F.

J.A. very much wants to be reunited with his mother. As his dependency proceedings unfolded, it became clear that no one was interested in assembling the law and facts to support that desire. J.A. contacted the University of Washington Children and Youth Advocacy Clinic ("the Clinic") and asked that they help him get counsel to represent his interests in his dependency case. App. G.

On Mar. 1, 2013, the Clinic entered a limited notice of appearance for J.A. in the Juvenile Division of the Pierce County Superior Court in order to request counsel at public expense for J.A. App. D. J.A. filed the motion under RCW 12.34.100(6)(f) which states; "If the child requests legal counsel and is age twelve or older… the court may appoint an attorney to represent the child's position." The state was silent and there was no opposition from the CASA, the mother or the father to the motion for counsel at public expense. At the motion hearing on March 14, 2013, when the Clinic informed the court that J.A. retained the Clinic, the court responded;

> Well then you guys are welcome to be part of the case. We're done. I don't even have to talk to him. If he's retained you, then we're done with the conversation and you are absolutely appointed as counsel for him, and that supplements the guardian ad litem's work.

RP 6, Mar. 14, 2013. When the Clinic clarified that it was only appearing for the limited purpose of requesting counsel for J.A. at *public expense*, the court continued the hearing for another day so that J.A. could be present. RP 8, Mar. 14, 2013.

A. Hearing On The Motion To Appoint Counsel

At the next hearing on the motion, the court asked counsel about the factors set forth in *Mathews*, 424 U.S. 319, specifically the private interests at stake. The court asked, "so can you articulate that for me, given that the permanent plan is guardianship and we have a guardianship, Marilyn, who he seems to like living with her and feels safe there, so what's the private interest that's at stake that's so crucial?" RP 20, Mar. 21, 2013. The court also asked J.A's counsel from the Clinic:

> Does J.A. have an understanding of what your advocacy clinic—what your mission statement is...Well, for instance, your supervisor testified in front of the Legislature that every child should have an attorney and my guess is if I deny this request, there will be an appeal. Does he understand what that is and that he could perhaps be the new Gideon and be famous? Does he understand any of that? Did you talk to him about that?"

RP 27, Mar. 21, 2013. The trial court went on to ask counsel about the analysis under *Mathews*. In the course of its inquiry, the trial court asked if there is funding for attorneys for every child to have an attorney and made reference to other "unfunded mandates." RP 29-30, Mar. 21, 2013.

As the trial court began considering the *Mathews* factors, it commented on its belief that J.A.'s mother had failed to comply with the court or social worker's requests, and said that the court viewed J.A. as capable of talking to the court himself. RP 31-32, Mar. 21, 2013. At the conclusion of the hearing the trial court denied the motion for appointment of counsel at public expense.

2. Review Hearing Where Findings Of Fact And Conclusions Of Law On Motion To Appoint Counsel Are Presented

On April 4, 2013, the court held a joint permanency planning review hearing and presentation of the Findings of Fact and Conclusions of Law on the motion to appoint counsel. At this hearing, counsel for the mother put on the record the mother's efforts to qualify for reunification;

> My client has visited CPS on five occasions for purposes of psychological evaluation, urinalysis, and parenting classes. The last time she visited child Protective Services was on February 25, 2013. . .she waited from 10 in the morning until 1 p.m. The purpose of her visit…was for the psych eval, the UA and the parenting class…she waited three hours, it wasn't provided, and she left.

RP 33-34, May 9, 2013.

At the conclusion of this hearing, the court set two more hearings. The first was a status hearing and the second a review hearing. The court intended to use the status hearing to discuss miscommunications that were occurring between all of the professionals in J.A.'s case that had resulted, among other things, in his mistakenly being sent to detention for the weekend. RP 29-31, May 9, 2013. The trial court made it clear that J.A. should not attend the status hearing. RP 46, May 9, 2013.

3. Motion For Reconsideration After New Information Revealed

In a letter dated April 2, 2013, foster parent [redacted] informed the Court that she no longer was willing to be a potential guardian for J.A. because she believed J.A. should be returned home. Based in part on this letter and on the father's impending release from prison, which was causing J.A. significant fear. App. F. J.A. filed a motion for reconsideration of the trial court's original ruling.

The trial court denied the motion on June 17, 2013, although it acknowledged that [redacted] was no longer interested in being guardian and that the father's impending release from prison and his desire to reconnect with J.A. was material evidence. App. B. The trial court found that the new evidence called for a re-weighing of the *Mathews* factors, in particular, the child's private interest. The court concluded, however, that "the new evidence does not change the weight given to the child's private interest and the countervailing government interest continues to be that there are limited resources for attorneys for children in this county." App B.

I. ARGUMENT

A. The Failure Of The Trial Court To Appoint Counsel Violated J.A.'s Constitutional Right To Appointment Of Counsel At Public Expense And Limited His Freedom To Act By Preventing Him From Developing And Presenting To The Court His Strong Case That He Should Be Returned Home

Discretionary review may be accepted only when 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. RAP 2.3(b)(2). The trial court committed error when it denied the motion to appoint counsel at public expense for J.A. by misapplying the factors under *Mathews,* 424 U.S. 319, a decision that substantially limits J.A.'s freedom to act.

RCW 13.34.100(6)(f) states; "If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position."

There is currently no Washington decision that directly addresses whether a child in a dependency proceeding has a constitutional right to counsel. *In Kenny A. ex rel. Winn v. Perdue,* 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the United States District Court for the Northern District of Georgia applied the *Mathews* factors and held that there is a constitutional due process right to counsel and effective legal representation at every stage of a dependency proceeding.

In *In re Dependency of MSR,* 174 Wn.2d, at 20, the Washington Supreme Court held that "children have fundamental due-process liberty interests at stake in termination-of-parental-rights-proceedings."[2]

[2] Although a finding of a dependency is generally a necessary predicate for a termination of parental right (TPR), the two are separate proceedings under separate cause numbers in Washington. While a TPR proceeding is very serious in nature, it is a dependency proceeding that initially transfers custody to the state and that determines "the welfare of the child and his best interest." *Matter of Becker's Welfare*, 87 Wn.2d 470, 476, 553 P.2d 1339 (1976). The dependency directly determines placement of the child and the services to be provided. RCW 13.34.130. As compared to a TPR, dependency orders more directly control the daily life of the dependent child-for example, where he or she shall live and with whom, what services he or she shall receive, including medications and

Although *In re Dependency of MSR* involved appointment of counsel in the context of a termination of parental rights proceeding, the court held that "children of 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." *In re Dependency of MSR*, 174 Wn.2d at 22. *MSR* held that "children have at least the same due process right to counsel as do indigent parents subject to dependency proceedings as recognized by the United States Supreme Court in *Lassiter." In re Dependency of MSR*, 174 Wn.2d at 20 (*citing Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 31, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (U.S.N.C. 1981)). In *In re Dependency of MSR*, 174 Wn.2d 1 went on to say that "The constitutional due process right to counsel is also protected by case by case appellate review." *In re Dependency of MSR*, 174 Wn.2d at 21. Applying a case-by-case analysis to the termination proceeding in *In re Dependency of MSR*, the Court found that a combination of the failure to clearly raise the issue at the trial court and the fact that the children were 9 years old and not covered by RCW 13.34.100(6)(f) made it not reversible error for the trial court to have failed to appoint counsel in that case.

J.A. asserts that, as was held by the federal district court in *Kenny A. ex rel. Winn*, 356 F. Supp. 2d 1353, application of *Mathews* to the child's interests in dependency as distinguished from parental cases, mandates the

---

hospitalizations, sibling visitations, and with whom he or she shall communicate. For this reason the need for counsel for a child in a dependency proceeding is even more crucial as compared to a TPR.

appointment of counsel for all children. However, after *MSR*, at the very least the case-by-case analysis of *Mathews* is necessary in dependency cases.[3]

Analysis under the *Mathews* factors includes consideration of: (1) the private interest that will be affected by the proceedings; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute safeguards; and (3) the government's interest. *Mathews*, 424 U.S. 319.

1. The Trial Court Erred In Its Application Of Every Part Of The Three-Part *Mathews* Test[4]

It is clear from the analysis of the trial court that it failed to properly consider each of the *Mathews* factors. Error in consideration of one factor would require reversal of the trial court's decision. The trial court's erroneous analysis under all three prongs of the *Mathews* test constitutes egregious error and mandates appointment of counsel in this case.

2. The Trial Court Grossly Undervalued J.A.'s Private Interest As Elaborated By The Washington State Supreme Court In *MSR*

The trial court erred in its application of the first *Mathews* factor by finding that J.A.'s private interest was "not that great:"

> The private interest at stake in this case is the interest that the child has in achieving permanency. While there was some understandable confusion over the permanent plan, it is guardianship. Guardianship is in the child's best interest. The 4. 3.

[3] While the language in *MSR* is instructive, it does not give guidance to the trial courts in how to apply the *Mathews* factors to an individual case. The trial courts need guidance in order to protect the fundamental liberty interest at stake in each and every case involving a vulnerable child caught up in the foster care system

[4] Mathews involves the federal constitutional standard. J.A. also has a state constitutional right to appointment of counsel at public expense, as shown below.

> 3. The court acknowledges that the child's stated interest is in reunification, but the court finds that alternative is not available at this time and that given that he is in a safe placement at this time with a caregiver who is willing to serve as his guardian, his private interests are not that great.
> . . .
> 5. The fact that guardianship is the permanent plan makes the privacy interest less compelling and impacts the analysis regarding appointment of counsel for Jordan.

App. A.

However, J.A.'s private interests are very "great:" As the quotation from *MSR* on page 1 of this motion shows, he has an interest in physical liberty that is strongly impacted. He also has fundamental, constitutionally protected interests both in permanency and being reunited with his mother.

> Under the Fourteenth Amendment to the United States Constitution, children have fundamental liberty interests at stake. . . . These include a child's interest in being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the family relationship, including the child's parents, siblings, and other familiar relationships.

In re Dependency of MSR, 174 Wn.2d at 20.

The plan of guardianship is no longer an option for J.A. because his current foster mother is no longer willing to be his guardian. This fact significantly diminishes his chances of achieving any permanent solution before he ages out of state care unless he can return to his mother. Even the foster mother agrees that it is appropriate to pursue his mother as a placement option and indicates in her letter that "J.A.'s mother has taken the trouble to keep in touch with her son by telephone on a daily basis, makes sure she is aware of his needs and desires, has never relinquished her rights as his guardian, and in all ways behaves like a concerned and

engaged parent." App. E. According to the mother's attorney, the mother has attempted to be involved in services but DSHS denied her. Finally, J.A.'s half-sister lives with his mother which shows she has the ability to parent appropriately and safely. Yet no one developed a case or made an argument for this viable option.

Counsel for J.A. would investigate his mother as a placement option, confirm her efforts at compliance, file a motion to have J.A. placed with his mother or to have increased visitation, and would call witnesses to testify and present evidence in support of the motion.

The trial court found that the CASA made J.A.'s desire to live with his mother known to the court and based its denial of the motion partially on that fact. However, merely telling the court what J.A. wants is not the same as developing a case and advocating on behalf of J.A.'s interests. Were it the same thing, attorneys would never be necessary in legal proceedings.

The trial court denied J.A. representation by pre-judging exactly the issue on which he wants representation and thereby concluded that his desire to be reunited with his mother was not a significant interest. This was clearly erroneous weighing of his private interests.

3. The Trial Court Understated The Risk Of Error And Confusion And Failed To Take Proper Account Of Changed Circumstances Involving Permanent Placement Options For J.A.

The second *Mathews* factor requires the court to consider the risk of error and the value of additional or substitute safeguards; "-… -whether

there is a constitutionally significant risk of erroneous deprivation of rights may also turn on whether there is someone in the case who is able to represent the child's interest or whose interests align with the child's." *In re Dependency of MSR*, 174 Wn.2d at 18. The trial court found that the risk of error in this case is low because of the court's belief that its team of social workers is committed and because the court has experience with this team. The court also mentioned that there are other lawyers on the case and that the GAL's role is to tell the court the child's wishes. App. A.

If accepted, the trial court's analysis would render both *MSR* and RCW 13.34.100(6)(f) meaningless. Counsel for a youth would never be necessary when the trial court has in its view a good team. But this fails to take into consideration the benefit of additional safeguards--in this case counsel--as is required under this prong of the *Mathews* test.

In fact, counsel in this case would help present matters the social work team didn't recognize as significant or simply missed. And this has already happened as those involved, none of who has as their job advocating for J.A.'s preferences, did not present all relevant considerations; others did: The foster mother revealed that she is not willing to be a permanent guardian. The fact of J.A.'s fears of his father's release was revealed in the motion for reconsideration filed for J.A. by the Clinic. J.A.'s mother may have been denied services because some involved dismissed her as an option even though she was trying to get services.

A status conference was held specifically to address the fact that J.A. spent time in detention due to miscommunication among those working with J.A., including "the team" the court touted. RP 29-31, May 9, 2013. These errors show a great risk of error without counsel.

4. The Trial Court Focused Heavily On the Cost Of Appointment Of Counsel, Which Is Not A Sufficient Interest To Outweigh J.A.'s Fundamental Liberty Interests

The trial court also erred in its application of the third *Mathews* factor. Though the State's representative did not object to appointment of counsel, the trial court effectively found that public fiscal concerns trumped all of J.A.'s interests: "The countervailing government interest in this case is that there are limited resources for attorneys for children in this county. Given the private interests at stake and the risk of error in this case, those limited financial resources should not be spent in this case. " App. A.

It is, however, established law that: "financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Mathews*, 424 U.S. at 338. "Though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here." *Lassiter*, 452 U.S. at 28. "Lack of funds does not excuse a violation of the Constitution and this court can order expenditures, if necessary, to enforce Constitutional mandates." *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003) (*citing Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 389,

932 P.2d 139 (1997)). In initially welcoming the Clinic to the case (before it knew that the request was for counsel at public expense), the court recognized the usefulness of counsel. Fiscal concerns cannot override the vital role that counsel would play in protecting J.A.

5. The Trial Court's Errors Limited J.A.'s Freedom To Act By Preventing Him From Developing And Making The Case That, As Recommended By The Foster Parent, J.A. Should Return Home

RAP 2.3(b)(2) under which J.A. seeks discretionary review, requires that there must be "probable error" (shown above) and the error "substantially alters the status quo or "substantially limits the freedom of a party to act."

The very nature of the dependency proceedings against J.A. places a limit on his freedom to act, as the Supreme Court said in *MSR*. J.A. has been ordered to live involuntarily, under penalty of contempt, with whichever family placement the State or court orders. If he chose to return to his mother's care he would likely be incarcerated. Involuntary placement is as great a limit on freedom as house arrest or involuntary commitment. Yet he has no counsel to protect his interests, even though counsel would provide viable alternatives to the court.

J.A. is a [redacted] with disabilities. There is no question he cannot meaningfully participate in his own legal case without counsel—he certainly cannot develop evidence and file motions on his own. Despite being the person most affected by the dependency, J.A. has been denied the freedom to make a motion to return home with his mother. J.A. needs

to ensure that the arguments for reunification with his mother are fully and fairly addressed.

The trial court based its very denial of the motion to appoint counsel largely on the court's pre-judgment that J.A. cannot return home to his mother, without any case for this being presented. By denying the motion based on this factor, the trial court is not only limiting J.A.'s interest in living where he wants, it is limiting his freedom to even advocate for what he wants. Although he can and has told the trial court that he wants to be returned home, he does not have the skills or the tools to effectively advocate for this desire. He has no idea what the rules of evidence are, how to persuasively develop or present his case, and he certainly cannot be expected to call witnesses to support his wishes. Among the motions that could be filed are: 1) a motion to increase visitation or have unsupervised visitation with his mother; 2) a motion to return home; 3) a motion limiting contact with his father; 4) a petition for TPR against his father; 5) a motion objecting to a filing of a petition for termination of parental rights (if a TPR was filed).

These actions need to happen in this case now. The trial court has effectively limited, indeed denied, J.A.'s ability to take these actions and even to make an adequate record for appeal.

With loss of the foster mother as a prospective guardian, J.A.'s case heads into limbo. If J.A. is forced to wait to appeal the denial of the motion to appoint counsel he may never get his day in court and certainly

will not get it before incredible damage to his life and loss of his relationship with his mother.

6. The Trial Court Violated The Washington Constitution When It Failed To Appoint Counsel.

The Washington State Constitution provides an independent basis for appointment of counsel as of right for J.A., and all children in dependencies. Although the Washington Supreme Court in *MSR* did not reach the issue of a child's right to counsel under *In re Dependency of*, it is clear such a right exists.

Historically, Washington has provided greater access to counsel and greater protection to children than the United States Constitution. Analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), shows that Art. I, § 3 provides broader protection on this issue. *Gunwall* sets forth six nonexclusive factors to guide the court in determining whether a state constitutional provision affords greater rights than its federal corollary. As they apply in this case:

A. The textual similarities between the state and federal due process clause do not foreclose greater protection under the state clause:

With regards to factors one and two (textual similarities or differences), the texts of the federal due process clause and Art. I, § 3 are not significantly different. However, even where state and federal constitutional provisions are identical, the intent of the framers of each constitution may have been different. *Gunwall*, 106 Wn.2d at 61.

B. State constitutional history suggests an independent interpretation:

The third *Gunwall* factor strongly counsels for an independent state constitutional analysis with broader protections. Art I, § 3 requires independent interpretation unless historical evidence shows otherwise. 106 Wn.2d at 514-16. "State constitutions were originally intended to be the primary devices to protect individual rights, with the federal constitution as a secondary layer of protection. *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring).

C. Preexisting state law indicates broader protection of children's fundamental liberty interests:

The fourth *Gunwall* factor examines case law and statutory law "dealing with the issue and not just the particular constitutional provision." *Smith*, 117 Wn.2d, 286 (Utter, J., concurring).

There are two key differences between the state and federal due process holdings. First, unlike federal precedent which extends the right to counsel only where physical liberty is curtailed, longstanding case law in Washington has required that counsel be appointed in civil cases when physical liberty is threatened "or where a fundamental liberty interest, similar to the parent-child relationship, is at risk." *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). The *MSR* court found that dependent children "have vital liberty interests at stake," 174 Wn.2d at 5, interests which are "very different from, but at least as great as, the parent's [interests]." *Id.* at 17-18. Thus, a dependent child's physical liberty, as well as his or her fundamental liberty interests, are always implicated in dependencies. Second, the absolute right to counsel for parents in

dependencies has been part of Washington statutory and constitutional jurisprudence for over 35 years.[5] Given that dependent children "have at least the same due process right to counsel" as do their parents, *In re Dependency of MSR*, 174 Wn.2d at 20, all children must have a constitutional right to counsel based in the state constitution.

D. Structural differences support an independent analysis:

The Washington Supreme Court has "consistently concluded that the fifth factor supports an independent analysis" as the state constitution is "more protective of individual rights than its federal counterpart." *King v. King*, 162 Wn.2d 378, 393, 174 P.3d 659 (2007).

E. Issues relating to children are matters of state concern:

The sixth *Gunwall* factor weighs heavily in favor of independent interpretation because "the right to counsel in child deprivation proceedings finds its basis solely in state law." *In re Welfare of Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983). Issues of family relations are matters of state or local concern. *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).

In sum, both historical interpretation of rights in child dependency and related parental termination proceedings and the *Gunwall* criteria compel an independent state constitutional analysis, dictate that Art. § 3 is more

[5] In 1974, the Washington Supreme Court held that a "parent's right to counsel in [TPR's] is mandated by the constitutional guarantees of due process under the fourteenth Amendment of the [U.S.] Constitution and Wash. Const. art. I, § 3." *In re Luscier's Welfare*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). The Washington Supreme Court extended these guarantees to parents in dependencies. *In re Myricks' Welfare*, 85 Wn.2d 252, 253, 533 P.2d 841, 841 (1975). The Legislature codified these rights soon thereafter in RCW 13.34.091. Laws of 1977, 1st Ex. Sess., ch.291, § 37.

protective than the 14th Amendment, and require counsel in this case and all dependencies

II. CONCLUSION

For the foregoing reasons, J.A. requests that this court grant discretionary review, and order that counsel be appointed to represent him in his dependency proceeding.

Respectfully submitted this 31th day of July, 2013.

_____ _____

Jill A. Malat
WSBA #23727
Counsel for Petitioner

Candelaria Murillo
WSBA #36982
Counsel for Petitioner