No. 45134-4

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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

REPLY TO STATE'S RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Objecting for the first time to the appointment of counsel for J.A., the State provides numerous strong points that support the appointment of counsel. First, in February 2012, J.A. spent three weeks in inpatient mental health treatment. Second, there appear to be pending criminal proceedings against J.A. Third, the GAL violated RCW 13.24.105(1)(g), which requires the GAL to inform the court if a child wants to have counsel. *See* Br. of Resp's App. I. Fourth, the GAL stepped outside his authority by requesting that all professionals (including J.A.'s mother) should not be having conversations with J.A. about the proceedings. Finally, although J.A. may be a member of the [redacted]e, (Br. of Resp. App. B) no determination regarding J.A.'s status as an [redacted]child has been made violating 25 U.S.C § 1903 (4). Br.of Resp App. H. All of these issues require counsel to protect J.A.'s rights, and to prevent error.

The main thrust of the State's argument is that because J.A.'s mother is an unfit parent the risk of error is low. However, J.A. needs counsel to: make the case for his desire to return to his mother, engage him in the proceedings, explain his legal rights to him, counsel him,

encourage accountability among the parties, and to file motions on his behalf.

The State also posits a standard of review under which not only would a denial of counsel never be reversed, it could never even be reviewed. This is not and must not be the standard.

II. ARGUMENT

A. The State Argues for an Incorrect Standard

In its brief, the State manages to morph a standard of "probable error" into one of "manifestly unreasonable." On its face this is incorrect. RAP 2.3(b) requires only a showing of "probable error" to justify appellate review. The standard of "probable error" for the purposes of discretionary review is separate from the standard that may be applied in the hearing on the merits.[1] In other words, the question is whether the appellate court would probably come to a contrary conclusion.[2] J.A. does not believe that "abuse of discretion" is appropriate on the merits. For the purpose of the motion for review, "probable error" is the standard, and that most clearly has been met.[3]

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[1] *See Stokes v. Bally's Pacwest, Inc.*, 113 Wash. App 442, 445 (Div. 1 2002); *State v. Haydel*, 122 Wash. App 365 (Div. 1 2004).
[2] Note that RAP 2.3(b)(1) requires a higher standard of "obvious error."
[3] Were it applicable, the "abuse of discretion" standard has also been met.

B. The Trial Court Order Substantially Limits J.A.'s Freedom to Act

The State argues that J.A.'s freedom to act is not substantially limited due to the inherently temporary nature of the dependency review and because there is, purportedly, a later opportunity for appointment of counsel. But the ongoing process doesn't change J.A.'s need for counsel now. In denying J.A.'s motion to appoint counsel, the trial court substantially limited his freedom to act as has previously been argued on page 15 of Petitioner's motion for discretionary review. J.A. was limited in his ability to litigate whether being placed in an inpatient facility was in fact legally and clinically appropriate. In addition, he was limited in his ability to protect himself from the threat of criminal prosecution.[4]

The State bases its argument that the dependency process is inherently temporary in part on *In re Chubb,* 112 Wn.2d 719, 773 P.2d 851 (1989), but *Chubb* merely holds that review of orders other than final dependency dispositions and terminations of parental rights must be under RAP 2.3(b) *See Chubb*, 112 Wn.2d at 721. J.A.'s only recourse regarding the denial of the appointment of counsel is through discretionary review.

[4] Children subject to involuntary commitment and criminal proceedings are also provided with attorneys from the outset. RCW 71.05.300(2); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

C. Assuming The Correct Standard for Appointment of Counsel for Children is Application of the *Mathews* Factors, the Trial Court abused its Discretion in Its Misapplication of the Mathews Factors

J.A. maintains that all children in dependency proceedings have a right to counsel. However, even assuming that a case-by-case *Mathews* test applies not only to *terminations* but to dependencies as well, the trial court severely misapplied those factors. It erroneously found that J.A.'s private interest was not that great, understated the risk of error and confusion, failed to take the value of additional safeguards into consideration and improperly weighted the cost of appointment of counsel.

The State's brief seems to assume that an assertion that J.A.'s mother is an unfit parent (notwithstanding that she is raising his sister) is enough to deny him a private interest in where he is ordered to live. The trial court found that his private interest was not great because there was a prospective guardian and guardianship was the permanent plan. However, when the identified guardian refused to be considered as a guardian because she felt J.A.'s mother was the better alternative, the trial court's basis was no longer supported. To then continue to find that J.A. has no private interest when there is not a viable plan in place (as the trial court did on reconsideration) was clearly an erroneous application of the *Mathews* factors.

The State argues that the government's interest is its *parens patriae* interest in the child's welfare, obtaining an accurate decision and in reducing the county's administrative burden. Br. of Resp at 13. The State presumably believes that this weighs against appointing counsel. But, given that this argument was not considered by the trial court, it should not be considered here. In addition the state argues under *Mathews* that "at some point the benefit of an additional safeguard...may be outweighed by the cost." Br. of Resp. at 13. *Mathews* also states that "financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Mathews* at 348. Thus while cost can be one factor, it cannot be the controlling factor and cannot outweigh other significant factors.

The State relies on the fact that J.A.'s mother's interest in reunification and increased contact aligns with J.A.'s and that the Guardian Ad Litem represents J.A.'s interests, to claim that J.A. does not need independent counsel. Br. of Resp. at 14. This fails to recognize that placement of J.A. with his mother is just one of the myriad of interests that J.A. has in his case and that counsel for J.A. would protect his legal rights in addition to advocating for him to return home to his mother.

The argument that the GAL represents J.A.'s interests is not accurate. It is the job of the GAL to make recommendations to the court

regarding what the GAL believes is in the best interest of the child. This is a very important function but not one that involves advocacy on behalf of the child's stated and legal interest. Telling the court that J.A. wants to be returned to his mother is not the same as advocating for this outcome.

In addition, because the GAL is not an attorney he is unable to protect J.A.'s legal interests. The GAL's [redacted] report highlighted this difference. He reported that "J.A. is currently on probation, but since this is his first offense they are waiting to see the evaluation report before recommending him to Diversion." Br. Of Resp. App. I. However, if J.A. was on probation then he must have had a prior offense, and the GAL's statement is a legal impossibility. Equally concerning is that according to this same report J.A. spent a night in detention in [redacted] *Id.* Finally, the GAL believed that no professionals should discuss the case or permanent plan with J.A. *Id.* This is not a decision for the GAL to make *sua sponte*. J.A. clearly wishes to be involved in his case and to know what is happening. Not only did he contact counsel and request representation, but when given the option by the trial court judge to remain in court to hear the argument regarding appointment of counsel, he chose to stay. Verb. Report of Proceeding 3/21/2013 p. 13.

The State argues that, under some circumstances, an attorney representing a child's interest will make it less likely that the correct legal

result will be reached Br. of Resp. at 14. This fails to take into consideration that the judge is the decision maker and assumes that somehow the judge will be so influenced by counsel for a child that she will be unable to come to a proper decision regarding the child's best interest.

Finally the State argues that because of J.A.'s disabilities an attorney appointed to represent him would not know what to advocate for and therefore should not be appointed. This argument would not stand up in any other legal proceeding. There are many examples of individuals with disabilities who still have the right to an attorney—criminal defendants and individuals subject to involuntary commitment are but two examples of this.

D. The Argument That Every Child Who is The Subject Of A Dependency Proceeding Has A Right to Counsel Is Supported By Both Federal and State Constitutional Principles

1. Federal Constitutional Law: Although J.A. is entitled to counsel on the specific and compelling fact of this case, the State incorrectly claims J.A. has not supported his argument that every child in a dependency proceeding is entitled to an attorney. Courts throughout the nation have increasingly recognized children's constitutional right to counsel in

dependency proceedings, and in fact, the State cites no decision to the contrary.[5]

2. State Constitutional Law: The State's argument on state constitutional law, while erroneous, underscores the need for discretionary review—the lower courts need guidance on a child's right to counsel in dependency hearings. Full briefing awaits if the court grants review. There are, however, a few key points at this stage.

First, although the text of the federal and state constitution is not significantly different on due process, that has not prevented the findings of broader protection in other contexts.[6] and the State fails to show why this similarity indicates a lack of greater state constitutional rights *in this particular context.*

With respect to the third *State v. Gunwall* 106 Wn.2d 54, 720 P.2d 808 (1986) factor, Art I, § 3 requires independent interpretation unless historical evidence shows otherwise. 106 Wn.2d at 514-16.[7] The State

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[5] *See Kenny A. ex rel. v. Perdue,* 356 F. Supp. 2d 1353 (N.D.GA 2005); *Rose v. Conn,* 417 F. Supp. 769, 780 (M.D. Ala. 1976) (Numerous state courts have found that children in dependency and termination of parental rights proceedings require counsel); *See Matter of T.M.H.,* 613 P.2d 468, 470-471 (Okla.1980); *In the Matter of Jamie T.T.,* 191 A.D.2d 132, 599 N.Y.S. 2d 892 (Ct. of App. NY 1993)

[6] *State v. Ortiz,* 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (noting that in two other instances Art. I sec. 3 has been found to afford broader rights) (citing *State v. Bartholomew,* 101 Wn.2d 631, 683 P.2d 1079 (1984), and *State v. Davis,* 38 Wn. App. 600, 686 P.2d 1143 (1984)).

[7] In *Ortiz,* on which the State relies, the court distinguished the issue as a "different application of due process" than two other instances where it had found a broader right under Art. I, § 3. 119 Wn.2d at 303. Thus, *Ortiz* only affirms that the state due process clause has, on more than one occasion, been held to be broader.

presents no historical evidence to suggest that the state clause is limited to the scope of its federal counterpart as to dependent children's due process protections.

For the fourth *Gunwall* factor—preexisting law—the State incorrectly asserts that this analysis "looks to the law existing when a constitutional provision was adopted, and that it is not informed by court decisions issued more than 100 years later." Br. of Resp. at 17-18. The *Gunwall* court itself looked at recent as well as older laws in applying this factor. *See, e.g. Gunwall*, 106 Wn.2d 66. Further, due process analyses are not static. *Grant County Fire Prot. Dist. v. City of Moses Lake No. 5*, 150 Wn.2d 791, 809, 83 P.2d 419 (2004).[8]

The State also incorrectly asserts that this Court should not rely on *In re Grove*, 127 Wn.2d App. 221, 897 P.2d 1252 (1995), because it relies on *In re Welfare of Luscier*, 84 WN.2d 135, 524 P.2d 906 (1974), and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975), both cases predating *Lassiter v. Dep't of Soc. Servs.*452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (U.S.N.C. 1981). Br.of Resp. at 18. Although *Lassiter* came after both *Myricks* and the enactment of a statutory right to counsel for parents, Washington courts have continued to reaffirm the constitutional

[8] See also *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (opinion concurring in judgment) (stating "due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

basis of *Luscier* and *Myricks* indicating that the right must be grounded in the Washington State constitution.[9] And *Grove's* declaration that "counsel should be appointed in civil cases when an individual's physical liberty is threatened or where a fundamental liberty interest, similar to the parent-child relationship, is at risk,"[10] has also been reaffirmed.[11]

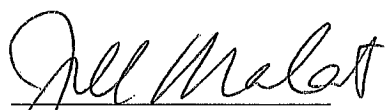
The State agrees with J.A. that the fifth and sixth *Gunwall* factors require independent analysis, so those factors will not be further discussed here. Br.of Resp. at 19.

In sum, the majority, if not all of the *Gunwall* factors, compel an independent state constitutional analysis.

III. CONCLUSION

For the reasons stated herein J.A. urges this Court to accept discretionary review of this case.

Respectfully submitted this 10th day of September, 2013.



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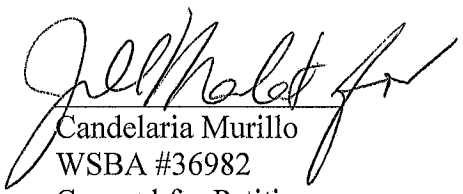

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[9] In 1983, the Washington Supreme Court held that the right to counsel in child deprivation proceedings, except in limited circumstances, finds its basis solely in state law. *See In re Luscier*, 84 Wn.2d 135, 138 524 P.2d 906 (1974); RCW 13.34.090 .

[10] 127 Wn.2d at 237.

[11] *See King v. King*, 162 Wash 2d 378, 383 (2007).