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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DEPENDENCY OF:

No. 45134-4-II

J.A.,

RULING GRANTING REVIEW

A minor child.

J.A., a [REDACTED] born in [REDACTED], seeks discretionary review of the juvenile court's orders denying his motion to appoint counsel at public expense and denying his motion for reconsideration under CR 59(a)(4) and (a)(9). He argues that the juvenile court's failure to appoint counsel violates his constitutional due process rights and limits his freedom to develop and present a strong case that he should be returned home to his mother, M.B. Concluding that J.A. has shown that review is warranted, this court grants discretionary review.

FACTS

J.A. is a [REDACTED] year-old boy who functions at about a seven-year-old level. He attends school in a self-contained classroom with an Individual Education Plan (IEP) for special education and behaviors, and he lives in a Behavioral Rehabilitation Services (BRS) foster home because of behavioral issues that include aggressive and disruptive behavior.

In [REDACTED], when J.A. was [REDACTED] old, the juvenile court found him dependent as to M.B. under former RCW 13.34.030(6)(c) (2011),¹ and ordered that he be placed in licensed care. The dispositional order required M.B. to engage in a number of services, including random urinalysis testing and a psychological evaluation with a parenting component. Between [REDACTED] and [REDACTED] M.B. was not in compliance with the court's order and was not making progress towards correcting her parenting deficiencies. J.A. remained in licensed care during this time and had weekly supervised visits with M.B.

[REDACTED] [REDACTED] was appointed as J.A.'s guardian ad litem (GAL) in the dependency action. In [REDACTED] [REDACTED] reported to the juvenile court that he had informed J.A. about his right to request an attorney. [REDACTED] believed, however, that

¹ After a contested dependency fact-finding hearing as to M.B., the juvenile court entered the following findings of fact:

[M.B.] was involved in 8 past referrals with the Department - all involving [J.A.]. [M.B.] is developmentally delayed and has mental problems. [J.A.] came into his father's care last year because [M.B.] was unable to care for him. Mother has not visited [J.A.] since the start of the dependency proceedings.

Resp. to Mot. for Disc. Rev., App. B at 2.

J.A. was unable to differentiate between a GAL and an attorney and recommended to the juvenile court that he remain as J.A.'s advocate.

In [REDACTED] first reported to the juvenile court that J.A. wished to "go home with his family." Resp. to Mot. for Disc. Rev., App. I at 4. Because J.A.'s parents had not engaged in services or shown an interest in being a placement option for him, Serrano recommended that J.A.'s permanent plan be adoption, as he had been in the Department's care for two years. In [REDACTED] again reported to the juvenile court that J.A. expressed a desire to go home.

[REDACTED] informed the juvenile court that M.B. had told J.A. during supervised visitation that he would be coming home soon, leading J.A. to become very emotional after visits with her. [REDACTED] believed that J.A., who could not read or write and struggled with communication skills, as well as with behavioral and mental health issues, did not understand why he was in foster care.² Because M.B. regularly visited J.A. but still had not engaged in any services or shown an interest in being a placement resource for J.A., [REDACTED] recommended a Title 13 guardianship as the primary permanent plan for J.A., with an alternative plan of adoption.

On [REDACTED] the juvenile court followed [REDACTED] recommendation and ordered that J.A.'s primary permanent plan be changed to guardianship. It also allowed one additional hour of supervised visitation between M.B. and J.A. each week but ordered that M.B. not talk with J.A. about returning home.

² [REDACTED] reported that J.A. had begun urinating and defecating in his room in front of his foster parent, believing that the Department would have no choice but to send him home if he displayed inappropriate behavior.

In [REDACTED] without notice to or consultation with the Department social worker or [REDACTED] J.A. retained the Children and Youth Advocacy Clinic (CAYAC) of the University of the Washington School of Law to represent him for the limited purpose of requesting that he be appointed counsel at public expense in the dependency action.³ On [REDACTED], [REDACTED], CAYAC submitted a motion on J.A.'s behalf, arguing that the juvenile court must appoint counsel for him under chapter 13.34 RCW, as well as the state and federal constitutions. In support of the motion, J.A. filed a declaration stating that he wanted to tell the juvenile court that he would rather live with M.B. than his foster parents.

At a hearing on [REDACTED], the juvenile court offered CAYAC the opportunity to represent J.A. pro bono, but CAYAC declined to do so, stating it only operated during the academic year and was unable to represent clients in ongoing dependency matters. Because J.A. was not present at the hearing, the juvenile court continued the matter so it could hear from him directly.

On [REDACTED], the juvenile court spoke with J.A. about his request for counsel. J.A. generally understood what was going on in the dependency action, but he could not articulate what an attorney could do for him other than to talk with him and the

³ The juvenile court questioned how J.A. could retain CAYAC or consent to the release of certain confidential medical records given his age and intellectual capacity. The Department informed the juvenile court that Catholic Community Services (CCS), an agent of the Department, became involved in the matter without the Department's or Serrano's knowledge. The Department expressed concern with the procedural history of J.A.'s motion and CCS's involvement in providing a declaration by J.A. to support the motion. The Department had concerns over whether J.A. appreciated what was outlined in his declaration and whether he could formulate words or thoughts as delineated in the declaration due to his mental capacity.

judge. J.A. stated that he wanted an attorney so he could tell the juvenile court that he wanted to go home to M.B. When the juvenile court asked J.A. if there was anything else he wanted to say, he responded: "No." Mot. for Disc. Rev., App. G at 22 (Report of Proceedings (RP) Mar. 21, 2013 at 7). The juvenile court also asked J.A. why he needed an attorney, to which J.A. responded: "Because I want an attorney" and "attorneys are cool." Mot. for Disc. Rev., App. G at 23 (RP Mar. 21, 2013 at 8). During the hearing, J.A. recognized [REDACTED] and the Department social worker, [REDACTED]⁴ and he reported that both of them had visited him at home and school. Because J.A. said that he believed [REDACTED] worked for Child Protective Services (CPS), the juvenile court informed him that [REDACTED] fact worked for him.

Following J.A.'s testimony and CAYAC's argument,⁵ the juvenile court denied J.A.'s motion to appoint counsel at public expense. It found that J.A. had shown he was capable of talking to the court directly about his wishes to return home and that the GAL and social worker had informed the court about his wishes in the past. The juvenile court understood that J.A. wanted to go home with M.B., but it found that she was not capable of caring for him as of that time since she was not in compliance with the court order and was not making progress towards correcting her parenting deficiencies.

However, the juvenile court did not foreclose the possibility that J.A. could return home in the future, stating that reunification was always an alternative and until there was a

⁴ The juvenile court found that J.A.'s face "lit up," expressing happiness, when it asked if he knew [REDACTED] and "lit up" again when it asked if he knew [REDACTED] Mot. for Disc. Rev., App. A at 3.

⁵ The Department took no position on the issue and did not make any argument.

termination, the Department, the GAL, and all the parties needed to work towards such goal, as mandated by law.

The juvenile court concluded that J.A. could retain private or pro bono counsel to represent him in the dependency action but that it was not mandatory to appoint counsel at public expense based on its balancing of the three factors in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). It stated that J.A. had a private interest in achieving permanency but such interest was not that great because he was in a safe placement with a caregiver who was willing to serve as his permanent guardian. The juvenile court concluded that the risk of error was low because J.A. made it clear that he wanted to go home and because the GAL's role was to tell the court, at every hearing, what J.A.'s wishes were.⁶ Also, the case already included a team of committed social workers and several lawyers. Finally, the juvenile court concluded that the Department's countervailing interest in preserving its limited resources for providing attorneys to children outweighed any conflicting private interest.

On [REDACTED], the parties appeared in court for presentation of the juvenile court's order and for a permanency planning review hearing. During the proceeding, the Department expressed frustration over the lack of communication between Catholic Community Services (CCS) and J.A.'s foster parents with the Department and the GAL's office, as it had been unclear who was bringing J.A. to the hearing that day.

⁶ The juvenile court noted, however, that there may be some cases where children have significant differences with a social worker or a GAL and that, in those situations, when there are viable alternatives, an attorney could assist the child. It also noted that a child would be entitled to an attorney where he or she is on the run and facing contempt.

In addition, ██████ reported that on ██████ J.A. had a "meltdown" and was being destructive and verbally abusive to his foster mother. Mot. for Disc. Rev., App. G at 61 (RP May 9, 2013 at 25). Because the foster mother "did not get the support from her private agency [CCS]," she called law enforcement and J.A. was detained in a juvenile detention facility in ██████ County. Mot. for Disc. Rev., App. G at 61 (RP May 9, 2013 at 25). CCS did not pick J.A. up from detention that day and did not address his needs,⁷ resulting in his stay in detention from March 22, 2013 through ██████ at which point he was released to his foster mother. While in detention, J.A. was "locked . . . up" and was "terrified." Mot. for Disc. Rev., App. G at 62 (RP May 9, 2013 at 26). At the hearing, Serrano stated that neither he nor Tisino had been provided with an incident report as to what happened on March 22, even after the Department filed a formal complaint with the State. ██████ stated that "everything goes unanswered" and that he still had "no report as to what's going on with [J.A.], what services are in place for this [B]RS, and nothing." Mot. for Disc. Rev., App. G at 63 (RP May 9 2013 at 27). ██████ expressed concern over the situation, stating: "I . . . don't want [J.A.] to go back into detention when he has the next meltdown because it's, it's going to be detrimental to him and he shouldn't be in there." Mot. for Disc. Rev., App. G at 63 (RP May 9, 2013 at 27).

The juvenile court noted its displeasure and stated: "I want to make sure we've got a good team for [J.A.], and that includes somebody who's going to be responsive when there are issues that arise." Mot. for Disc. Rev., App. G at 66 (RP May, 9, 2013 at

⁷ The foster mother reported that she called intake when the incident happened.

30). The juvenile court ordered CCS to provide the requested reports and, after more miscommunication ensued during the hearing as to what CCS needed to do, it added:

You know what? We're going to have a staffing between now and the two week status. We're having a lot of miscommunication here. This isn't working. This is really not working

. . . . [I]t's really important that everybody communicate, whether it's about [J.A.] or some other child. Everybody who's involved with the child needs to be able to communicate. We can't have miscommunications about who's going to pick him up and bring him someplace, and we can't have miscommunication by having him in detention somewhere

Mot. for Disc. Rev., App. G at 67-68 (RP May 9, 2013 at 31-32).

On [REDACTED] J.A. filed a motion for reconsideration of the juvenile court's order denying his motion to appoint counsel. He argued that the juvenile court should rebalance the *Mathews* factors under CR 59(a)(4) and (a)(9) because there was newly discovered evidence that was not available at the time of the [REDACTED] hearing. This evidence included that J.A.'s foster mother no longer wished to be a permanent guardian for him and that J.A.'s father was being released from incarceration in the next few months and J.A. did not want any contact with him. J.A. asserted that this evidence made his private interest more compelling than previously determined by the juvenile court. In addition, J.A. argued that the breakdowns in communication between the parties since the [REDACTED] hearing demonstrated that the risk of error was greater than previously understood.

On [REDACTED] juvenile court considered the newly discovered evidence under *Mathews* but found that J.A.'s private interest and the risk of error remained unchanged, as J.A. had consistently indicated his desire to return home to M.B. and his

wishes had always been clearly stated by the social worker and the GAL. The juvenile court also clearly understood J.A.'s fear of his father. Without addressing how the detention or miscommunications in the matter affected the risk of error, the juvenile court denied J.A.'s motion for reconsideration and upheld its prior order. J.A. appeals.

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). J.A. seeks discretionary review under RAP 2.3(b)(2).

Mathews Factors

First, J.A. argues that the juvenile court committed probable error in denying his motion to appoint counsel at public expense because it misapplied the factors in *Mathews*, 424 U.S. 319. He asserts that the juvenile court: (1) undervalued his private interest because guardianship is no longer an option for him; (2) understated the risk of error and value of additional or substitute safeguards; and (3) focused too heavily on the cost of appointment of counsel.

In actions under chapter 13.34 RCW, the juvenile court may, but is not required to, appoint counsel for children 12 years or older if they request counsel. RCW 13.34.100(6)(f).⁸ Although RCW 13.34.100 makes appointment of counsel for children in dependency proceedings discretionary, the Washington State Supreme Court recently held in *In re Dependency of M.S.R.*, 174 Wn.2d 1, 22, 271 P.3d 234 (2012), *reconsideration denied*, (May 9, 2012), 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 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 what RCW 13.34.100 and 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

⁸ 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).

foreclose argument that a different analysis would be appropriate during the depende[n]cy stages.” *M.S.R.*, 174 Wn.2d at 22 n.13, as corrected (May 8, 2012).

Because the parties in this matter—a dependency action—do not argue that a different analysis applies, this court assumes without deciding that the *Mathews* factors guide whether appointment of counsel is required. *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.

As to the first *Mathews* factor, in its original decision, the juvenile court considered J.A.’s private interest in permanency and in maintaining a relationship with M.B., as well as his interest in being free from unreasonable risk of harm. See *M.S.R.*, 174 Wn.2d at 20 (stating that children have fundamental liberty interests “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

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).

familiar relationships; and in not being returned to (or placed into) an abusive environment over which they have little voice or control"). It concluded that his private interest was not that great, as he was in a safe placement with a caregiver who was willing to serve as his permanent guardian. In addition, J.A.'s interest in maintaining a relationship with M.B. was protected by allowing supervised visitation. The juvenile court also noted that J.A.'s interest in being returned to M.B. was protected by the court's mandate in dependency actions to preserve the family unit and work towards reunification. See RCW 13.34.020; see also *In re Dependency of Tyler L.*, 150 Wn. App. 800, 208 P.3d 1287 (2009) ("[P]reservation of the family and reunification of a dependent child with his or her parents are goals for dependent children") (quoting *McKinney v. State*, 134 Wn.2d 388, 404, 950 P.2d 461 (1998)). Further, J.A. had an interest in being free from harm. M.B. was not in compliance with the court order and was not making progress towards correcting her parenting deficiencies. In fact, [REDACTED] earlier reported that M.B. showed no interest in being a placement option for J.A. (although M.B.'s later statements to J.A. about returning home indicate some interest on M.B.'s part for reunification¹⁰).

Following the hearing on J.A.'s original motion, however, the facts changed so as to cause this court to question whether J.A.'s interests remained protected absent appointment of counsel. Primarily, J.A.'s current foster mother expressed that she no longer wished to be appointed his permanent guardian. Thus, although the juvenile

¹⁰ At the [REDACTED] permanency planning review hearing, M.B.'s counsel also stated: "[M]y client's frustrated because she very much wants these services and wants to have her child back." Mot. for Disc. Rev., App. G at 70 (RP May 9, 2013 at 34).

court correctly noted that the placement objective of guardianship had not changed in the period prior to the reconsideration motion, J.A. no longer had an assurance of remaining in his present environment. Given that the juvenile court originally identified J.A.'s private interest in this matter as "achieving permanency" and based its decision, in part, on the fact that "he is in a safe placement at this time with a caregiver who is willing to serve as his guardian," Mot. for Disc. Rev., App. A at 3, its conclusion on reconsideration that the new circumstances did not change the weight given to J.A.'s private interests warrants discretionary review.

As to the second *Mathews* factor, in its original determination, the juvenile court considered the risk of erroneous deprivation and the value of the additional procedures sought. *M.S.R.*, 174 Wn.2d at 18. Relevant considerations regarding this factor include the legal and factual complexity of the case and "whether there is someone in the case who is able to represent the child's interests or whose interests align with the child's." *M.S.R.*, 174 Wn.2d at 18. The juvenile court originally determined that the risk of error was low because J.A. demonstrated his ability to speak directly to the court and to express his wishes to return home to M.B. and not have contact with his father, which the court clearly understood. In addition, the juvenile court determined that Serrano adequately represented J.A.'s interests by informing the court at every hearing what J.A.'s wishes were, as required by former RCW 13.34.105(1)(b) (2011). [REDACTED] and the Department also recognized the bond between J.A. and M.B. and recommended that M.B. remain in J.A.'s life through a guardianship. As such, J.A.'s desire to maintain

a relationship with M.B. aligned with what the other parties believed was in his best interests.

Again, however, circumstances arose in the time between the juvenile court's denial of J.A.'s motion and its denial of his reconsideration motion to question whether his interests continued to be adequately protected by those involved in the dependency proceedings and whether he instead requires additional procedures or protections. Specifically, during the May 9, 2013, permanency planning review hearing, Serrano reported that J.A. spent three nights in juvenile detention because of his behavioral issues at his out-of-home placement and his foster mother's inability to receive support from CCS. ██████ stated that J.A. was "terrified" by his detention "in a facility that houses criminals," and that requests for information as to what happened regarding the incident went unanswered. Mot. for Disc. Rev., App. G at 62, 61 (RP May 9, 2013 at 26, 25). In addition, the Department noted a significant lack of communication regarding who was responsible for bringing J.A. to the review hearings. In his motion for reconsideration, J.A. argued that the risk of error was great due to these significant "communication breakdowns between the Department, Catholic Community Services, and the foster parent." Resp. to Mot. for Disc. Rev., App. P at 5. Despite these concerning events, the juvenile court did not explicitly re-address the *Mathews* risk of error factor on reconsideration, simply stating that "the risk of error remain[s] unchanged." Resp. to Mot. for Disc. Rev., App. Q at 3.

These failures to communicate, specifically regarding the detention, caused harm to J.A. The detention not only deprived him of his liberty for a longer period than

necessary but it also appeared to have caused him emotional harm in that [REDACTED] believed J.A. was "terrified." This incident demonstrates that a compelling risk of error exists in this case. The "team of social workers," the GAL, and the "several lawyers already on the case," that the juvenile court initially determined protected J.A. from a risk of error, in fact failed to appropriately respond to the detention situation. Mot. for Disc. Rev., App. A at 4. Accordingly, discretionary review of this factor is warranted.

Finally, the third factor requires the juvenile court to weigh the government's interest in the proceeding. *Mathews*, 424 U.S. at 335; *M.S.R.*, 174 Wn.2d at 14. Because this court has determined to grant review based on the first two *Mathews* factors, it will not address this issue herein.

In sum, the issue whether J.A. has a right to be represented by counsel at public expense in a dependency proceeding is significant. Although this court's analysis focused on facts arising after the juvenile court's original denial of J.A.'s motion and how these facts altered the court's original *Mathews* balancing test, the grant of discretionary review will extend to all three *Mathews* factors and the facts available to the court when deciding both the original and reconsideration orders. RAP 2.3(e).

Right to Counsel Under Washington Constitution

Second, J.A. argues that the juvenile court violated the Washington Constitution by failing to appoint counsel, as the state due process clause is more protective than its federal counterpart. He asserts that the six factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), support an independent analysis of the state constitution. Although J.A. made this argument in his motion to appoint counsel, the juvenile court

did not consider the argument and did not base either decision on this issue. The parties, however, will be permitted to address the state constitutional issue on discretionary review. RAP 2.3(e).

J.A.'s Freedom to Act

Finally, J.A. argues that the juvenile court's failure to appoint him counsel substantially limits his freedom to act under RAP 2.3(b)(2) by preventing him from developing and presenting a strong case that he should be returned home. Although decisions made by the juvenile court during the dependency review period are inherently temporary, see *In re Dependency of M.A.*, 66 Wn. App. 614, 620, 834 P.2d 627 (1992) ("Because they take place in an ongoing process, the review hearings and the orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing."), allowing J.A. to proceed without counsel where the *Mathews* factors may weigh in favor of the mandatory appointment of counsel satisfies RAP 2.3(b)(2)'s requirement that J.A. show the juvenile court's decision either substantially alters the status quo or substantially limits his freedom to act.

CONCLUSION

J.A. demonstrates that discretionary review of the juvenile court's decision to deny his motion for appointment of counsel is warranted under RAP 2.3(b)(2).

Accordingly, it is hereby


ORDERED that J.A.'s motion for discretionary review is granted. It is further

ORDERED that because this matter involves a dependent child, review of this matter is accelerated. Appellant has 10 days to designate Clerk's Papers and file a

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Statement of Arrangements. The Verbatim Report of Proceedings is due within 20 days.¹¹ Appellant's opening brief is due 20 days after the Verbatim Report of Proceedings is filed in the trial court. Respondent's Brief is due 15 days after service of the Appellant's Brief and any Reply Brief is due 15 days after service of the Respondent's Brief.

DATED this 18th day of October, 2013.



Aurora R. Barse
Court Commissioner

cc: Ryan P. Anderson
Jill Malat
Candelaria Murillo
Renee N. Morioka
Carrie Hoon Wayno
Hon. KittyAnn van Doorninck

¹¹ This court recognizes that many of the relevant hearings have already been transcribed and were included as appendices to the discretionary review briefs.