No. 45134-4

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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

OPENING BRIEF OF J.A.

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I. INTRODUCTION

J.A. is a [redacted] youth in foster care. He wants to go home to his mother and half-sister. His foster mother, with whom he has lived for over a year, agrees that he should be returned home. Because J.A's case worker, Assistant Attorney General and the non-attorney Guardian Ad Litem (GAL) are unwilling to argue for J.A.'s reunification or for other protections, J.A. asked for an attorney at public expense. The University of Washington Children and Youth Advocacy Clinic ("the Clinic") appeared for the limited purpose of moving to have a lawyer appointed to J.A. at public expense. In denying the motion, the Court misapplied the test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

> 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). J.A. needs counsel to protect and advocate for his legal rights and interests,

counsel him on his legal options, and help him understand the proceedings.

At a minimum, the *Mathews* test clearly requires appointment of an attorney in this case. However, the Washington State Constitution also mandates the appointment of counsel for children in all cases where the child's physical and fundamental liberty interests are at risk. J.A. requests that this Court reverse the ruling of the trial Court and order that J.A. be appointed counsel at public expense, while he can still influence the outcome of his placement and before his childhood is lost to him. As the case stands now, there is a real risk that J.A. will continue to languish in the foster care system for years and turn 18 without ever returning home to his mother or finding a new family—left forever in limbo and moving into adulthood without a support system.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to appoint counsel at public expense for J.A. under RCW 13.34.100 and the 14th Amendment to the U.S. Constitution.
2. The trial court erred in failing to appoint counsel for J.A. at public expense under Art. I. § 3 of the Washington State Constitution.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Does a child in a dependency proceeding have the right to the appointment of an attorney at public expense under the 14th Amendment of the U.S. Constitution? (Assignment of Error 1).
2. Does a child in a dependency proceeding have a right to the appointment of an attorney at public expense under Art. I § 3 of the Washington State Constitution? (Assignment of Error 2).

IV. STATEMENT OF THE CASE

A. J.A., a [redacted] Dependent Youth, Has a Number of Significant Legal Interests That Need to Be Protected By Counsel

J.A. is a [redacted] youth who has been in foster care since 2010. The filing of the original dependency petition resulted in removal of J.A. from his father's custody. CP 11-12. J.A. has a strong relationship with his mother and half-sister, who is being raised by J.A.'s mother. CP 427-428. J.A. has weekly, supervised visits with his mother and half-sister and his mother calls him once per week. CP 384 and CP 558. During the dependency, the case-worker, observed that J.A.'s mother "shares affection with him freely and he enjoys attention from her…She brings snacks and gifts to the visits and shows an interest in any subject he is interested in." CP 201. J.A's father is a convicted sex offender (CP 251), who will soon be released from prison and who has expressed a desire to

be in his son's life. RP 24 May 9, 2013. J.A. has lived in the home of foster parent, [redacted], since June 2012. CP 427-428. He has a state case-worker and a lay Guardian Ad Litem (GAL) assigned to his case.[1]

J.A. receives special education services at his middle school to accommodate his learning and developmental disabilities. He receives specialized services from DSHS through both the Children's Administration and the Developmental Disabilities Administration. He also takes psychotropic medications. CP 427-428. There have been three court orders signed over the course of J.A.'s stay in foster care authorizing the prescription of psychotropic medications. CP 87-88, 127-128, 277-278

Throughout J.A.'s time in foster care he has engaged in behaviors on several occasions that could potentially lead to criminal charges being filed against him. CP 165, 167. According to an update to the court by his current state case worker, [redacted], on May 9, 2012, J.A. had a meltdown at his placement and broke a baseboard heater and kicked walls. The police were called to the scene and J.A. admitted what he had done to the police. Although the police were reluctant to take J.A. into custody, the

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[1] "Guardian ad litem" means a person, appointed by the court to represent the best interests of a child in a proceeding under this chapter, or in any matter which may be consolidated with a proceeding under this chapter. A "court-appointed special advocate" appointed by the court to be the guardian ad litem for the child, or to perform substantially the same duties and functions as a guardian ad litem, shall be deemed to be guardian ad litem for all purposes and uses of this chapter. RCW 13.34.030(11).

individuals at his placement convinced law enforcement to take him to juvenile detention. As a result of being in detention, he missed a follow up medical appointment at [redacted] hospital regarding his seizure disorder. CP 300-301. He also spent time in detention between March 22 and March 25, 2013 as a result of threatening and destructive behaviors. CP 525. Prior to being placed in detention, in February 2012, J.A. spent three weeks in a youth inpatient psychiatric facility. CP 300. There is little evidence in the record to explain what caused him to be placed in a psychiatric facility.

There is no dispute that J.A. very much wants to be reunited with his mother. CP 424-425. He has physical and mental health issues as well as educational needs, and has faced detention and been placed in a psychiatric facility. He would also like to maintain a relationship with his half-sister. J.A. believes that no one will listen to him or tell him what is happening in his case. CP 424-425. The Guardian Ad Litem requested that all professionals (including J.A.'s mother) not have conversations with J.A. about the proceedings. CP 341.

J.A. wants a lawyer who will advocate the court to return him to his mother. CP 424-425. J.A. contacted the University of Washington Children and Youth Advocacy Clinic ("the Clinic") and asked that it help him get counsel to represent him in the dependency case. CP 461-465.

J.A.'s mother and father have attorneys assigned to represent them. Neither attorney has filed a motion or report to the court in the three-plus years that this case has been open. Mother's lawyer has missed several hearings. He was not present at the first dependency review hearing (CP 101), did not appear at two hearings where the court authorized psychotropic drugs be given to J.A. (CP 101, CP 127-128), gave telephonic authorization for another order authorizing psychotropic (CP 277-278) and, finally, on May 9, 2013, when the court held an interim review hearing regarding the mother's services, the mother appeared but her attorney did not. CP 388.

On March 1, 2013, the Clinic entered a limited notice of appearance for J.A. in the dependency court in order to request counsel at public expense. CP 394-395. J.A. filed the motion under RCW 13.34.100(6)(f), which allows the court to appoint counsel to adolescents upon request. The State did not object to the motion and, although the GAL filed a declaration objecting to the appointment of counsel[2] (CP 441-444), the GAL did not argue against the motion during any hearing. Neither the mother nor the father objected or—responded—to the motion. At the March 14, 2013 motion hearing, no party objected to appointment of

[2] Neither J.A. nor "the Clinic" was served with a copy of this declaration.

counsel. When the Clinic informed the court that J.A. had retained it, the court responded that the Clinic was "welcome to be part of the case." RP 6, Mar. 14, 2013. The court continued that "[i]f he's retained you, then we're done with the conversation and you're absolutely appointed as counsel for him and that supplements the guardian ad litem's work." Id., 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.

B. March 21, 2013 Hearing On The Motion To Appoint Counsel

On the next hearing on the motion to appoint counsel, the court asked the Clinic about the factors set forth in *Mathews*, 424 U.S. 319, specifically the private interests at stake. The court asked why the private interest was so crucial when the permanent plan was guardianship and a guardian had been identified. RP 20, Mar. 21, 2013. The court also asked:

> 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 court asked if there was funding for attorneys for every child to have an attorney and made reference to other "unfunded mandates." RP 29-30, Mar. 21, 2013.

The court commented that it believed that J.A.'s mother had failed to comply with the court or social worker's requests, and said that it viewed J.A. as capable of talking to the court himself. RP 31-32, Mar. 21, 2013. At the conclusion of the hearing, the Court denied the motion for appointment of counsel at public expense. CP 479.

C. April 4, 2013 Presentation of Findings Of Fact And Conclusions Of Law

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, mother's counsel noted his client's efforts to qualify for reunification, including multiple visits to CPS to obtain the ordered services. RP 33-34, May 9, 2013.

The court entered the order denying the motion to appoint counsel at public expense and made conclusions of law. As for the application of the legal test from *Mathews*, the court opined that J.A's private interests were "not that great" because guardianship was the permanent plan; the risk of error was low given the commitment of the court's team; and the countervailing government interest of limited resources for attorneys for

children in the county outweighed J.A.'s interests. The court also found that J.A. could retain private counsel. CP 539-542.

At the conclusion of this hearing, the court set a status hearing and a review hearing. The court indicated that it 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 court made it clear that J.A. should not attend the status hearing. RP 46, May 9, 2013.

D. Motion For Reconsideration

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. CP 555. In addition, J.A.'s father was nearing release from prison, which was causing J.A. significant fear. Because of these events, J.A. filed a motion for reconsideration of the trial court's denial of the motion to appoint counsel. CP 556-557.

The trial court denied the reconsideration 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. CP 559-560. While the trial

court found that the new evidence called for a re-weighing of the *Mathews* factors and, in particular, the child's private interest, it concluded 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." CP 559-561. J.A. timely filed this appeal and Commissioner Bearse granted discretionary review on October 18, 2013. CP 670-686.

V. ARGUMENT

A. The Trial Court Erred in Failing to Appoint Counsel for J.A Under RCW 13.34.100 and the 14th Amendment

1. The 14th Amendment Requires That Counsel Be Appointed for All Children in Dependencies

Whether due process requires counsel for children in dependency proceedings is a matter of law reviewed *de novo*. *Hale v. Wellpinit Sch. Dist. No. 49,* 165 Wn.2d 494, 503, 198 P.3d 1021 (2009). There is currently no Washington decision that directly addresses whether a child in a *dependency* proceeding has a constitutional right to counsel.

In 2012, the Washington State Supreme Court did rule on the right to counsel under the federal constitution for children *in termination of parental rights (but not dependency)* cases. In *In re the Matter of the Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012) (*"MSR"*) the Court held that "children have fundamental due process liberty interests at

stake in termination-of-parental-right (TPR) proceedings and that the *Mathews* test must be applied in individual cases to determine whether the United States Constitution requires appointment of counsel for a particular child. 174 Wn.2d, at 20-22.[3] But the Court was explicit that *MSR* does not bind dependency proceedings.[4]

While there is thus no binding precedent in Washington, no federal or state court in the post-*Mathews* era has declined to find an absolute constitutional right to counsel for children in dependency proceedings. 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 for a child of any age at every stage of a dependency proceeding. Applying the *Mathews* test, the court found that dependency proceedings implicate children's physical liberty as well as their fundamental liberty interests in "maintaining the integrity of the family unit and in having a relationship

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[3] In *MSR,* the Court went on to say that, with respect to TPRs "the constitutional due process right to counsel is also protected by case by case appellate review" *In re Dependency of MSR*, 174 Wn.2d 21.

[4] The Washington Supreme Court amended its original decision in *MSR* by adding that "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 stages." *M.S.R.*, 174 Wn.2d at 22, reconsideration denied (May 9, 2012), as corrected (May 8, 2012).

with [their] biological parents." *Id.* at 1360. The court found that these interests cannot be protected by the parent, who has an inherent conflict with his or her child, and who has allegedly abused or neglected the child. *Id.* at 1358-59. Additionally, the child's interests cannot be protected by the foster care agency, whose "institutional concerns … may conflict with the needs of the deprived child." *Id.* at n. 6.

The *Kenny A.* court also found there was a significant risk of erroneous decisions in dependencies that could go unmitigated by CASAs or juvenile court judges. *Id.* at 1361. Finally, noting that the government had fiscal and administrative interests at stake, the court found that the government's "overriding interest is to ensure that a child's safety and well-being are protected," and that "such protection can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and TPR proceedings." *Id.*

In 1993, a New York appellate court also found that children have a constitutional right to counsel in abuse and neglect proceedings. *In the Matter of Jamie T.T.,* 191 A.D.2d 132, 599 N.Y.S.2d 892 (Ct. of App. NY 1993) (emphasis added).[5] Analyzing the issue under *Mathews*, the *Jamie*

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[5] *See also In re H.R.C.,* 286 Mich. App. 444, 458, 781 N.W.2d 105 (2009) (citing *In re C.R.,* 250 Mich. App. 185, 197-98; 646 N.W.2d 506 (2001) ("Thus, the principles of *effective* assistance of counsel [for children] developed in the context of criminal law apply by analogy in child protective proceedings.") (emphasis added)).

T.T. court held that it "would be callously ignoring the realities of [the child's] plight during the pendency of this abuse proceeding if [the court] failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process." *Id.* at 136.[6]

In summary, no appellate court applying the *Mathews* test to the issue of counsel for children in dependency proceedings[7] has ever found that any child lacks a constitutional right to counsel, regardless of the child's age.[8] Nor were the holdings affected by the presence of a non-attorney

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[6] Other state and federal courts have found a right to counsel in dependency proceedings, though not under the *Mathews* analysis. Almost 30 years before *Kenny A.*, a federal court in Alabama came to the same conclusion as the *Kenny A.* court. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (judges should appoint counsel for foster children at public expense if the parents are indigent). *See also Doe v. State*, 165 N.J. Super. 392, 408, 398 A.2d 562 (1979). New Jersey subsequently enacted a statutory right to counsel for all children. N.J. Stat. Ann. §§ 9:6-8.23, 9:6-8.21. In addition to courts and legislatures, numerous entities have called for counsel to be provided to children in dependencies. *See infra,* Section IV(B)(2)(c).

[7] State courts have found an absolute right to counsel for children involved in TPR proceedings as well. *See, e.g., Adoption of Meaghan*, 461 Mass. 1006, 961 N.E.2d 110 (2012) ("The child cannot have a meaningful opportunity to be heard in a contested proceeding without the assistance of counsel, regardless whether the case is initiated by the department or other agency or by a private party."); *In re Clark*, 303 N.C. 592, 600-01, 281 S.E.2d 47 (1981) ("fundamental fairness requires that the minor child be represented by counsel..."); *Matter of T.M.H.*, 1980 OK 92, 613 P.2d 468 ("if a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client..."). *See also In the Matter of the Guardianship of S.A.W.*, 1993 OK 95, 856 P.2d 286 (expanding holding in *T.M.H.* to private parental TPRs); *In the Matter of the Adoption of K.D.K.*, 1997 OK 69, 940 P.2d 216 (failure to appoint counsel for child on petition for adoption was fundamental error).

[8] Many of these children were much younger than J.A..: in *S.A.W.*, the child was four years old; in *T.M.H.*, five; in *K.D.K.*, eight; in *Roe v. Conn*, a class of children under 16; and in *Kenny A.*, a class of children of all ages. 856 P.2d at 287-88; 613 P.2d at 468; 940 P.2d at 217; 191 A.D.2d at 132; 417 F. Supp. at 773-74; 356 F. Supp. 2d at 1353 (respectively). The Washington Supreme Court has acknowledged the importance of the opinions of young children in legal proceedings, commenting that "children as young as

GAL, as exists in the present case. *See, e.g., Kenny A.*, 356 F. Supp. 2d at 1359.

The reasoning of these decisions, rather than the holding of *MSR* that applies only to TPRs, should be applied here. In answer to the question that the *MSR* court posed when it amended the decision, there are crucial differences between dependencies and TPRs that strongly support an absolute right to counsel in dependencies where there is no absolute right in TPRs.

The State itself asserted many of the differences in its briefing in *MSR*. DSHS explained numerous times that dependencies and TPRs differ in their effect on a dependent child's physical and other liberty interests. For example, the State wrote that "a termination proceeding does not determine where a child will be placed – that is a function of the dependency proceeding." Supplemental Brief of Respondent Department of Social and Health Services at 15, *In re MSR*, (08/10/2011) (No. 85729-6), 2011 WL 3694327 at *15. In another brief, it noted that:

> A parental rights termination case is a discrete proceeding focused exclusively on whether the legal right of a parent to the care, custody, and control of his or her child should be terminated. When the court reaches a decision on the merits of the termination petition, the termination proceeding is over. *A*

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five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Rule of Professional Conduct (RPC) 1.14, comment 1.

> *dependency proceeding, in contrast, concerns the child's ongoing welfare and encompasses all matters associated with the child's care and well-being during the dependency.*

Response Brief of Respondent Department of Social and Health Services at 28-29, *In re MSR*, (11/22/10) (No. 85729-6) (emphasis added).

> The mother claims that children have a liberty interest in a termination proceeding because they are in the custody of the State and are subject to a wide variety of placements. However, a child's placement is a function of the dependency proceeding. Placement is not and cannot be considered as part of a termination proceeding.

Id., at 29-30. The State went on to argue that contempt of juveniles, which can lead to detention, was "a function of a dependency proceeding and not a termination proceeding." *Id.,* at 30-31.

J.A. agrees with the State that dependencies and TPRs are very different, especially from the child's standpoint. The two are separate proceedings with separate cause numbers and have different standards, focuses and purposes. 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." *Welfare of Becker,* 87 Wn.2d 470, 476, 553 P.2d 1339 (1976).[9] The dependency determines whether children will be taken from their parents and their

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[9] In a dependency, "the likelihood of eventual permanent deprivation is substantial." *In re Welfare of Myricks*, 85 Wn.2d 252, 253, 533 P.2d 841 (1975).

home in the first place, governs a child's placement throughout the time the child is in the state's custody, and determines the services to be provided. RCW 13.34.130. Dependency proceedings focus on children's best interests, while TPR proceedings are more heavily focused on the fundamental rights of parents. As compared to a TPR's clear and convincing standard, a dependency proceeding uses a "relatively lenient preponderance standard." *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). "Permitting state intervention on a standard of proof lower than a clear and convincing standard is important in providing the necessary flexibility to the State." *In re Chubb*, 46 Wash. App. 530, 536-37, 731 P.2d 537 (1987). Although a relaxed standard of proof may provide for more flexibility, it will inevitably lead to a greater chance of error. 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 hospitalization, and with whom he or she shall communicate.[10]

Given these differences, all of which point toward the need for stronger protections for children, Washington courts should follow the

[10] While a TPR order could give rise to a contempt finding against a child, it is far more likely that the child's violation of a *dependency* order will lead to sanctions and possible incarceration.

many cases holding that due process requires that all children in dependencies be represented by counsel. This Court should so hold. However, at a minimum, under the due process clauses of the state and federal constitutions, and under the due process standards laid out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), J.A. should have an attorney at public expense. The bare minimum due process standard that applies requires the case-by-case application of *Mathews v. Eldridge.*[11] However, J.A.'s case involves a dependency, which, as the State pointed out in *MSR*, more directly implicates physical liberty and other fundamental liberty interests, and thus, stronger constitutional protections apply.

The three-part test articulated in *Mathews v. Eldridge* requires, in considering whether counsel is constitutionally mandated, 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.[12]

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[11] 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.

[12] Technically, the *Mathews* test is to be used as a federal due process analysis for cases where there is no physical liberty at stake to overcome the presumption against

2. The Trial Court Erred In Its Application of Every Part of The Three-Part Mathews Test[13]

a) First Prong: The Trial Court Undervalued J.A.'s Private Interest As Elaborated By The Washington State Supreme Court In MSR

The trial court failed to properly consider each of the *Mathews* factors. Error in consideration of even 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.

The trial court erred in its application of the first *Mathews* factor by finding that J.A.'s private interest was "not that great," inappropriately limiting it to "the interest the child has in achieving permanency." CP 541. The minimization of J.A.'s private interest was based on J.A.'s desire to go home to his mother and the court's belief that that option was unavailable at the time. The court's analysis remained unchanged despite later discovery and recognition of "confusion about the permanent plan" and the disintegration of the prospective guardianship plan before the motion for reconsideration. CP 543-557.

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appointment of counsel for civil litigants. *King v. King*, 162 Wn.2d 378, 395, 174 P.3d 659 (2007). Because physical liberty is at stake for dependent children like J.A., counsel should have been appointed, or, at a minimum, a presumption that appointment is required should apply.

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

Perhaps more importantly, the court inappropriately narrowed the scope of J.A's interests in this case, which includes control over his life. As the Court in *MSR* noted, all dependent youth, and certainly J.A., have, an interest in physical liberty that is strongly impacted by dependencies, as well as 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.

More specifically, "[I]n a dependency or [TPR] proceeding . . . the child is at risk of not only losing a parent but also relationships with sibling [sic], grandparents, aunts, uncles, and other extended family." *MSR,* 174 Wn.2d at 15. The child faces the loss of *physical* liberty because the child "will be physically removed from the parent's home" and "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. Additionally, the *MSR* Court recognized that a child "who is the subject of a dependency or [TPR] proceeding is at risk of being returned by the State to an abusive or

neglectful home," and reiterated that "foster children have a substantive due process right 'to be free from unreasonable risks of harm . . . and a right to reasonable safety.'" *Id.* at 17 (quoting *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 699 81 P.3d 851 (2003).[14] The Court concluded that "for the purposes of *Mathews*, the child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's." *Id.* at 17-18.

Beyond safety, foster children have significant educational rights under federal and state law, including a right to education under the Washington Constitution, as well as rights related to special education.[15] Additionally, foster children have rights related to privacy,[16] religion,[17] and culture.[18] A child's physical and fundamental liberty interests are at the mercy of the State for up to an entire childhood—a dependency court

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[14] *See also Jamie T.T.*, 599 N.Y.S.2d at 894 (liberty interests include protection from sexual abuse).

[15] 20 U.S.C. § 1400 *et seq.*; RCW 74.13.550, RCW 28A.150.510; Wash. Const. art. IX, §1; Ch. 28A.155 RCW.

[16] RCW 9.02.100.

[17] WAC 388-148-0430(3).

[18] 25 U.S.C. §§ 1901 *et seq.* (Indian Child Welfare Act); RCW 13.34.040; RCW 13.34.070(10); WAC Ch. 388-70.

can make decisions about a child's life for 21 years,[19] far beyond the length of time a juvenile offender court may wield jurisdiction.[20]

It is difficult to imagine private interests that are more important or compelling. For the trial court to find that J.A.'s private interest was not "very great" directly contradicts the holding in *MSR*. No dependent child—and certainly not one who has been incarcerated, involuntarily hospitalized, separated from his mother and sibling, and who fears his violent father—could possibly have anything other than a great liberty interest in his or her dependency.

Even had the trial court been correct in limiting J.A.'s liberty interest to "permanency", J.A.'s interest in achieving permanency could not possibly be "not that great." The trial court may have believed that his interest was adequately protected by the system, but that is not what the first prong of *Mathews* is about—it is simply about the contours of the "private interest at stake." How could J.A.'s interest in permanency be

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[19] RCW 74.13.031(10) allows certain youth to continue receiving extended foster care services and remain dependent until they are 21.

[20] The comparison between a child's right to counsel in offender and dependency proceedings was not lost on a federal court in 1976. *Roe v. Conn*, 417 F. Supp. 769. The *Roe* court adopted the reasoning of *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), in which the U.S. Supreme Court held that due process required independent counsel for children subject to delinquency proceedings which may result in the child's institutional placement. 417 F. Supp. at 780 ("[m]uch the same reasoning [of *Gault*] applies to a neglect determination proceeding[,]" and thus, judges should appoint counsel for foster children at public expense if the parents are indigent).

anything other than great? Whether those interests are adequately protected is the second prong of the test. In addition to his interest in permanency, J.A. has numerous other interests at stake. He has an interest in his personal safety and security, bodily integrity, having his physical, mental health and educational needs met, privacy, and sibling and parent visitation and connections.

Additionally, and while more relevant for prong two, the trial court believed the prospective guardianship minimized J.A.'s private interest in his case. However, this plan was no longer an option for J.A. because his current foster mother became unwilling to be his guardian. This fact significantly diminishes his chances of achieving permanency before he ages out of state care unless he can return to his mother. Even J.A.'s 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." CP 555.

However, Mother's counsel has filed no motions or reports to the trial court on the mother's behalf, and J.A. did not have counsel who could file a motion to have him placed with his mother or to have increased

visitation. J.A.'s counsel would also be able call witnesses to testify and present evidence in support of the motion.

The trial court denied J.A. representation by pre-judging one of the major issues on which J.A. wants representation, concluding that his desire to be reunited with his mother was not a significant interest. This greatly undervalued his private interest at stake.

MSR forecloses the option for a trial court to find that a dependent child has anything other than "fundamental liberty interest" at stake in their dependency. Even if this were not the case, J.A's strong private interest in this case, as well as the numerous issues at stake for him in the proceeding, outweigh the other two *Mathews* prongs and lead to the conclusion that he has a constitutional right to the appointment of counsel at public expense.

b) Second Prong: The Trial Court Understated the Risk of Error and Failed to Account for a Change in J.A.'s Permanent Placement Options

The second *Mathews* factor requires the trial court to consider the risk of error and the value of additional or substitute safeguards. The risk of error in the absence of counsel for children is particularly high given the subjective "best interest" standard used in dependency proceedings. As the U.S. Supreme Court has found, this standard is imprecise, "leave[s] determinations unusually open to the subjective values of the judge" and

serves to "magnify the risk of erroneous fact finding." *Kenny A.*, 356 F. Supp. 2d. at 1361 (quoting *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). Further compounding the risk, as the *Kenny A.* court noted, is the "strong empirical evidence that [the State] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children." *Id.*

Despite the complexity of and high risk of error in dependency proceedings, RCW 13.34.100(6) merely requires that children 12 and older be notified of their right to *request* counsel. Though the Washington Supreme Court has explicitly said that some children of all ages have a federal constitutional right to counsel (in TPRs), and that this issue must be decided on a case-by-case basis, *MSR*, 174 Wn.2d at 19-22, it did not explain how the issue was supposed to arise, given that no notice is provided to or inquiry made of children under the age of 12. Additionally, JuCR 9.2(c)(1) requires appointment of counsel only if a child is not appointed a GAL/CASA and the issue comes before the court.

In fact, outside of JuCR 9.2, there are only two instances where children have a right to counsel. First, when they seek reinstatement of rights for a terminated parent. RCW 13.34.215. Through a motion for

reinstatement, a child *of any age*[21] for whom the state had failed to find permanency after three years, can petition to be reunified with his or her parent. This mechanism underscores risk of erroneous deprivation, and the legislative recognition of the importance of children's counsel to adequately arguing one's case. The second instance occurs when youth participate in "extended foster care" after age 18, even if they haven't had an attorney for the preceding 18 years. RCW 13.34.267.

In a case such as J.A.'s, which presents multiple challenging legal issues with high stakes outcomes, it is important that the rights of all parties be protected and all perspectives be heard so that the trial court can arrive at a well-informed decision. Dependency proceedings involve complicated legal and procedural issues, including discovery, motions practice, presentation of evidence and testimony, and cross-examination, among other things. Providing dependent children, like J.A., with legal representation would substantially mitigate the risk of error involved in dependency proceedings. A lawyer's ability to spot legal issues and argue on behalf of the child's legal rights in the dependency context is critical. As the Supreme Court in *MSR* acknowledged, GALs and CASAs "are not trained to, nor is it their role to, protect the legal rights of the child." 174

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[21] Children under 12 years old must show good cause before they can proceed in a petition for reinstatement of parental rights. RCW 13.34.215.

Wn.2d at 21. CASAs and GALs serve as the "eyes and ears" of the dependency court, they do not, however, direct the course of litigation in a dependency proceeding.[22] Attorneys, on the other hand:

> ...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.

MSR, 174 Wn.2d at 21. A volunteer GAL is insufficient in this respect to guard against an erroneous deprivation of J.A's. rights. Moreover, GALs are not required to abide by a child's wishes—they may adopt and pursue a position at odds with the child's desires.[23] In fact, here, the GAL's position is at odds with J.A.'s.

Attorneys' substantive arguments are strengthened by the fact that they maintain a confidential and privileged relationship with their child-clients—"unlike a GAL, an attorney can maintain confidential

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[22] *Veazey v. Veazey,* 560 P.2d 382, 391 (Alaska 1977) ("[GAL] services are valuable supplements to, but not a substitute for, an independent advocate for the child") (citation omitted), *superseded by statute*, Alaska Stat. § 09.65.130, *as recognized in Deivert v. Oseira*, 628 P.2d 575, 579 n.3 (Alaska 1981). One legal scholar noted: "[P]roponents ask the following question: If the parents and the agency need attorneys to properly represent their views in court, why does the child, whose entire future is at stake, need something less?. . . Children deserve the same level of representation as parents and agencies—legal representation." John E.B. Meyers, *Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court,* 8 U.C. Davis J. Juv. L.& Pol'y 267, 270 (2004).

[23] RPC 1.2(a) requires lawyers to ". . . abide by a client's decisions concerning the objectives of representation." No such obligation binds a GAL or CASA.

communications with the child so the child is free to disclose the child's deepest secrets and concerns and ensure that children know with whom and in what manner they can communicate." *MSR*, 174 Wn.2d at 19. Additionally, attorneys serve an important counseling role for child-clients. A child's attorney has the duty to inform his or her client about what is happening in his case and to provide him with an understanding of the broader context. *See* RPCs 1.4, 2.1.

Beyond substantive arguments, children's counsel can utilize procedural mechanisms to ensure their child-client's interests are protected. The *MSR* Court found that attorneys "can facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders." 174 Wn.2d at 21. Children's counsel can also, when appropriate, negotiate to settle. If negotiations take place, it is imperative that the child have counsel through which her rights and stated interests can be protected. When negotiations are not successful, a child, through an attorney, can file pretrial motions, conduct discovery, put on and cross-examine witnesses, challenge the state's experts, and object to the introduction of prejudicial or inadmissible evidence. An attorney can also ensure that the child is present at all hearings in which his or her interests are at issue and request the child's *in camera* testimony or a scheduling order that ensures the child's meaningful presence.

DSHS is also unable to represent J.A.'s interests. Though mandated to provide for the welfare of J.A. and many children facing a similar plight, it will inevitably encounter conflicts between its "broad programmatic needs" and "the specific needs of the individual child," hampering its ability to advocate for J.A.'s interests. *Kenny A.*, 356 F. Supp. 2d at 1359, n.6. To illustrate how the needs of children can suffer when a child welfare agency is faced with the other pressures on its system, the *Kenny A.* court cited to instances of children placed in inappropriate homes, others given one short placement after another with no prospect of permanency, and still others inappropriately institutionalized. *Id.* DSHS has encountered similar challenges in Washington—the most recent report on its compliance with the requirements of the *Braam* Settlement Agreement[24] shows that DSHS has not yet reached compliance with a majority of the 21 required outcomes, including the failure to provide the required number of monthly social worker visits to children in foster care, maintain adequate caseload ratios, and ensure that siblings maintain regular visits/contacts if they are separated in foster care, among other

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[24] The *Braam* Settlement Agreement was reached in 2004 after the Washington Supreme Court concluded that "foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety." *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003). The Revised Settlement Agreement outlined goals to improve the foster care system. *See* http://www.braamkids.org/media/ab5b368a1afe03dcffff8017ffaf2815.pdf

failures. Faced with a variety of competing pressures, DSHS cannot possibly be said to provide complete and effective representation of J.A.'s or any dependent child's interests.

J.A.'s mother is equally incapable of fully representing her son's interests. The very nature of a dependency proceeding, in which DSHS has alleged that the parent is unfit, indicates that the interests of the parent and child do not align. *See Kenny A.*, 356 F. Supp. 2d. at 1359. In this case, the Mother has had limited supervised access to J.A., who has lived consistently in foster care since June of 2010. Even if the Mother did have access to her son, she would be an inappropriate representative of J.A.'s interests—it is not appropriate or reasonable for parents who have been found to be neglectful or abusive to be charged with protecting the legal interests of the child who has been neglected or abused. In no other legal proceeding would a victim be represented by someone found to have failed to have protected that victim's interests. The mother, therefore, does not and cannot represent J.A.'s interests. In addition, the record indicates that the attorney for the mother has missed several hearings, has filed no motions and has submitted no reports on the mother's behalf to the trial court.

J.A.'s expressed interests cannot be merely summed up by whether he wants to be returned to his mother or not. Without counsel to fully develop

J.A.'s position from his perspective, it is impossible to know the full depth and breadth of his interests and to assert them for his unique benefit. To protect him from the high risk of error in dependency hearings, J.A., like all children in dependency proceedings, must have a lawyer appointed specifically to represent *his* interests, one who is free from conflicting interests or external pressures.

The trial court found that the risk of error in this case was low because the trial court had worked with a "team" that it believed was "experienced," which included a GAL whose role was to tell the trial court of the child's wishes, and that there were other lawyers on the case. CP 539-542.

In addition, the trial court based its denial of the motion partially on its finding that the GAL reported on J.A.'s desire to live with his mother to the trial court. However, telling the trial court what J.A. wants is not the same as developing a case and advocating on behalf of J.A.'s interests.

A youth will be affected by a dependency in a way that is much different and much more intrusive from the effect the dependency will have on either the parent or the State. The parent has an interest in maintaining parental rights and in being found to be a responsible parent. The State has many extrinsic factors to consider in a dependency proceeding, including its liability, resources, and fiscal concerns. And,

though the State and the parents share the child's interest in protecting his or her welfare and avoiding erroneous dependency, their interests are not coterminous.[25] Quite simply: "[O]nly the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." *Kenny A.*, 356 F. Supp. 2d at 1361.

The trial court failed to take into consideration the benefit of additional safeguards—in this case, counsel for J.A.—as is required under this prong of the *Mathews* test. Counsel in this case would help present matters that the social work team did not recognize as legally significant or simply missed. In fact, the team, none of whose jobs include advocating for J.A.'s rights or stated interests, missed several substantially relevant considerations. The Clinic, representing J.A. in the motion, brought to the trial court's attention the fact that the foster mother was not willing to be a permanent guardian. CP 555. Similarly, J.A., through the Clinic's representation, revealed J.A.'s fears about his father's release from prison in the motion for reconsideration. CP 556-557.

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[25] Parents' interests diverge from their children's from the moment a dependency order is entered—the children are alleged to be victims of abuse or neglect and may have interests different from that of their parents. *See Kenny A.*, 356 F. Supp. 2d at 1359 (there is an 'inherent conflict of interests' between a child and his parent or caretaker in a deprivation proceeding) (*citing* 1976 Op. Att'y Gen. No. 76-131 at 237). Thus, parents and/or their attorneys cannot mitigate the risk of error that children face in dependencies. *See also Santosky,* 455 U.S. at 761 (1982). Likewise, the State's interests diverge from the children's interests because the State has pecuniary, institutional and programmatic needs that may conflict with a child's specific needs. *Kenny A.*, 356 F. Supp. 2d at 1359 n.6.

The trial court held a status conference specifically to address the fact that J.A. spent time in detention due to miscommunication among the very team that the trial court believed prevented error. RP 29-31, May 9, 2013. J.A.'s stint in detention is just one of the errors that occurred in this case. By being removed from his family, he was cut off from his sibling and, from significant contact with his mother. J.A. now faces the possibility that he could be required to have contact with his father—a person he fears greatly. Without counsel representing his interest there is a great risk that the trial court will not know J.A.'s perspective regarding the most important aspects of his life.

In J.A.'s case, the existing procedures led to at least one unnecessary stay in detention (without due process), commitment for three weeks in a psychiatric hospital (without due process), psychotropic drugs being ordered (without due process) and an absence of any permanent placement option. Thus, these existing procedures have not provided J.A. with adequate protections.

Errors are common in dependency proceedings. For example, in *In re Dependency of M.S.D.*, 144 Wn. App. 468, 182 P.3d 978 (Div. 1 2008), the Court of Appeals found that the trial court has established a dependency based on insufficient evidence. The Court of Appeals reversed the dependency and warned judges to refrain from entering custody

decisions based on a court's perceived ability to make better decisions than the child's parents. In *In re Dependency of R.L. and I.L.,* 123 Wn. App. 215 (Div.1, 2004), the Court of Appeals vacated a dependency due to inappropriate exclusion of the father's evidence and remanded the case to determine if the father could be a viable placement.

Dependencies are a highly subjective process in which errors can be reduced by the child having counsel.

c) Third Prong: The Government Has More of an Interest in Protecting J.A. than in Avoiding the Cost of Counsel

The third prong of *Mathews*—the government's interest—aligns with J.A.'s request for counsel. While the State did not object to counsel being appointed or make *any* argument about the fiscal impact of counsel, the trial court found that 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." CP 539-542.

Again, no party presented any evidence about the fiscal impact or about the county's resources available for counsel, leaving the trial court to create arguments on the government's behalf. [26]

In any case, "financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Mathews*, 424 U.S. at 338. Even the U.S. Supreme Court, in *Lassiter v. Dep't of Soc. Servs. Of Durham Cnty., N.C.* 452 U.S. 18, 101 S. Ct 2153, 68 L.Ed.2d 640 (U.S.N.C. 1981), held the state's pecuniary interest to be "hardly significant enough to overcome private interests as important as those here." *Lassiter*, 452 U.S. at 28. In identifying significant constitutional due process rights for foster children, the Washington Supreme Court noted that "[l]ack of funds does not excuse a violation of the Constitution." *Braam*, 150 Wn.2d at 710, 81 P.3d 851 (2003) (*citing Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 389, 932 P.2d 139 (1997)).

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[26] Notably, other counties have found counsel to be financially worthwhile. J.A. would have had an attorney in King County at age 12, in Benton and Franklin Counties at age 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. In fact, in the Hells County Circuit, an attorney would have been appointed to represent him regardless of his age. Local Rules for the Superior Courts of Asotin, Columbia, and Garfield Counties, HCCLR 24.

"As *parens patriae*, the government's *overriding interest* is to ensure that a child's safety and well-being are protected … such protection can be adequately ensured only if the child is represented by legal counsel throughout the course of the deprivation and TPR proceedings." *Kenny A.*, 356 F. Supp. 2d at 1361 (emphasis added). In other words, the State has an interest in providing counsel, because counsel promotes the child's well-being and safety.

Furthermore, there is no evidence (and certainly none was provided to the trial court) that providing attorneys to dependent children will impose a significant fiscal burden on the State. In fact, a seminal study indicates that providing children with counsel in their dependency proceedings reduces their length of stay in foster care and may actually reduce the long-term financial burden on the State.[27] The study found that children with legal representation had "a significantly higher rate of exit to permanency" than those without, without leading to significantly lower

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[27] ANDREW ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY (2008), *available at http://www.chapinhall.org/research/report/expediting-permanency* (Finding that children with counsel experienced exits to permanent homes about 1.5 times more frequently than children without counsel. Children with counsel also moved from case plan approval to permanency at approximately twice the rate of those without representation.) (last visited December 9, 2013). *See also* LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 615-16 (2009) (Children who achieve permanency are more likely to achieve higher educational gains, to be employed, and to have higher incomes and are less likely to be incarcerated, have substance abuse issues or receive state aid than their counterparts).

rates of reunification.[28] The study found that the "savings associated with reduced substitute care *considerably* offset the costs" of counsel.[29]

The State, which apparently does not oppose appointment of counsel to J.A, and which took no position until the appeal, is defending the trial court's exercise of discretion. In fact, DSHS and the Office of the Attorney General, along with all other major foster care stakeholder groups in Washington, unequivocally endorsed counsel for all dependent children in all proceedings, including appeals, in the recommendations of the 2010 Statewide Children's Representation Workgroup, appointed by the Washington Supreme Court Commission on Children in Foster Care.[30]

The value of attorney representation for youth has been recognized by representatives of national bodies over and over again. The American Bar Association reiterated its call for all dependent children to have attorneys in its 2011 Model Act Governing the Representation of Children in Abuse,

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[28] Zinn & Slowriver *supra* note 27, at 1.

[29] Clark Peters & John Walsh, *Fiscal Returns on Improved Representation of Children in Dependency Court: The State of the Evidence*, 36 Nova L.Rev. 435, 443 (2012) (emphasis added). The article does note that the evidence of fiscal returns is promising yet limited. *Id.* at 436.

[30] WASHINGTON ADMINISTRATIVE OFFICE OF THE COURTS, REPRESENTATION FOR CHILDREN AND YOUTH IN WASHINGTON'S CHILD WELFARE SYSTEM (2010), *available at* http://www.law.washington.edu/Directory/Docs/kelly/HB2735.pdf (last visited December 9, 2013).

Neglect and Dependency Proceedings.[31] Notably, the Model Act was not only supported by, but co-sponsored by the ABA's Judicial Division and the ABA's Government and Public Sector Lawyers.[32] The value of attorneys for children has also been recognized by the Washington Legislature, which unanimously espoused the value of well-trained attorneys for dependent children.[33]

The weight of authority suggests that the government's interests would, in fact, be furthered by providing dependent children, including J.A., with independent legal counsel. As argued above, counsel for J.A.

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[31] AMERICAN BAR ASSOCIATION, ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY PROCEEDINGS 5 (2011), *available at* http://www.firststar.org/policy-legislation/legal-representation-for-children/aba-model-act-governing-the-representation-of-chil.aspx (last visited December 9, 2013).

[32] Other entities call for counsel to be provided to children in dependencies and TPRs recognize. *See* Lisa Hunter Romanelli et al., *Best Practices for Mental Health in Child Welfare: Parent Support and Youth Empowerment Guidelines*, 88 Child Welfare League of Am. 189, 202 (2009), *available at* http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={FAAABEF9-2E5C-4D63-8584-73205D3B7CA4} (last visited Dec. 10, 2013); U.S. DEP'T. OF HEALTH AND HUMAN SERVS., ADOPTION 2002: *THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN §VII* (1999), *available at* http://archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu_djvu.txt (last visited Dec. 10, 2013); The United States Children's Bureau has also recently funded an effort to implement effective legal representation for dependent children based on the premise that "[a]ll children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court's jurisdiction continues." *See* National Quality Improvement Center *on the Representation of Children in the Child Welfare System, available at* http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx (last visited Dec. 11, 2013).

[33] The Washington Legislature unanimously recognized that attorneys have "different skills and obligations" than GALs, and that attorneys are uniquely situated to protect children's legal rights and interests. Laws of 2010, ch. 180, § 1 (HB 2735).

would assist in the effective administration of justice by fully developing the complex issues before the dependency court and would ensure that J.A.'s physical, mental health, and safety needs are met.

In addition, a representative of the Washington State Center for Court Research recently testified that certain time to certain court benchmarks in dependency hearings was significantly reduced in those counties where attorneys are routinely appointed to represent dependent youth.[34]

Ultimately, J.A.'s case highlights how the *Mathews* analysis, when applied to dependency proceedings, results in a different outcome than in *MSR.* All three factors of the *Mathews* test indicate that appointment is necessary for J.A., if not for all dependent children, and thus constitutionally required by the 14th Amendment to the U.S. Constitution.

B. The Trial Court Erred in Failing to Appoint Counsel for J.A. Under the Washington State Constitution

1. Historically, Washington State has provided greater access to counsel and greater protection to children

Our courts have not addressed the question of whether, as to the right to counsel for dependent children, the due process protections in Art. I, § 3 of the Washington State Constitution provide more protection than the 14th

[34] October 3, 2013 Judiciary Jt. w/Early Learning and Human Services Committee work session on Legal representation for minors in dependency proceedings. Available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013100062

Amendment to the federal constitution.[35] Four critical differences between the federal and state provisions provide context and mandate recognition of this right.

First, whereas the federal clause only mandates counsel where physical liberty is at stake, *Lassiter v. Dep't of Soc. Services of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (U.S.N.C. 1981), Washington's due process clause also requires counsel where *fundamental* liberty interests are at stake. *In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995) (relying on *In re Luscier*, 84 Wn.2d 135, 542 P.2d 906 (1974); *In re Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975) (emphasis added)). The *MSR* Court has been clear that such fundamental liberty interests are directly implicated for children in dependencies.

Second, after *Lassiter* held that parents lack an absolute right to counsel under the federal constitution in termination cases, Washington courts have continued to recognize parents' absolute constitutional right to counsel in terminations—a right that, post-*Lassiter,* must be based in the Washington Constitution. Given that dependent children "have at least the same due process right to counsel" as do their parents, *MSR*, 174 Wn.2d at

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[35] The issue of dependent children's right to counsel under the Washington constitution has been raised before the Washington Supreme Court on three occasions just in the last eight years, with the Court declining to rule each time. In *In re Parentage of L.B.*, 155 Wn.2d. 679, 712, 122 P.3d 161, 179 (2005); In *In re Termination of D.R. and A.R.*, No 84132-2 (Wash. St. Sup. Ct. 2011); *MSR,* 174 Wn.2d at 245, n. 11.

20, all children must have a constitutional right to counsel based in the Washington state constitution.

Third, "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, 1248 (1983). Washington law affords children and parents a constitutional right to counsel in dependency proceedings; with the U.S. Supreme Court's holdings on the federal constitution having no bearing on the meaning of the Washington Constitution.

Fourth, there is no binding state or federal precedent regarding the constitutional right to counsel for *children* in *dependency* proceedings.[36] The U.S. Supreme Court has never ruled that parents or children lack a federal (or state) constitutional right to counsel in *dependencies*.

Within this context, there can be no question that the right to counsel for these children is required under the Washington constitution.

2. A *Gunwall* analysis supports an independent state constitutional analysis and concludes that Art. I, § 3 provides broader protection on this issue

State v. Gunwall sets forth six nonexclusive factors to guide the court in determining whether a state constitutional provision affords greater rights than its federal corollary: (1) the textual language of the state

[36] As noted above, the only federal courts to reach this issue found that children are entitled to counsel in termination and dependency proceedings under the 14th Amendment. *Kenny A.*, 356 F. Supp. 2d 2353; *Roe v. Conn*, 417 F. Supp. 769.

constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the state and federal constitution; and (6) matters of particular state of local concern. 106 Wn.2d 54, 61-2, 720 P.2d 808 (1986).[37]

Any *Gunwall* analysis must be contextual. In the context of counsel for children in dependency hearings, the *Gunwall* factors support an independent state constitutional analysis and show that Art. I, § 3 provides greater protections in the context of children's due process right to counsel in dependency proceedings.

a) The textual similarities between the state and federal due process clause do not foreclose greater protection under the state clause

With regard to factors one and two, the texts of the federal due process clause and Art. I, § 3 are not significantly different.[38] However, even where state and federal constitutional provisions are identical, the intent of the framers of each constitution may have been different or another intent may be found in a different provision of the state constitution. *Gunwall*,

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[37] "There is no presumption that the minimum degree of protection established by the federal constitution is the degree of protection to be afforded under the Washington Constitution." *State v. Reece*, 110 Wn.2d 766, 780, 757 P.2d 947 (1988).

[38] Art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." Const. Art. I, § 3. The 14th Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV.

106 Wn.2d at 61.[39] For example, in *State v. Bartholomew*, this court held that despite textual similarity, Art. 1, § 3 is broader than the 14th Amendment and not controlled by it. 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (finding that provisions of the capital punishment statue at issue in *Bartholomew* violated due process under the state constitution even if under the same result is not compelled under the 14th Amendment).

b) State constitutional history suggests an independent interpretation

Art. I, § 3 requires independent interpretation unless historical evidence shows otherwise. *Gunwall*, 106 Wn.2d at 514-16. "State constitutions were originally intended to be the primary devices to protect individual rights, with the federal constitution a secondary layer of protection." *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652, 662 (1991) (Utter, J., concurring).[40]

Additionally, Washington's constitution, unlike the federal, is far more protective of children, twice referencing their care. Art. IX, § 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. . . ". Art. XIII, § 1

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[39] *See also* Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitution and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984).

[40] *See also* Wash. Const. art. I, § 1 (government powers "are established to protect and maintain individual rights"); Hugh Spitzer, *New Life for the "Criteria Test,"* 37 Rutgers L.J. 1169, 1192 (2006).

requires the state to foster and support institutions for the benefit of youth who have physical or developmental disabilities or mental illness and "other such institutions as the public good may require."[41] These state provisions indicate that the framers intended for Washington to go beyond the federal government in its protection of children's welfare.

c) Preexisting state law indicates broader protection of children's fundamental liberty interests

This factor refers to case law and statutory law "dealing with the issue and not just the particular constitutional provision." *State v. Smith*, 117 Wn.2d 263, 286, 814 P.2d 652, 663 (1991) (Utter, J., concurring). Courts have looked at recent as well as older laws in applying this factor. *See, e.g., Gunwall* 106 Wn.2d at 66 (preexisting law includes "long history and tradition of strict legislative protection of telephonic and other electronic communications in this state").[42]

Due process analyses are not intended to freeze the interpretation of constitutional principles. *Grant County Fire Prot. Dist. v. City of Moses Lake No. 5,* 150 Wn.2d 791, 809, 83 P.2d 419 (2004). "Due process is, perhaps, the least frozen concept of our law—the least confined to history

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[41] This provision could be read to include foster care.

[42] *See also State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990) (current ordinances dealing with curbside trash collection sufficient for preexisting law); *State v. McKinney*, 148 Wn.2d 20, 26-29, 60 P.3d 46 (2002) (preexisting law includes Department of Licensing statutes between 1915 and 1990).

and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (opinion concurring in judgment).[43] If due process notions did not evolve, children, as well as others, would retain their status as chattel. As the Washington Supreme Court noted, without counsel, children in dependency proceedings are given an inferior status wherein they are rendered even more "vulnerable ... powerless and voiceless." *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n. 29, 122 P.3d 161 (2005).

In two critically relevant areas, the state due process clause has been held to go further than its federal counterpart: 1) it extends the right to counsel beyond situations where physical liberty is threatened; and 2) it protects the right to counsel for parents in dependencies, even if not in TPRs. Thus, this should not only be weighed in J.A.'s favor, but that all children in dependencies have a right to counsel.

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 an individual's physical liberty is threatened "*or* where a fundamental liberty interest,

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[43] As such, "constitutional amendment[s] must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S 86, 101-02, 79 S. Ct. 590, 2 L. Ed. 2d 596 (1958).

similar to the parent-child relationship, is at risk." *Grove*, 127 Wn.2d at 237.[44]

Second, owing to this difference between the two constitutions, the absolute right to counsel for parents in dependencies has been part of Washington statutory and constitutional jurisprudence for almost four decades. In 1974, noting that a parent's right to the care, custody and companionship of his or her child is a constitutionally protected liberty interest, the Washington Supreme Court held that a "parent's right to counsel in [TPRs] is mandated by the constitutional guarantees of due process under the Fourteenth Amendment of the [U.S.] Constitution and Art. I § 3 of the Washington Constitution." *Luscier*, 84 Wn.2d at 138. The next year, the Washington Supreme Court extended these guarantees to parents in dependencies because "the likelihood of eventual permanent deprivation is substantial." *Myricks*, 85 Wn.2d at 253. The Legislature codified these rights soon thereafter in RCW 13.34.091. Laws of 1977, 1st Ex. Sess., ch. 291, § 37. Six years later, the U.S. Supreme Court held that there was no universal right to counsel under the *federal* due process

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[44] In *King v. King,* the Washington Supreme Court again reaffirmed that the right to counsel extends to cases in which "a fundamental liberty interest ... is at risk." *King,* 162 Wn.2d at 378 (quoting *Grove,* 127 Wn.2d at 237). In *King*, the Washington Supreme Court declined to find a right to counsel in a private custody action because the interest at stake was not commensurate with the interests "at stake in a termination or dependency proceeding." *King*, 162 Wn.2d at 395.

clause for parents *in TPRs. Lassiter v. Dept. of Soc. Serv's.*, 452 U.S. 18 (emphasis added).

Lassiter only dealt with TPRs. Thus, the Washington Supreme Court's ruling in *Myricks* that parents have such a right in dependencies is still binding law under the federal and state constitution. It cannot be argued, and no court has ever found, that *Lassiter* directly or indirectly overruled the state or federal constitutional basis of the right to counsel in dependencies found in *Myricks*. Washington courts have continued to reaffirm the constitutional basis of *Luscier* and *Myricks*, indicating that the right must be grounded in the Washington constitution. In 1983, the Washington Supreme Court held that:

> [T]he right involved in the present case is the right to counsel in child deprivation proceedings which, 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; *compare Lassiter v. Department of Social Servs.,* 452 U.S. 18, 31, 101 S. Ct. 2153, 2162, 68 L. Ed.2d 640 (1981) (right to counsel in child deprivation proceedings guaranteed by federal constitution only in limited circumstances).

Hall, 99 Wn.2d at 846; *In re Mosley*, 34 Wn. App. 179, 660 P.2d 315 (1983) (parents in TPRs have a right to effective assistance of counsel under the state's due process clause).[45]

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[45] See, also, *King,* 162 Wn.2d at 414 (Madsen, C.J., dissenting) ("...when the fundamental liberty interest in one's children is at stake, an independent state constitutional analysis should be applied.").

As applied to dependent children, these two key differences between the state and federal due process holdings are conclusive. First, as to the state's extension of the right to counsel to fundamental liberty interest, there can be no question that dependent children have both physical and fundamental liberty interests at stake—the Washington Supreme Court found that dependent children "have vital liberty interests at stake," interests which are "very different from, but *at least* as great as, the parent's [interests]." *MSR*, 174 Wn.2d at 5, 17-18 (emphasis added). A dependent child's physical liberty, as well as his or her fundamental liberty interests, are always implicated in dependencies.[46] This case implicates J.A.'s physical liberty, family integrity, educational rights, privacy rights, substantive due process rights, rights to safety, and myriad other rights and interests found in state and federal law. Given that, in Washington, counsel must be appointed in cases when an individual's physical liberty *or* fundamental liberty interest is threatened, J.A. must be provided counsel to protect his legal rights and interests.

Second, preexisting state law has granted the absolute right to counsel for parents in dependencies for almost four decades, and the only

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[46] The right to familial integrity held by children finds its basis in the age-old state right of parents to care for their children. Parents' right to "the care, control, custody and education of their children" has long been part of Washington's panoply of rights. *Lovell v. House of the Good Shepherd,* 9 Wn. 419, 422, 37 P. 660 (1894). *See Luscier*, 84 Wn.2d at 137 (discussion of the cases recognizing the fundamental right dating back to 1942).

logical conclusion is that an absolute right to counsel for children must follow. Dependent children "have *at least* the same due process right to counsel" as do their parents. *MSR*, 174 Wn.2d at 20 (emphasis added). If parents continue to have a constitutional right to counsel under Art. I, § 3, as must be the case, all dependent children, including J.A., also have a right to counsel.[47]

Finally, preexisting statutory law also protects children's rights to familial integrity and other fundamental liberty interests far more than federal law. In discussing the family unit as a "fundamental resource of American life," RCW 13.34.020 explains that children's rights take precedence, and that children's rights include basic nurture, physical and mental health, safety, rights to safe, stable and permanent home, and a right to a speedy resolution of any 13.34 proceeding. There is no analogous federal protection. Children's rights to well-being in our state are a paramount consideration supported by a long history. *See, e.g.*, *Carey v. Hertel*, 37 Wn. 27, 30, 79 P. 482 (1905) ("The future welfare of the child is the paramount consideration…). Children enjoy greater rights

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[47] The fact that a parents' right to counsel has been part of the law for decades is critical. "[W]here the United States Supreme Court determines to further limit federal guaranties in a manner inconsistent with our prior pronouncements" the Washington Supreme Court is not precluded from continuing to take a more expansive view of a state constitutional provision. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136, 143 (1984) (refusing to withdraw more expansive search and seizure protections under Wash. Const. Art. I § 7, as they had been part of state jurisprudence for over 15 years).

under Washington dependency law than under federal law in other areas, such as the right to petition for reinstatement of parental rights (and be appointed counsel in that proceeding). RCW 13.34.215.

Ultimately, the preexisting state law factor not only strongly indicates greater protection on this issue, it requires dependent children to be provided counsel unless the Washington Supreme Court's prior pronouncements regarding right to counsel are overruled.

d) Structural differences support an independent analysis

The Washington Supreme Court has "consistently concluded that this factor supports an independent analysis" as it is "more protective of individual rights than its federal counterpart." *King*, 162 Wn.2d at 393.

e) Issues relating to children are matters of state concern

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) (domestic relations law traditionally left to state regulation).

The fact that numerous other state high courts have likewise determined that their state constitutions provide a right to counsel for parents, despite *Lassiter*, further indicates that this is a matter of state concern. For example, in *Matter of D.D.F.*, 1990 OK 89, 801 P.2d 703, the Oklahoma Supreme Court reconsidered, in light of *Lassiter,* a previous holding that parents were automatically entitled to counsel in TPRs.

Noting that *Lassiter* set the floor and not the ceiling, the *D.D.F.* court concluded that "[a]lthough the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution, Art. 2, § 7." *Id.* at 706.[48]

In sum, the *Gunwall* criteria compel an independent state constitutional analysis and dictate that Art. I, § 3 is more protective than the 14th Amendment.

VI. CONCLUSION

For the foregoing reasons, J.A. requests that this court reverse the decision of the trial court and order that counsel be appointed to represent him in his dependency proceeding.

Respectfully submitted this 11th day of December, 2013.

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/s/

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[48] In 1983, the Alaska Supreme Court held that the Alaska state constitution guaranteed a parent the right to counsel in TPRs. *V.F. v. State*, 666 P.2d 42 (Alaska 1983). Ten years later, the Montana Supreme Court also held that its due process clause gives a parent the right to counsel in TPRs. *Matter of A.S.A.*, 258 Mont. 194, 852 P.2d 127 (1993). The due process clauses of Oklahoma, Alaska and Montana are identical to that of Washington.