NO. 45134-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Dependency of: J.A.,

Minor Child.

BRIEF OF RESPONDENT

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I. INTRODUCTION

RCW 13.34.100(6) permits, but does not require, a trial court to appoint counsel for children in all dependency proceedings. This case-by-case approach satisfies due process. As the Washington Supreme Court held regarding appointment of counsel to children in a proceeding to terminate parental rights, under RCW 13.34.100(6) trial courts have the discretion to decide whether to appoint counsel, and the trial judge should apply the *Mathews v. Eldridge* factors to each child's individual circumstances to determine if appointment is required. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012).

The trial judge followed the direction provided by the Supreme Court in the *M.S.R.* decision by applying the *Mathews* factors in determining whether appointment of counsel was required. First, the court considered J.A.'s interests: returning to his mother's home and not visiting with his father. The court also accounted for the government's interest and the administrative cost of appointment of counsel. Finally, the court considered the risk of error to be low under the circumstances of this case, given that J.A.'s interests in returning home were aligned with his mother's, and the Guardian ad Litem and social worker had kept the court informed of J.A.'s wishes.

RCW 13.34.100(6) also complies with article I, section 3 of the Washington Constitution. Appellate courts have appropriately practiced great restraint in expanding state due process beyond federal perimeters. The *Gunwall* factors offer no reason to abandon that restraint in this context.

II. COUNTERSTATEMENT OF FACTS

The Department filed a dependency petition as to then 11-year-old J.A.[1] in 2010, alleging that he was dependent under RCW 13.34.030(6)(b) and (c). CP at 1-6. At the time, J.A. had been in his father's care and the dependency petition alleged that the father and his girlfriend had physically abused J.A., abused methamphetamines, and failed to provide J.A. suitable food and shelter; the mother was alleged to be unable to parent her son due to her developmental delays, past physical abuse and neglect of J.A., and her unstable mental health. CP at 1-6.

J.A.'s mother failed to appear for her dependency fact-finding trial and, after a hearing, the trial court found J.A. to be dependent because there was "no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical

[1] In order to protect the confidentiality of J.A., he will be referred to as "J.A." In addition, his parents will be referred to as "the mother" or "the father." No disrespect is intended in doing so.

development." CP at 77-85. The trial court found the mother was "developmentally delayed and has mental [health] problems" and that J.A. had been in his father's care leading to the court's involvement because the mother "was unable to care for [J.A.]." CP at 78. The court ordered the mother to complete remedial services, including urinalysis testing, a possible drug and alcohol evaluation, and a psychological evaluation with a parenting assessment. CP at 82. The court also ordered weekly visits between the mother and J.A. CP at 83.

The mother did not appear for the first dependency review hearing several months later. CP at 101-11. The court found the mother was not in compliance with court-ordered services and had not made progress toward correcting the parental deficiencies that necessitated J.A.'s out-of-home placement. CP at 103. The court also found that the mother had not visited J.A. on a regular basis during the review period due to difficulties in maintaining contact with her. CP at 104. The court adopted the same service plan for the mother as was previously ordered. CP at 105-06.

At the next hearing six months later, the court again found the mother was not in compliance with court-ordered services and that she had made no progress in correcting her parental deficiencies. CP at 136. The court again ordered the mother to complete the same services. CP at 138-39.

The mother again failed to appear for the next hearing, which occurred when the child had been dependent for over a year, and the court found that she was not compliant with court-ordered remedial services and had made no progress in correcting her parental deficiencies. CP at 207-17. The court also ordered that a petition to terminate J.A.'s parents' rights be filed within 30 days. CP at 212.

When the child had been dependent for over two years, the court held another hearing that the mother failed to attend, and the court again found that the mother was not compliant with court-ordered services and had made no progress in correcting her parental deficiencies. CP at 317, 320. For the sixth time, the court ordered the mother to complete the same services. CP at 322-23.

The mother appeared for the next hearing six months later, and the court found she was not compliant with court-ordered services and had made no progress. CP at 377-87. The court ordered the mother to complete the same services as it had previously ordered and adjusted her visitation. CP at 382, 384. The court also amended J.A.'s permanent plan, and adopted a primary plan of Title 13 Guardianship and an alternative plan of adoption. CP at 387.

The Guardian ad Litem assigned to the case is [redacted] J.A. recognizes [redacted] and reported that [redacted] visits him at his

home and his school. 2 RP (March 21, 2013 transcript) at 10-11. [redacted] provided a report to the court before each hearing and included in these reports J.A.'s stated wishes – that he wants to return home to his mother. CP at 315, 342.

On March 1, 2013, the University of Washington Child and Youth Advocacy Clinic filed a Limited Notice of Appearance as counsel for J.A. (CP at 394-95) and a Motion for Appointment of Counsel for Dependent Child at Public Expense (CP at 396-435).

The substantive hearing on J.A.'s motion took place on March 21, 2013, and included a conversation on the record between Judge van Doorninck and J.A. 2 RP at 4-13. While J.A. is chronologically [redacted] old, he functions at the level of a [redacted] CP at 539-42. J.A. stated during the hearing on his motion that he wanted an attorney to talk to the court for him, and to tell the court that he wants to live with his mother. 2 RP at 7. When the court asked J.A. why he needed an attorney to do this for him, he answered, "Because I want one . . . . [A]nd attorneys are cool." 2 RP at 8. The court also learned that J.A. sees his mother every week on Sundays, and they play together at the [redacted] 2 RP at 9.

The court ultimately denied J.A.'s motion for appointment of counsel. CP at 479, 539-42. Counsel for J.A. moved for reconsideration,

CP at 543-57, and the court denied the motion for reconsideration. CP at 559-62.

While this was not raised in J.A.'s motion for reconsideration, CP at 543-50, the social worker and GAL had reported to the court in April 2013 that J.A. had been placed by law enforcement in detention for three days from March 22 to 25, 2013. CP at 503, 525. The foster parent could not control the child's destructive behavior, and could not reach anyone at the private agency that supervises her foster home, so she called law enforcement. CP at 525. Law enforcement then placed J.A. in detention on March 22, 2013, a Friday, and he was released the following Monday, March 25, 2013. CP at 525.

Upon denial of the motion for counsel for J.A. a timely Motion for Discretionary Review to this Court followed, CP at 571-72, which this Court granted. CP at 670-86.

Throughout the pendency of review by this Court, the underlying dependency proceeding has continued. The court held a dependency review hearing on May 9, 2013, and found that neither parent had complied with remedial services, nor had they progressed in correcting their parental deficiencies. CP at 531. The court also inquired about J.A.'s detention stay in March and ordered that [redacted], the agency that supervises the J.A.'s foster home, provide

documentation regarding the child's care and that it hold a staffing to discuss its management of this case. CP at 528. The court scheduled and held a status review hearing on May 23, 2013, to review these issues. CP at 528, 558.

Additional hearings continue to be scheduled and held, as appropriate, including a dependency review hearing on August 1, 2013, at which the court ordered that there would be no visits between J.A. and his father until the child requests them. CP at 633. In that same month, the court learned that the mother had completed her psychological evaluation, which found her overall prognosis to be poor because, while she cares for her son, "she does not have the necessary parenting skills to offer [him] a consistently safe, healthy home or make the most of available services for his special needs." CP at 637-52, 654-69.

III. ARGUMENT

RCW 13.34.100(6) allows the trial court discretion to decide whether to appoint counsel to dependent children, and therefore meets due process requirements because not every child in every dependency case has the right to counsel. The trial court should conduct a case-by-case analysis of whether appointment is required based on the facts of each case. Here, the trial court correctly applied the *Mathews v. Eldridge* factors in weighing J.A.'s private interests, the government's interest, and

the risk of error. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Moreover, the statute complies with state constitutional due process requirements and based on the *Gunwall* factors there is no basis to conduct an independent analysis of our state's due process clause. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

A. The Fourteenth Amendment of the United States Constitution Does Not Require Appointment of Counsel for Every Child in Every Dependency Case

The Legislature has addressed the question of what due process children in dependency proceedings should be afforded by enacting and amending RCW 13.34.100, which provides that the trial court is authorized to appoint counsel to children in dependency proceedings. Statutes are presumed constitutional and the statute's challenger has a heavy burden to show otherwise; "the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (citations omitted). The Washington Supreme Court found RCW 13.34.100 constitutional with regard to the decision to appoint counsel to children in termination proceedings, and there is no basis to conclude otherwise regarding children in dependency proceedings. J.A. failed to meet the heavy burden to demonstrate that the statute is unconstitutional. As such, the decision whether every child in

every dependency proceeding must be appointed counsel – and necessary funding for this decision – is appropriately left to the Legislature.

1. Under the Reasoning of the Washington Supreme Court's Decision in *M.S.R.*, Not All Dependent Children Have the Right to Counsel

This case is governed by *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). In *M.S.R.* the Washington Supreme Court held that appointment of counsel for all children in termination of parental rights proceedings was not constitutionally required. The Court found that "the due process right of children who are subjects of dependency or termination proceedings to counsel is not universal."[2] *M.S.R.*, 174 Wn.2d at 22. State law and court rules "give trial judges the discretion to decide whether to appoint counsel to children who are the subjects of dependency or termination proceedings." *Id.* (citing RCW 13.34.100(6)(f) and JuCR 9.2(c)).

The Washington State Supreme Court has already rejected the argument that the United States Constitution requires appointment of counsel to all dependent children in termination proceedings. Instead, the Court directed that trial courts should apply the *Mathews v. Eldridge*

[2] The Court later noted that it recognized *M.S.R.* was an appeal of a termination order, and thus the decision did not foreclose argument that a different analysis would be appropriate in dependency proceedings. *M.S.R.*, 174 Wn.2d at 22 n.13. Nevertheless, the Court did consider the child's interests at stake in both dependency and termination proceedings in forming its conclusions. *Id.* at 15-16.

factors individually to decide whether to appoint counsel, and that a trial judge appropriately exercises her discretion by similarly doing so in dependency proceedings, as well. *M.S.R.*, 174 Wn.2d at 21-22. In doing so, the Court noted that despite the suggestion from the mother that "children's rights fall outside *Lassiter*'s framework," it found the United States Supreme Court's decision on the rights of a parent in *Lassiter* instructive in analyzing the rights of a child facing the same proceeding. *M.S.R.*, at 14-15.

An individualized *Mathews* analysis allows the trial court to take into account that "each child's circumstances will be different" when deciding whether "the child's individual and likely unique circumstances" require the appointment of counsel. *M.S.R.*, at 21, 22. "[T]he *Mathews* factors may weigh differently when applied to different children." *M.S.R.*, at 22. In contrast, a conclusion that all children in dependency proceedings are constitutionally required to be appointed counsel would ignore each child's unique circumstances and the Supreme Court's holding that "[t]he due process right of children who are subjects of dependency or termination proceedings to counsel is not universal." *See id.*

The *M.S.R.* decision followed the lead of the United States Supreme Court in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S. Ct. 2153,

68 L. Ed. 2d 640 (1981), in which the Court similarly endorsed a case-by-case analysis to determine whether indigent parents have the right to counsel in all termination cases. The Court explained that there is a "presumption that an indigent litigant has a right to appointed counsel if when, if only he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 18. According to the Court, the "case of *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 [1976], propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, at 27. The court "must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Id.*

Similarly, the Washington State Supreme Court endorsed an examination, on a case-by-case basis, of the need for appointment of counsel for children using the *Mathews v. Eldridge* factors. *Id.*; *see Mathews v. Eldridge*, 424 U.S. 319. In *M.S.R.*, the Court first examined two of the *Mathews* factors, recognizing the important liberty interest a child has in maintaining a relationship with family, and that the state has a strong interest in the welfare of the child and an "accurate and just decision." *M.S.R.*, 174 Wn.2d at 15-18. Regarding the third factor – risk of an

erroneous decision – the Court acknowledged that there are significant procedural protections in place to ensure an accurate decision. *M.S.R.*, at 18. Ultimately, the Court held that each case must be decided on its individual facts and that in *M.S.R.* there was no constitutional violation of the children's rights because there was no evidence to show that appointment of counsel was necessary. *M.S.R.*, at 22.

An individualized *Mathews v. Eldridge* analysis is also appropriate when a trial court decides whether to appoint counsel to a child in a dependency proceeding. An analysis similar to the one endorsed in *M.S.R.* for termination proceedings appropriately provides for consideration of the interests of foster children in dependency proceedings and their unique circumstances, as well as the risk of error in appointing additional counsel.

2. Children Have Significant Interests in Both Termination and Dependency Cases

While a child's interest in a dependency proceeding differs from his interest in a termination proceeding, both are significant. In a termination proceeding, the petitioner seeks to permanently terminate the parent-child relationship, which severs the child's legal relationship with his parents, and extended family. *See M.S.R.*, 174 Wn.2d at 15; RCW 13.34.180, .190. When the court grants a termination order, all "rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control,

visitation, or support existing between the child and parent shall be severed and terminated . . . ." RCW 13.34.200. When a child's parental rights are terminated, he is deprived of the benefits that derive from that parent – "the potential for nurturing support and the financial support that the law would otherwise obligate [the parent] to provide." *In re Welfare of S.V.B.*, 75 Wn. App. 762, 880 P.2d 80 (1994). Termination of parental rights is allowed "only for the most powerful of reasons." *In re S.J.*, 162 Wn. App. 873, 880, 256 P.3d 470 (2011).

As the Washington State Supreme Court noted in *King v. King*, 162 Wn.2d 378, 394, 174 P.3d 659 (2007), an order terminating parental rights "ends the parent/child relationship entirely and permanently." In contrast, and like a decree of dissolution, a dependency order does not sever a parent's rights and responsibilities for a child; instead, it temporarily suspends some of the parent's rights, and may be modified throughout the dependency case. *Id.*; *see In re Myricks' Welfare*, 85 Wn.2d 252, 533 P.2d 841 (1975); RCW 13.34.120.

Before a child's parental rights can be involuntarily terminated, the court must have found the child dependent. RCW 13.34.180(1)(a). "The primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties." *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). A child is found dependent

when he or she "has been abandoned, abused or neglected, or 'has no parent, guardian, or custodian capable of providing adequate care.'" *In re Dependency of K.N.J.*, 171 Wn.2d 568, 577, 257 P.3d 522 (2011) (citing RCW 13.34.030(6)). If the court finds the child is dependent, it holds a hearing to determine placement of the child and services to be provided. *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). After a child is found dependent, the court must hold dependency review hearings every six months, at which the court considers the progress of the parties and determines whether court supervision should continue. *See* RCW 13.34.388; *see also K.N.J.*, 171 Wn.2d at 579.

The court in a dependency proceeding decides where a child will be placed – under the court's supervision with a parent, with a relative or other suitable person, or in licensed foster care. RCW 13.34.130. Additionally, the court decides what remedial services the parents will be court-ordered to complete, whether the parents have progressed in services that have been offered, and what visitation the parents and children will be provided. RCW 13.34.130, .138. The court also holds annual permanency planning hearings, at which it adopts a permanent plan for the dependent child – return home, adoption, guardianship, or third-party custody. RCW 13.34.134. Orders entered in dependency cases can be modified at any time on a showing of a change in circumstances. RCW 13.34.150.

3. *M.S.R.* Cannot Be Distinguished Just Because This Is a Dependency Case

This Court should reach the same result as did the Washington Supreme Court in *M.S.R.* because the rationale of that decision applies to both types of cases.[3]

While the issues before a trial court differ in termination and dependency proceedings, similar procedural safeguards exist to reduce the risk of error in both proceedings. Indigent parents are statutorily entitled to court-appointed counsel. RCW 13.34.090(2). The child's caregiver has a right to be heard prior to each proceeding regarding a child in their care, and must be notified of this right by the Department. RCW 13.34.096. Absent good cause the child must be appointed a Guardian ad Litem (GAL) who reports to the court on the child's interests and present evidence and examine witnesses. RCW 13.34.100(1), (5). Both the Department case worker and the GAL must notify each child of his or her

[3] J.A. argues that in past appellate briefs the Department's position was that a child's rights are fundamentally different in dependency and termination proceedings. Br. of Appellant at 14-15. However, the Supreme Court did not consider the child's interests in these proceedings separately; instead, the Court addressed the interests of children in both dependency and termination proceedings together, and did not revise this language even in response to a motion for reconsideration. *M.S.R.*, 174 Wn.2d at 17-18, 20, 22 n.13. Similarly, J.A. refers to a statement of policy made by the Department and the Office of the Attorney General supporting appointment of counsel for dependent children, Br. of Appellant at 36, but this 2010 policy statement does not reflect a constitutional analysis or the position of either agency on the rights of dependent children under the constitution, especially in light of the *M.S.R.* decision issued two years later.

right to request counsel, ask whether the child wishes to have counsel, and report this to the court. RCW 13.34.100(6)(a), (b), (d).

No court has concluded that appointment of counsel to every child in every dependency proceeding is required under the Fourteenth Amendment of the United States Constitution. J.A. analogizes this case to that in *Kenny A. ex rel. Winn v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005), and argues that the district court in *Kenny A.* "held that there is a constitutional due process right to counsel . . . ." Br. of Appellant at 11. In *Kenny A.* the federal district court found that this right "is guaranteed under the Due Process Clause of the Georgia Constitution . . . ." *Kenny A.*, 356 F.Supp.2d at 1359. The federal district court did not hold that such a right exists under the United States Constitution.

The appellant also analogizes to a New York state court appellate decision, *Matter of Jamie T.T.*, 191 A.D.2d 132, 599 N.Y.S.2d 892 (1993), but that decision does not stand for the proposition that all children in dependency proceedings have a constitutional right to counsel. Instead, the question before the court was whether the child was entitled to effective representation. The child had alleged sexual abuse by her legal custodian, but after a hearing on the merits the juvenile court dismissed the petition, which would lead to the child being returned to her allegedly abusive custodian. *Matter of Jamie T.T.*, at 135-36. New York statutory

law already provided children in dependency proceedings the right to counsel, and the child was represented by a Law Guardian at the trial, but the court found this assistance ineffective. *Id.*, at 136-37. Thus, the court held pursuant to an individualized *Mathews* analysis that the child in question was due effective legal representation of her interests. *Id.*, at 136. The court did not hold that appointment of counsel for *all* dependent children is required to meet the due process requirements of the United States Constitution – in fact, that question was not addressed in the decision.

The United States Constitution does not require appointment of counsel for every child in every dependency proceeding. When the Washington Supreme Court was presented with a similar question regarding children in termination proceedings it followed the lead of the United States Supreme Court in *Lassiter* and endorsed a case-by-case *Mathews v. Eldridge* analysis to determine the child's right to counsel. This court should do the same.

B. The Trial Court Properly Applied the *Mathews* Factors in Deciding That Appointment of Counsel Was Not Required

The trial court properly applied the *Mathews v. Eldridge* factors in declining J.A.'s request for court-appointed counsel. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The court

correctly considered the facts of this child's situation and, applying the *Mathews* factors, determined that the additional procedure of appointment of counsel was not required. The court appropriately considered "[t]he private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *M.S.R.*, 174 Wn.2d at 14 (citing *Lassiter*, 452 U.S. at 27).

Orders issued in dependency cases are reviewed under the abuse of discretion standard. *See, e.g., Welfare of J.H.*, 75 Wn. App. 887, 894, 880 P.2d 1030 (1994); *In re Dependency of A.C.*, 74 Wn. App. 271, 275, 873 P.2d 535 (1994). The Washington Supreme Court stated in *M.S.R.* that the trial judges have the discretion to decide whether to appoint counsel to children who are subjects of dependency proceedings. *M.S.R.*, 174 Wn.2d at 22. As an Oregon appellate court noted in considering whether appointment of counsel is required, the trial court is "peculiarly well suited to make the determination of whether independent counsel might produce relevant evidence additional to that introduced by those already participating in the proceeding." *In the Matter of D.*, 24 Or. App. 601, 609, 547 P.2d 175 (1976). An abuse of discretion exists only when no reasonable person would take the position adopted by the court. *Griggs v. Averbeck Reality,* 92 Wn.2d 576, 584, 599 P.2d 1289 (1979). The decision of the court must be "manifestly unreasonable". *State ex rel*

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (overruled on other grounds).

1. The Appellant's Interests Are Not So Great As to Require Appointment of Counsel

The juvenile court was correct in concluding that J.A.'s interests did not weigh strongly enough in favor of appointment of counsel that such an order was required. In his underlying motion for court-appointed counsel at public expense, J.A.'s stated interest was reunification with his mother. CP at 424-25. In his motion for reconsideration he raised a new interest – that of protection from his father, whom he deemed unsafe. CP at 556. Given the facts of this case, neither of these interests weighs strongly enough in favor of requiring appointment of counsel.

The *M.S.R.* court recognized the private interests a child may have in a dependency proceeding, which may require appointment of counsel: a right to be free from unreasonable risk of harm and a right to reasonable safety; the right to basic nurturing, including a safe, stable, and permanent home; and an interest in not being returned to the custody of those who will victimize the child. *M.S.R.*, 174 Wn.2d at 17.

The trial court found that a key interest J.A. had in being appointed counsel – to seek return to his mother's care – was not an option available to him, regardless of whether counsel was appointed to represent him.

CP at 541. While J.A.'s interest in his on-going relationship with his mother is significant, the value of court-appointed counsel was reduced because his mother is not fit to care for him. This consideration could also indicate that the risk of error in not appointing counsel is low.

When J.A. was asked what an attorney could do for him, he answered, "Like, I want to go home to my mom." 2 RP at 7. When asked if there was anything else an attorney could do for him, he said, "No." *Id.* However, since the first review hearing on September 27, 2010, the mother has remained incapable of safely parenting her son. *See* CP at 103, 136, 210, 259, 380, 531, 628. She has been diagnosed with posttraumatic stress disorder, methamphetamine use in remission, major depression, and moderate developmental disability. CP at 648. The psychologist who evaluated her determined that the mother's limited cognitive ability resulted in her inability to meet her son's needs. CP at 651.

While J.A. argues that he has other interests generally based on risks to which dependent children may be exposed, none are directly implicated in this case. *See* Br. of Appellant at 19-20. First, J.A.'s counsel argued in support of his motion that the child's physical liberty was impacted when a child in a dependency proceeding is placed in a new home, CP at 403, and argues on appeal that he is at risk of being moved from home to home. Br. of Appellant at 19. However, J.A. has been in

the same foster home since June 2012, where he remains. CP at 585, 503. This is where the child wants to stay unless he can return to his mother. CP at 557. The child has not been moved to another placement, and there is no basis at this time to conclude that such a move will occur. Thus, based on the specific facts of this case, this risk is not great enough to weigh in favor of requiring appointment of counsel.

Further, a child does not have a physical liberty interest in avoiding foster care. As the United States Supreme Court has recognized, "'juveniles, unlike adults, are always in some form of custody,' and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (citation omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)). Children in foster care do not have a *physical* liberty interest in a particular custodial placement.

J.A. also argues that his right to a permanent home is implicated because the current placement is in a home with a foster parent who is not at this time willing to become a permanent home for the child. Br. of Appellant at 22. However, until April 2013, the current foster parent was willing to be a guardian for the child. CP at 341, 366. The Department

learned for the first time that she was not willing to do so when her letter stating as much was filed in support of the child's motion for reconsideration. *See* CP at 555. Despite this, the child remains in this home. CP at 524, 585. Further, the mother is no closer to being able to parent her son. CP at 651. The current foster parent has graciously treated this child as one of her own, and integrated him into her family. CP at 612. Unfortunately, due to confidentiality requirements, the foster parent cannot be provided detailed information about the parents' compliance and progress in remedial services, or about why the mother cannot meet her child's needs. *See* RCW 13.50.100. Here, while the court has found the mother has not complied with court-ordered remedial services, it appears that the foster parent has been told otherwise and, as such, the foster parent supports reunification. CP at 587. In any case, no placement move has been sought or ordered. Thus, based on the circumstances of this case, there is no basis to conclude that the child's private liberty interest in permanency weighs in favor of requiring appointment of counsel.

Additionally, in support of his motion for appointment of counsel, J.A. argued that his right to family integrity was implicated because his relationship with his mother could be permanently lost in the dependency proceeding. CP at 405. However, the child continued to visit weekly with

his mother, sister and grandparents, and his weekly telephone contact with his mother was even expanded recently. CP at 587, 612, 619, 633. Thus, under the facts of this case there is no basis to conclude that the child's right to family integrity was so great as to require appointment of counsel.

The child's counsel argued in support of his motion for reconsideration that the child feared visiting with his father upon his father's impending release from prison, which implicated his right to safety. *See* CP at 546-47. However, in denying the motion for reconsideration the court noted that it clearly understood the child's fear of his father, CP at 560, and in the review hearing on August 1, 2013, the juvenile court ordered that visits between the father and his son would not begin until J.A. requests that this occur. CP at 633. Again, based on the specific facts of this case, there is no basis to conclude that the child's right to safety is so great as to require appointment of counsel.

It was not until the appellant replied to the state's response to his motion for discretionary review that the child raised as a basis for appointment of counsel any private interests implicated by a detention stay or psychotropic treatment. Reply to State's Response to Mot. for Disc. Review at 3, 6; Br. of Appellant at 21. Neither of these issues was a basis for the child's request for appointment of counsel in the underlying motions. Thus, the juvenile court did not have the benefit of these

arguments when it weighed the child's private interests. As such, this court should decline to consider these issues for the first time on appeal – especially where, as here, the appellant argues that the trial court erred in not appointing counsel. *See State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011); RAP 2.5(a).

If this Court does consider the private interests implicated by the child's stay in detention and psychotropic treatment, it should consider the circumstances associated with these incidents. Even before he entered foster care at the age of 11, this child suffered from behavioral and mental health challenges that required treatment with mood stabilizers and stimulants. CP at 91-92, 122-23. He has a history of violent outbursts and has been diagnosed with attention deficit hyperactive disorder, oppositional defiant disorder and posttraumatic stress disorder as well as developmental delays. Behaviors related to these conditions have reduced over time in stabilizing foster homes, but also resulted in two detention stays and required authorization for mental health treatment.

When the Department sought authorization for psychotropic medication it accompanied the requests with declarations from the social worker or GAL and a mental health treatment provider that together explained the need for the treatment, possible side effects, and why the benefits outweighed the risk. CP at 91-99, 120-26, 271-76. The first two

types of medication that were sought – to address the child's ADHD and to stabilize his moods – were a continuation of treatment the child had received while in his parents' care, before he entered foster care. *Id.* In April 2012, authorization was requested to provide another medication on an as-needed basis to manage his anxiety. CP at 272.

Despite efforts to address the child's behavioral and mental health needs, in April 2012 the child destroyed property in the home of his foster parent in a fit of anger. CP at 275-76, 300. The child was being provided mental health treatment through [redacted] Mental Health Services, which advised law enforcement that its Youth Inpatient Unit could provide no remedy. CP at 300. The child's damaging behavior continued unabated, so law enforcement placed him in juvenile detention. *Id.* Thereafter, the foster parent requested the child be moved, and on June 15, 2012, he moved into the home of a new foster parent in [redacted] WA, where he has flourished. *Id.*; CP at 612. In March 2013, the child again was sent to detention when his foster parent contacted law enforcement due to his destructive behavior and law enforcement detained him. CP at 525.

At the time of the hearing on the child's motion for appointment of counsel, the court had not ordered psychotropic treatment for almost a year, it had been almost a year since the first detention stay, and the

second occurred before the motion for reconsideration was filed, yet none of these issues were identified as a basis for J.A.'s motion.

2. The Government's Interest Does Not Weigh In Favor of Appointment of Counsel

The government's interest is its *parens patriae* interest in the child's welfare, in obtaining an accurate decision, and in reducing the county's administrative burden and cost of appointing counsel. While the trial court did not reference this in its decision, *M.S.R.* recognized that "the State has a compelling interest in both the welfare of the child and in an accurate and just decision." *M.S.R.*, 174 Wn.2d at 18. The court considered the countervailing government interest of "limited resources for attorneys for children in this county." CP at 554. As *Mathews* observed, "the Government's . . . administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard . . . may be outweighed by the cost." *Mathews*, 424 U.S. at 348.

Even the "seminal study" cited by J.A. in his brief indicates that there is a cost to appointment of counsel – the study estimated the daily per-child cost of counsel. Andrew Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008), at 22, *available at* http://www.chapinhall.org/research/report/expediting-permanency

(hereafter Palm Beach study). As the Washington Supreme Court found with regard to appointment of counsel to children in truancy proceedings, "it is reasonable to conclude that costs would rise and additional administrative resources would be expended if an attorney had to be appointed whenever counsel is sought . . . ." *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 709, 257 P.3d 570 (2011). Thus, this factor does not weigh in favor of requiring counsel.

The Palm Beach study indicated that later savings offset the costs of counsel for that program. Br. of Appellant at 35-36. However, the study does not support the proposition that appointment of counsel in this case would result in reduced cost. The Palm Beach study only evaluated outcomes of a program in which attorneys were appointed to represent children who were 12 or younger. Study at 4. J.A. is [redacted] years old and functions at the level of a [redacted]-old – he faces different challenges than do younger dependent children. Also, one children's counsel evaluated in the Palm Beach study performed a key function that contributed significantly to increased time to permanency – they filed termination petitions at a high rate. Study at 4, 13. But appointment of counsel had no significant impact on the rate of reunification.[4] Study at

[4] The study noted that this outcome is not surprising because while a child's attorney can ask the court to reevaluate whether risk persists, and to order the provision

15. Here, J.A.'s stated interest is in reunification – a permanency outcome that the Palm Beach study indicates is not more likely to occur simply due to appointment of counsel.

Further, during a joint work session of the House Judiciary and Early Learning and Human Services Committees, two of the legislative committees currently considering this issue heard testimony about the administrative burden of appointment of counsel to all children. Cowlitz County Superior Court Judge Stephen Warning, who also serves as the Legislative Chair of the state Superior Court Judges Association, testified that counties already struggle to fund mandated programs, and that if appointment of counsel were required in his county this would likely result in the elimination of their Family Court, as it is one of the last remaining non-mandated programs operated by the court. Joint House Judiciary and Early Learning and Human Services Committee, Work Session on Legal Representation for Minors in Dependency Proceedings at 1:11:50 (Oct. 3, 2013), *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013100062. He testified, "Counties can't pay for this process if they don't get money to do it." *Id.* He encouraged the legislature to fully fund its

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of services, the extent to which the child's attorney is able to work directly with parents is often circumscribed by prohibitions on contact with represented parties. Study at 15.

mandate if it decided that appointment of counsel for dependent children was good policy.

Additionally, as noted by J.A., during the same work session Dr. [redacted] of the Washington State Center for Court Research, testified that he had obtained preliminary data comparing performance on timeliness measures in counties that appoint counsel to all dependent children over a certain age, to counties that do not do so. *See* Br. of Appellant at 38; Joint House Judiciary and Early Learning and Human Services Committee, Work Session on Legal Representation for Minors in Dependency Proceedings at 1:15:00 (Oct. 3, 2013), *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013100062. This preliminary data indicated that for two of the three timeliness measures, counties in which children are appointed counsel achieved the measures more quickly. *Id.*

However, this data did not account for other factors that affect timeliness. Dr. [redacted] noted that counties that receive local court improvement funds generally perform better overall in achieving court timelines. This, in fact, is evident when one reviews the timeliness data for Pierce County, where J.A.'s dependency case is located, which participates in the court improvement program. Washington State Center for Court Research, *Dependent Children in Washington: Case Timelines*

and Outcomes 2012 Annual Report, at 24, *available at* http://www.courts.wa.gov/wsccr/docs/DTR2012.pdf. In Pierce County, the juvenile court's performance on the three timeliness measures referenced by Dr. [redacted] exceeded the statewide average by 15, 11, and 23 percentage points. *Id.* at 10, 12, 15 (statewide average); D-107 (Pierce County performance). Thus, even without appointing counsel to all children in Pierce County, the juvenile court has had great success in achieving a high level of performance on key court timelines.

Appointment of counsel for dependent children brings with it costs to the counties and an administrative burden related to implementation. Further, there is no data to indicate that those costs are likely to be offset in this case through speedier permanency. To the extent that it may be true that appointment of counsel results in better outcomes for children overall such that later savings offset earlier investments, this is a question for the legislature, and not the courts, to decide.

3. The Risk of Error Does Not Weigh in Favor of Appointment of Counsel

The risk of error in this case is low. Several procedural safeguards were in place to ensure the risk of error in this dependency proceeding was low. Importantly, other parties in the dependency proceeding are positioned to advocate for the child's interests. "[W]hether there is a

constitutionally significant risk of an erroneous deprivation of rights may also turn on 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. Finally, there is an increased risk of error if this child is appointed counsel.

Here, the mother's interest in reunification and increased contact with her son align with his stated interest in both of these issues. She is represented by counsel and able to raise these issues at will. In fact, the mother reengaged in services in 2013 by participating in a psychological evaluation in August. CP at 618-19, 638-52. She was found compliant with services and making progress in the August 1, 2013, review order. CP at 629. Her weekly telephone contact with her son was also increased in August 2013. CP at 619, 633. The mother is well-positioned to advocate for return home and further expansion of visitation, and her interest in doing so aligns with her son's interest in the same.

The trial court appropriately relied on the experienced team of professionals already involved in this case to determine that the risk of error associated with not appointing counsel was low. As early as July 3, 2012, the GAL reported to the court the child's wish to return to his family's care, and that the child was informed of his right to request appointment of counsel. CP at 215. J.A. argues that the court

miscalculated the ability of this team because there was a "miscommunication" that the child deems an error. Br. of Appellant at 32. In fact, the record shows that the team learned of and responded appropriately to an error by the private agency that supervised the foster home where the child was placed. The system worked as it should to address this problem.

In the incident in question, J.A.'s behaviors were out of control and the foster parent contacted law enforcement on March 22, 2013, when the private agency that supervises her foster home, [redacted] Community Services, was not available to respond to her concerns. CP at 525. Law enforcement placed J.A. in detention that day, and the foster parent picked him up from detention the following Monday, March 25. CP at 525. The GAL and social worker learned about this incident during a monthly visit and were very concerned because it indicated the private agency may not be compliant with its contractual obligations to ensure support for high needs children, and they followed up with the agency. *See* CP at 525. Both advised the court of the incident in their reports and at the next review hearing on May 9, 2013, the court addressed the issue by ordering the agency to share its documentation regarding the child, and ordering a staffing to occur, as well as a status hearing. CP at 503, 525, 528, 535. On May 23, 2013, the court held a follow-up hearing and noted that the

agency had provided records and a staffing had occurred as ordered. CP at 558. The response by the team of the Department social worker and GAL, with support from the court, demonstrates the utility of such a team. There is no indication that an attorney for J.A. could have addressed these issues in a more productive fashion.

J.A. argues that the Department is unable to represent his interests due to the broad programmatic needs of the agency. Br. of Appellant at 28. This argument has no bearing on the child's interests in this case, and as such provides no basis to conclude that the risk of not appointing counsel was greater. The child merely cites to *Kenny A.* for the proposition that the interests of the public child welfare agency are not always aligned with those of a dependent child. Br. of Appellant at 28. Certainly this may be true in a number of cases, but J.A. does not explain how this was true in this case, thereby contributing to increased risk of error here. And in fact, the Department's interest in protecting the safety and well-being of foster children was aligned with this child's interest. *See* RCW 74.13.031(5), (6) (requiring the Department to monitor out-of-home placements and authorizing the Department to provide child welfare services and medical, dental, and mental health care); *see also* CP at 91-92; 120-25; 300-01; 366; 503-04; 612.

The appellant argues based on the *Kenny A.* decision that children in general are placed in inappropriate homes, and refers to the class action settlement agreement in *Braam v. State of Washington* as an example of this occurring in Washington. [5] Br. of Appellant at 28. However, the appellant makes no assertion that this child is in an inappropriate placement. In fact, he is flourishing in his current long-term in-home foster care placement which, until April 2013, was willing to be a permanent home.

Moreover, the Department has achieved full compliance with the outcomes in the referenced settlement agreement that relate to placement stability and unsafe placements, and neither remains enforceable under the agreement. *See Braam v. State*, Whatcom County Superior Court No. 98-2-01570-1, Settlement and Exit Agreement Semi-Annual Performance Report January – June 2012 Executive Summary, September 28, 2012, at i, available at http://www.dshs.wa.gov/pdf/ca/braam0912ExecutiveSummary.pdf

[5] This revised agreement of the class action suit in *Braam v. State of Washington* was reached in 2011, after the 2004 agreement expired. The 2011 agreement expired in December 2013. Braam v. State of Washington Revised Settlement and Exit Agreement, at 4, ¶1, available at http://www.dshs.wa.gov/pdf/ca/Braamagreement103111.pdf. The Department has achieved at least six months of compliance with 14 outcomes in the revised settlement agreement. July – December 2012 Braam Revised Settlement and Exit Agreement Semi-Annual Performance Report, April 1, 2013, at 1-3, available at http://www.dshs.wa.gov/pdf/ca/Braam0413SemiAnnualPerfReport.pdf ; January – June 2013 Braam Revised Settlement and Exit Agreement Semi-Annual Performance Report, September 30, 2013, at 1-3, available at http://www.dshs.wa.gov/pdf/ca/Braam0913SemiAnnualPerfReport.pdf.

(indicating 18 months of full compliance with safety in care measure); *Braam v. State*, Whatcom County Superior Court No. 98-2-01570-1, Settlement and Exit Agreement Semi-Annual Performance Report July – December 2011 Executive Summary, March 30, 2012, at ii, available at http://www.dshs.wa.gov/pdf/ca/braam0312ExecutiveSummary.pdf (indicating 18 months of full compliance with placement stability measure).

There is no evidence to indicate that *only* an attorney representing the child's interest will improve the dependency process, and this issue was not decided in *M.S.R.* *See M.S.R.*, 174 Wn.2d at 19. Even the Palm Beach study cited by J.A. notes that another unanswered question is whether the successes seen in the study are a function of the particular program in the study or just a reflection of what any well-resourced child welfare agency could accomplish. Study at 31. Under some circumstances, appointing attorneys who will attempt to tilt the outcome in the direction of the child's wishes may make it more likely that there will be an erroneous result. *See* Martin Guggenheim, *Reconsidering The Need For Counsel For Children In Custody, Visitation and Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998). As here, a child may want to return home to an unfit parent. Advocacy by a child's

attorney to this effect will make it less likely, not more likely, that the correct legal result will be reached.

Additionally, the risk of error of court-appointed counsel for J.A. was heightened due to his limited developmental abilities and resulting diminished ability to direct counsel. A child's developmental level plays a role in his ability to benefit from counsel. *See M.S.R.*, 174 Wn.2d at 21. J.A. is chronologically [redacted] years old, but he functions at the level of a [redacted] old. CP at 540 ¶ 2. He wanted an attorney to advocate for him because "attorneys are cool." 2 RP at 8. To the extent J.A. cannot understand the legal implications of advocacy on his behalf, his attorney would advocate for his best interests, rather than his stated interests. This can lead to "a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child." Randi Mandelbaum, *Revisiting The Question Of Whether Young Children In Child Protection Proceedings Should Be Represented By Lawyers*, 32 Loy. U. Chi. L.J. 1, 36 (Fall 2000).

Appointment of counsel may also increase risk of error by increasing this child's out-of-control behaviors, which could jeopardize his placement. The child's problematic behaviors, which included using

foul language and being aggressive as well as urinating and defecating in his room, had reduced, but in December 2012 discussions between the mother and J.A. about the likelihood of his return home triggered more emotional behavior. CP at 341. J.A. believed that if he continued to exhibit these behaviors he would be sent home. *Id.*

J.A.'s argument that "errors are common in dependency proceedings" is without merit. *See* Br. of Appellant at 32. The appellant supports this argument with citations to two cases in which the appellate court reversed a trial court order – neither of which mention children's specific interests in established dependency proceedings. In the first, *In re Dependency of M.S.D.*, 144 Wn. App. 468, 182 P.3d 978 (2008), the appellate court reversed a finding of dependency due to insufficient evidence. In the second, *In re Dependency of R.L.*, 123 Wn. App. 215, 98 P.3d 75 (2004), the appellate court found the trial court abused its discretion by not taking live testimony from the father's witnesses on placement when credibility was an issue. Neither case stands for the proposition that errors are common in dependency proceedings, nor do they even reference children's interests in the proceedings. More importantly, neither case indicates that appointment of an attorney for the child would have led to a different outcome.

After considering J.A.'s interests, the government's interest, and the risk of error in appointing additional counsel, the court did not err in denying the request to appoint counsel to him.

C. RCW 13.34.100 Does Not Violate the Due Process Clause of the Washington Constitution, Article I, Section 3 and the *Gunwall* Factors Do Not Support Broader Due Process Protections for Children Under the State Constitution

J.A. argues that the due process clause of the Washington Constitution provides an independent right to court-appointed counsel to dependent children. Br. of Appellant at 38-39. This argument fails because the due process clause of the state constitution does not mandate appointment of counsel for every child in every dependency proceeding.

The six *Gunwall* factors govern whether a state constitutional provision extends broader rights than its federal analog. *King v. King*, 162 Wn.2d 378, 392, 174 P.3d 659 (2007).

The first and second *Gunwall* factors consider the text and textual differences between the state and federal provisions. *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986). The Washington Supreme Court has repeatedly recognized that the first and second *Gunwall* factors do not support a more expansive interpretation of the state due process clause. "[T]here are no material differences between the 'nearly identical' federal and state provisions. This disposes of the first two *Gunwall* factors."

In re Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (footnote omitted) (quoting *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992)); *King*, 162 Wn.2d at 392 (language of state and federal provisions is identical). Article I, section § 3, of the Washington Constitution provides equal, but not greater, due process protections than those provided by the Fourteenth Amendment of the United States Constitution. *See In re Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Consequently, Washington courts analyze due process challenges under the Fourteenth Amendment. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216 n.2, 143 P.3d 571 (2006).

The third *Gunwall* factor considers whether the state constitutional provision's history reflects "an intention to confer greater protection" than its federal counterpart. *Id.* at 61. Washington's State Constitutional Convention adopted the due process clause as proposed, without modification or debate. *Journal of the Washington State Constitutional Convention,* 1889 § 3, at 495–96 (Beverly Paulik Rosenow ed. 1962). Thus, no legislative history "provide[s] a justification for interpreting the identical provisions differently." *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (considering Rosenow at 495-96).

The appellant argues that Washington's Constitution references children twice and concludes that the framers intended for Washington to

go beyond the federal government in its protection of children's welfare. Br. of Appellant at 42-43. However, neither of these references relate to foster care or due process. The first, article IX, section 1, is the preamble of the article on education, and provides that the state's paramount duty is to make ample provision for the education of all children. The second, article XIII, section 1, addresses state institutions, such as educational, reformatory and penal institutions, and was amended in 1988, but still contains no reference to foster care. *See* Amendment 83, 1988 House Joint Resolution No. 4231, P. 1553 (approved Nov. 8, 1988).

The fourth *Gunwall* factor, preexisting state law, likewise establishes no basis to expand state due process protections for children. It "requires [the court] to consider the degree of protection that Washington State has historically given in similar situations." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (focusing analysis of article I, section 12 on law around the time the provision was adopted). Nineteenth century law and society provided little or no protection when a problem concerned a child's safety within the family. Marvin R. Ventrell, *Rights & Duties: An Overview Of The Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259, 264 (Winter 1995). Indeed, "[a]lthough numerous private agencies dedicated to protecting children from harm existed throughout the world by the end

of the nineteenth century, children still had no established legal right to this protection." *Id.* (footnotes omitted). Thus, at the time the constitution was adopted, the concept of a lawyer representing a child's stated interests in a dependency action would have been completely foreign.

Instead of focusing on historical legal protections as *Gunwall* directs, J.A. points to *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995). He claims this case somehow informs the intended scope of article 1, section 3. Br. of Appellant at 45-46. This is incorrect. First, the fourth *Gunwall* factor looks to the law existing when a constitutional provision was adopted, and that is not informed by court decisions issued more than 100 years later. Second, *Grove* relies merely on *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974), and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975), without analyzing either case. Both of these cases predated the Supreme Court decision in *Lassiter*, 452 U.S. 18, which analyzed whether the due process clause of the federal constitution entitled an indigent parent to counsel in a termination case. Neither case establishes broader protections under the state due process clause. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 712, 257 P.3d 570 (2011) (noting that the "federal constitutional underpinnings of Luscier were, however, abrogated by the United States Supreme Court in Lassiter," and that *Luscier* "did not separately analyze the state and

federal constitutional provisions at issue").[6]

Indeed, *Luscier* and *Myricks* treat the Washington and federal due process clauses as equivalent. Neither case suggests that the due process clause of the state constitution offers broader protection than its federal counterpart. *Luscier* was based on both the federal and state constitutions. *In re Luscier*, 84 Wn.2d at 139 ("the right to one's children is a 'liberty' protected by the due process requirements of the Fourteenth Amendment and [Wash.] Const. Art. [I], § 3."). *Myricks* refers generally to "due process," does not cite to a particular constitutional provision, and relies almost exclusively on due process decisions of the United States Supreme Court. *In re Myricks*, 85 Wn.2d at 253–54.

Further, recent Supreme Court cases have not held that article I, section 3 offers broader protections than the Fourteenth Amendment. Most recently, in *M.S.R.*, the Court did not adopt such a conclusion with regard to children in termination of parental rights proceedings. *M.S.R.*, 174 Wn.2d at 20. In *Bellevue Sch. Dist. v. E.S.*, regarding appointment of counsel to children in truancy proceedings, and in *Marriage of King*, regarding appointment of counsel in custody matters, the Court again

[6]*Grove*, which considered when civil appellate counsel would be provided at public expense, recited without further analysis that a constitutional right to legal representation exists "where a fundamental liberty interest, similar to the parent-child relationship, is at risk." *Grove*, 127 Wn.2d at 237 (citing *In re Luscier*, 84 Wn.2d 135 and *In re Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975)).

found that the fourth *Gunwall* factor did not support an independent analysis of our state constitution. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d at 713; *King*, 162 Wn.2d at 393. Neither case stands for the proposition that article I, section 3 offers broader protection than the Fourteenth Amendment.

The Washington Supreme Court has held that the fifth factor, structural differences between the state and federal constitutions, supports an independent analysis. *King*, 162 Wn.2d at 393. However, this factor argues for independent analysis in every case, and does not dictate that such an analysis supports broader rights under the state due process clause.

Regarding the sixth factor, issues of family relations are generally matters of state or local concern. *In re Custody of R.R.B.*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) (citing *Rose v. Rose,* 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)). As is the case with the fifth factor, the fact that this factor may support an independent analysis does not mean that article I, section 3 provides greater due process protection in this context and J.A. offers no sound argument to the contrary.

This Court "traditionally has practiced great restraint in expanding state due process beyond federal perimeters." *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002). The due process clause of the state constitution also does not mandate appointment of counsel for every

child in every dependency case. Accordingly, RCW 13.34.100 does not violate the state's due process clause.

IV. CONCLUSION

The Department requests that this Court affirm the trial court's order declining the appellant's request to be appointed counsel where he did not have a constitutional right to appointment of counsel and his interests were adequately represented by other parties in the dependency proceeding.

RESPECTFULLY SUBMITTED this 10 day of January, 2014.

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PROOF OF SERVICE

I certify that I arranged to have served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of January at Tumwater, Washington.

Cheryl Chafin

CHERYL CHAFIN