*DIRECTIONS FOR USING THIS TEMPLATE:*

* *This template motion was last updated: on July 7, 2015 and is intended only for use in dependency proceedings (not TPR proceedings).*
* *This template motion to appoint counsel for a dependent child is intended to serve only as a guide—the attorney filing the motion should become familiar with the cited cases, review the latest case law updates and ensure that the facts are tailored to the child’s case before filing the motion.*
* *The argument section in the template motion includes arguments that may not be relevant to the child’s case—use only those arguments relevant to the individual child’s case.*
* *The comment boxes in the margins provide guidance to the attorney filing the motion—the comment boxes should be deleted before filing the motion.*
* *Make sure to fill in and/or edit [bracketed] and highlighted areas.*

**SUPERIOR COURT OF WASHINGTON FOR [ ] COUNTY**

JUVENILE DEPARTMENT

|  |  |  |
| --- | --- | --- |
| IN RE THE DEPENDENCY OF:    [Child]  D.O.B.:  Minor child. | )  )  )  )  )  )  )  )  )  ) | NO. [ ]  **MOTION FOR APPOINTMENT OF COUNSEL FOR DEPENDENT CHILD AT PUBLIC EXPENSE** |

**MOTION**

The undersigned represents to the court the facts and briefing below and moves for an order of the Court appointing legal counsel for [Child] at public expense.

**I. RELIEF REQUESTED**

requests the appointment of an attorney at public expense to represent [his/her] legal rights and stated interests in this matter. OR

[Parent, CASA/GAL, the department, or caregiver] requests the appointment of an attorney at public expense to represent the Child’s legal rights and stated interests in this matter.

**II. STATEMENT OF ISSUES**

1. Does the due process clause of the Washington Constitution require dependent children, including [Child], be appointed legal counsel at public expense to represent them in their dependency proceedings?
2. Does the due process clause of the U.S. Constitution require that dependent children, including [Child], be appointed legal counsel at public expense to represent them in their dependency proceedings?
3. If appointment of counsel is not required for all dependent children under the U.S. and Washington Constitutions, does consideration of the *Mathews v. Eldridge* due process balancing test require that [Child] be appointed legal counsel at public expense?
4. If the Court is not required to appoint counsel for [Child] under either the U.S. and Washington constitutions, is it in their best interest to be appointed counsel under the Court’s discretionary authority of RCW 13.34.100(7)?

**III. STATEMENT OF FACTS**

is [ x ] years old. This Court has assigned [Child] a Court Appointed Special Advocate (CASA)/Guardian ad Litem (GAL). The CASA/GAL is not an attorney and is not acting as an attorney.

[Relevant facts for appointment of a counsel include, but are not limited to:

* Age of the child.
* Child’s background and circumstances that led to dependency proceedings.
* As appropriate, discuss the relationship of the child with the CASA/GAL.
* How often does CASA/GAL communicate with child? Private & individual visits? Phone calls only?
* Any harms suffered by the child that could have been prevented by legal representation.
* Whether the CASA/GAL’s best interest recommendation conflict with child’s position.
* Any parties to the case with whose interests align with the child’s interests and the limitations to that alignment.
* If the Child wishes to be heard with regards to any issues under the court’s jurisdiction.
* Any instances in which the Child’s legal rights have not been zealously advocated for. E.g. the number of placements the child has had.
* Any instances where the Child has expressed a preference on a particular question but that preference was ignored or even contradicted.
* Relationship with siblings (if any) and frequency of visitation/contacts (and child’s wishes for more/less).
* Relationship with parents and frequency of visits/contacts (and child’s wishes for more/less).
* Relationship with other family members and frequency of visits/contacts (and child’s wishes for more/less).
* Frequency of visits by Department caseworker.
* Does the child require any services that have not been given?
* Special education needs of the child and school disciplinary issues such as suspension or expulsion.
* Child’s disabilities or cognitive skills.
* Mental health and behavioral needs of the child, including whether the child has been or may be institutionalized.
* Department considers the child to be, or the child has been adjudicated to be, a Sexually Aggressive Youth (SAY).
* Department considers the child to be, or the child has been adjudicated to be, a Physically Aggressive or Assaultive Youth (PAAY).
* Any issue for which child may be found in contempt of court.
* Any issues that make this case complex, such as international issues or interstate placements, implicating the Interstate Compact on the Placement of Children (ICPC).

**IV. ARGUMENT**

The due process clause of the U.S. and Washington State constitutions require that all dependent children, including [Child], be appointed legal counsel in their dependency proceedings.

RCW 13.34.100(7)(a) provides that “[t]he court may appoint an attorney to represent the child’s position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.” This recent change to state law demonstrates this state’s recognition of the value of the appointment of counsel for children in dependencies. General Rule (GR) 33(a)(1)(C) provides further legal authority to this court to provide counsel for [Child][[1]](#footnote-1).

Furthermore, JuCR 9.2(c) requires appointment of counsel for [Child] because no CASA or Guardian Ad Litem has appeared on the case.

1. **THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION REQUIRES THIS COURT TO APPOINT LEGAL COUNSEL TO [CHILD] AND ALL CHILDREN IN DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT PUBLIC EXPENSE.**

In 2012 the Washington Supreme Court analyzed a child’s right to counsel under the *federal due process clause* in a *termination of parental rights* proceeding*. In re Dependency of M.S.R. and T.S.R.*, 174 Wn.2d 1, 22 (2012), reconsideration denied (May 9, 2012), as corrected (May 8, 2012) (herein referred to as *“M.S.R.”*). **The Court in *M.S.R.* only analyzed the right of the child to counsel under the Federal Constitution and did not analyze the child’s right to counsel under the Washington Constitution.** 174 Wn.2d , at 20n11 (2012) (“this case does not provide us with a vehicle to consider the entire scope of the article I, section 3 right in this context.”). Although the Court did not fully address the scope of protection under the Washington constitution, the Court did make clear that “[t]he Washington State Constitution, of course, would not provide less due process protection.” Id., at 20

1. WASHINGTON LAW PROVIDES GREATER ACCESS TO COUNSEL THAN ITS FEDERAL COUNTERPART

Four critical differences between the state and federal due process provisions mandate recognition of the right to counsel for dependent children.

First, there is no binding precedent regarding the right to counsel for children in dependency proceedings under the Washington Constitution. 174 Wn.2d at 20n11 (2012). Second, whereas the federal clause only mandates counsel where physical liberty is at stake, Washington’s due process clause also requires counsel where fundamental liberty interests are at stake. *In re Grove*, 127 Wn.2d 221, 237 (1995). Third, after *Lassiter* held that parents lack an absolute right to counsel under the U.S. Constitution, Washington courts have continued to recognize parents’ absolute constitutional right to counsel—a right that, post-*Lassiter*, must be based on the Washington Constitution. Fourth, “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 (1983).

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

1. A GUNWALL ANALYSIS SUPPORTS AN INDEPENDENT STATE CONSITUTIONAL 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 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 or local concern. 106 Wn.2d 54, 61-2 (1986).

With regard to factors one and two, the texts of the federal due process clause and Art. I, § 3 are not significantly different. However, even where state and federal constitutional provisions are identical, the intent of the framers of each constitution may have been different or another intent may be found in a different provision of the state constitution. *Gunwall*, 106 Wn.2d at 61.

The third *Gunwall* factor strongly counsels for an independent state constitutional analysis with broader protections. Art. I, § 3 requires independent interpretation unless historical evidence shows otherwise. *Gunwall*, 106 Wn.2d at 514-16. Additionally, Washington’s constitution, unlike the federal, is far more protective of children, twice referencing their care. Art. IX, § 1 and Art. XIII, § 1.

The fourth *Gunwall* factor strongly points toward 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 (1991) (Utter, J., concurring). 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, similar to the parent-child relationship, is at risk.” *In re Grove*, 127 Wn.2d 221, 237. Owing to this difference between the two constitutions, the absolute right to counsel for parents in terminations has been part of Washington statutory and constitutional jurisprudence for over 35 years. See RCW 13.34.090; *In re Welfare of Myricks*, 85 Wn.2d 252, 253 (1975). 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. *M.S.R*., 174 Wn.2d at 20.

As to the fifth *Gunwall* factor, 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 v. King*, 162 Wn.2d 378, 393 (2007). The sixth *Gunwall* factor weighs heavily in favor of independent interpretation because “the right to counsel in child deprivation proceedings finds its basis solely in state law.” *In re Welfare of Hall*, 99 Wn.2d 842, 846 (1983). Additionally, issues of family relations are matters of state or local concern. *Rose v. Rose*, 481 U.S. 619, 625 (1987) (domestic relations law traditionally left to state regulation).

1. **THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION REQUIRES THIS COURT TO APPOINT COUNSEL TO [CHILD] AND ALL CHILDREN IN DEPENDENCY PROCEEDINGS AT PUBLIC EXPENSE.**

The Washington Supreme Court in *M.S.R.* was careful to limit the application of its analysis to termination of parental rights (TPR) proceedings. 174 Wash. 2d 1, 22 n.13. (“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 dependecy (sic) stages.”)

In evaluating a child’s right to counsel in a *dependency* proceeding, *M.S.R.* is should be considered the bare minimum standard. A dependency is at least as serious as a TPR because “the likelihood of eventual permanent deprivation is substantial.” *Myricks*, 85 Wn.2d at 253. In fact, in many ways, dependency dictates a *higher* level of protection TPR proceedings when both proceedings are viewed from the perspective of the child’s experience. Children in dependencies are initially impacted the most as they are removed from their homes, schools, and other places of familiar surroundings, and taken away from immediate family members to whom they may have strong attachments. The condition of being a dependent child is one that influences every aspect of a child’s life in ways that the singular issue of termination does not. This argument is not to diminish the importance of a TPR proceeding. To the contrary, it is the dependency that gives rise to the possibility of a TPR. How a child’s dependency proceeding is managed by state actors is exactly what determines whether a TPR will ever happen.

1. [Child]’s physical liberty is at risk in this dependency proceeding and therefore there is a presumption that federal due process requires the appointment of counsel.

A dependency proceeding entrusts the state with power over the physical liberty of the child. Where an individual’s physical liberty is threatened, there is a presumption that due process requires counsel:

“[T]he [Supreme] Court's precedents speak with one voice about what “fundamental fairness” has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.”

*Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 26-27 (1981).

The physical liberty of children is impacted from the moment the State removes them from their biological families and further when, as it often happens, they are forced to move from one home to another while in placement. *See M.S.R.*, 174 Wn.2d at 14. The loss of liberty through an involuntary, arbitrary placement process is compounded given that “foster children are ‘involuntarily placed. . . in a custodial environment, and . . . unable to seek alternative living arrangements.’” *Braam v. State*, 150 Wn.2d 689, 698 (2003) (quoting *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (comparing foster children to individuals involuntarily committed to hospitals)); *M.S.R*, 174 Wn.2d at 14 (highlighting how children can be powerless and voiceless as they are moved between homes). Dependencies directly determine placement of the child and the services to be provided. RCW 13.34.130.

Binding any child to a specific place with specific people by virtue of a government ordered placement inherently involves a paramount physical liberty interest that must be considered regardless of age. [Child]’s day-to-day existence and relationships are impacted by where [he/she] lives, by who [he/she] is court ordered to visit and when, with whom [he/she] is expected to live in the future, where [he/she] will go to school, what vacations [he/she] will be allowed to go on, and whether [he/she] has access to proper services to help her navigate a childhood that is being managed by the state. This court must find that [Child], and all children in dependencies, have a due process right to counsel because the dependency proceeding necessarily impacts [his/her] physical liberty.

1. An application of the *Mathews v. Eldridge* analysis to dependency proceedings requires this court to appoint counsel to all dependent children.

The Court in *M.S.R.* determined that, in considering a child’s right to counsel in a termination proceeding, under the due process clause of the U.S. constitution, a case-by-case analysis of the *Mathews v. Eldridge* due process factors was appropriate. 174 Wn.2d at 22. **If this court wishes to engage in a *Mathews v. Eldridge* analysis regarding [Child]’s right to counsel in [his/her] dependency proceeding, it is not limited to a case-by-case approach.** Instead, this court should consider the *Mathews* due process factors as applied to the class of dependent children generally.As Justice Blackmun explained in his dissent in *Lassiter,* “the case-by case approach entails serious dangers for the interests at stake and the general administration of justice.” *Lassiter v. Department of Social Services*, 452 U.S. 18, 50 (1981). Instead, the provision of counsel should be determined for each *context*, not for each *litigant*, as the *Mathews* Court originally envisioned. *Id.* at 49; *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976) (“But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”)

The *Mathews* test requires the Court to balance: (1) the private interest at stake; (2) the risk of error involved under the current procedures and the probable benefits of additional procedural protections; and (3) the government's interest in the proceeding, including fiscal and administrative burdens. *Mathews*, 424 U.S. at 335. In considering these factors as applied to dependent children generally, it is clear that due process requires appointment of counsel.

1. **Children In Dependencies Have Fundamental Liberty Interests At Stake**

As discussed in Section IV(B)(1), a child’s physical liberty is at stake in a dependency proceeding in ways that the singular issue of termination do not address - a situation which gives rise to the presumption of appointment of counsel. 452 U.S. 18, at 26-27. [Child]’s case demonstrates the need for counsel to protect the physical liberty of children in dependency proceedings. [Child] has been moved [x] times, forced to change schools [x] times, limited in his ability to visit with his mother, father and siblings all as a result of this dependency proceeding.

Additionally, a child’s family integrity is at stake in a dependency proceeding. Family integrity is among the most important liberty interests that children possess. In its analysis of the *Mathews* factors, the *M.S.R*. Court noted that “[i]n a dependency or termination proceeding, the parent is at risk of losing the parent-child relationship, but the child is at risk of not only losing a parent but also relationships with sibling, grandparents, aunts, uncles, and other extended family.” 174 Wn.2d at 14 (citing *In re Custody of Shields*, 157 Wn.2d 126, 151-52 (2006) (Bridge, J., concurring)). In this sense, a child has an even stronger fundamental interest than his or her parent in a dependency proceeding.

Like all children in dependency proceedings, [Child]’s liberty interest in family integrity will be severely impacted by this proceeding—the State interfered with the family unit and may [take/change] custody of the Child at any moment. [Child], like all children in dependency proceedings, may have [his/her] relationships with [parents, extended family, and siblings] altered or lost.]

Children subject to dependency proceedings also have the right to health and safety. RCW 13.34.020; *Braam v. State*, 150 Wn.2d 689, 699 (2003) (holding that foster children have a substantive due process right to be free from unreasonable risks of harm, including mental harm, and a right to reasonable safety). This court will make significant decisions that will affect [Child]’s health and safety. To achieve “the best interest of the child,” the dependency proceeding demands this court’s decisions on a wide range of [Child]’s personal and family life, including where and with whom [he/she] lives, whether [he/she] can meet [his/her] parents and siblings, and what treatment or services [he/she] will receive. RCW 13.34.025; RCW 13.34.130; RCW 13.34.136. Given the overwhelmingly broad intrusion in the child’s life, the risk of harming, rather than helping, the child is great.

In *Braam*, the Washington Supreme Court acknowledged that the State can cause harm to foster children when it fails to provide “adequate services to meet the basic needs of the child.” *Braam*, 150 Wn.2d. at 700. To ensure that a child is provided *adequate* services, this Court must hear from the child about [his/her] needs and desires. For [Child], ensuring [he] is free from an unreasonable risk of harm may require [services]. Thus far in the case, [Child] [has received x services, has been diagnosed with x, has been prescribed x medications]. At a minimum, [Child] must understand the options available to [him/her], the consequences of those options, and the opportunity to assert [his/her] wishes on important decisions impacting [his/her] own life. An attorney is best suited to these ends.

Finally, children subject to dependency proceedings have significant rights under federal and state law, including educational rights. *See* 20 U.S.C. § 1400; Wash. Const. art. IX § 1; RCW 28A.150.510; RCW Ch. 28A.155; *McCleary v. State,* 173 Wash.2d 477 (2012). The right to a basic education, a paramount duty of the state under the Washington Constitution, is especially significant when considering foster children have the lowest graduation rates in the state of any group, with worse graduation rates even than youth identified as homeless. Robin G. Munson, Ph.D., Office of Superintendent of Public Instruction, *Graduation and Dropout Statistics Annual Report* 3 (2012-2013). Foster children also have rights related to privacy, religion and culture, while in care. *See*  RCW 9.02.100; RCW 13.34.040; WAC 388-148-1520(8). Additionally, foster children have “the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” RCW 13.34.020. Both the Supreme Court and the Washington Legislature have noted the importance of permanency in a child’s life where multiple foster care placements can lead to negative outcomes for youth.[[2]](#footnote-2)

[Child]’s right to an education was impacted through these proceedings when…

Children in dependency proceedings need legal representation to protect their interests in physical liberty and family integrity and their rights to safety, health and well-being, education, privacy, permanency and religion.

1. **There is a high risk of error in dependency proceedings which will be reduced with the addition of an attorney.**

The potential risk of erroneous decisions is very high for children in dependency proceedings because courts are granted broad discretion in making these determinations. *In re J.S*., 111 Wn. App. 796, (2002). This risk is exacerbated by the fact that the standard for “best interests” is not specified. *J.S.*, 111 Wn. App. at 804. The “imprecise substantive standards that leave determinations unusually open to the subjective values of the judge” serve to “magnify the risk of erroneous factfinding.” *Santosky v. Kramer*, 455 U.S. 745, 762 (1982). 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), which allows for more flexibility, but greater chance of error.

An attorney can reduce the high risk of error that exists in a dependency proceeding. Without an attorney for [Child], the court will not fully understand the child’s stated and legal interests. This lack of understanding can lead to a detrimental result in which the court renders decisions without a full appreciation of the child’s legal rights, causing unnecessary destruction of the child’s most important family relationships. *See Kenny A. ex rel Winn v. Purdue*,356 F.Supp.2d 1353, 1360 (N.D. Ga. 2005). Because the court is only required to review the status of all children every six months, without counsel for the child to bring motions in front of the court, issues regarding the children could go unaddressed for a substantial amount of time. RCW 13.34.138(1). Moreover, [Child] will have no chance to correct the harm because no one will be capable of appealing on [his/her] behalf. By denying an attorney for [Child], the court will effectively deprive the child of the right to a fair and just hearing, as well as of the right to appeal.[[3]](#footnote-3)

The risk of erroneous decisions remains high even when, as here, a CASA or volunteer Guardian Ad Litem has been appointed. A CASA/GAL does not share the same obligations to the child that an attorney has. In *M.S.R.*, the Supreme Court articulated some of the differences between attorneys and GALs/CASAs:

We recognize that GALs and CASAs are not trained to, nor is it their role to, protect the legal rights of the child. Unlike GALs or CASAs, lawyers 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.

174 Wn.2d at 21 (citing 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, 61-62 (2000)).

An attorney, unlike a CASA or GAL, is bound by the Rules of Professional Conduct (RPCs) and would have a confidential and privileged relationship with [Child]—which allows for unfettered disclosure of issues and privileged legal advice on issues directly relating to the dependency or on issues that overlap with it, such as criminal or contempt matters, education, or mental health. An attorney, unlike a CASA or GAL, is also overseen by the Washington State Bar Association. When attorneys do not fulfil their duties under the RPCs, a client or any concerned individual can file a complaint with the Washington Bar Association. There is no such oversight for CASAs and non-attorney GALs. Only a child’s attorney is required to advocate for the child’s expressed wishes, exhibit competence in the law, keep the child informed, consult with the child, and promptly comply with requests for information, among other unique duties. RPC 1.2; RPC 1.1; RPC 1.4; RPC 1.14.[[4]](#footnote-4)

The high risk of error in dependency proceedings is demonstrated in this case where…. [it appears that [child]’s rights have not been protected/ [person] has raised serious concerns about [x]].

The value of attorney representation for youth has been widely recognized. 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, Neglect and Dependency Proceedings. American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, 5 (2011). 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. *Id.*

The risk of erroneous deprivation “depends on the legal and factual complexity of the situations and the parties’ ability to present their case.” *M.S.R.*, 174 Wn.2d at 18 (citing to *Lassiter*, 452 U.S. at 30). An attorney can adequately represent a child even in the most complex cases. An attorney has access to legal resources and research that a CASA/GAL does not.  Ultimately, an attorney can:

* Represent a child’s legal interests and rights;
* Ensure that a child’s expressed positions are effectively presented to the court;
* Educate an abused and neglected child on their legal rights in the dependency proceeding;
* Inform the child of this courts’ decisions to ensure they have an age-appropriate understanding of the decisions that impact their life;
* File legal briefs and appeals;
* Present and cross-examine witnesses;
* Advocate for and ensure the best educational placement and services for the child, thus increasing the chances of educational support, success, and graduation;
* Ensure financial benefits upon aging out of care, thus increasing the chances that the transition to independent young adulthood will be successful.

Unless the assistance of counsel is provided, children in dependency proceedings cannot effectively present [his/her] wishes and desires to the Court. With legal representation, [Child] will be able to understand the dependency proceeding, assert [his/her] legal rights, and express [his/her] needs and concerns about [his/her] placement, parent and sibling visitation, permanency plans and other important court decisions. The child will be most affected by the decisions of this Court, and [his/her] voice must be heard.

1. **There is no countervailing interest to justify denial of counsel to children in dependencies.**

There is no overriding countervailing interest here. The only possible *countervailing* governmental interest is financial. Where fiscal constraints are the only countervailing interest, however, the court will not excuse a violation of due process. *Mathews*, 42 U.S. at 348. (“Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard.”); *see also* *Braam*, 150 Wn.2d at 710 (“Lack of funds does not excuse a violation of the constitution and this court can order expenditures, if necessary, to enforce constitutional mandates.”)*.*

Providing legal counsel to children in dependencies is, in fact, in line with the state’s *parens patriae* interest to protect a child’s safety and well-being. *Kenny A.*, 356 F.Supp.2d at 1361 (finding that the state’s *parens patriae* function “can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and TPR proceedings. Therefore, it is in the state's interest, as well as the child's, to require the appointment of a child advocate attorney.”). This is supported by at least one study, which indicated that attorneys can expedite permanency for the child, thereby reducing the State’s cost in foster care and prolonged court proceedings, as well as ensuring the child’s right to a speedy resolution.[[5]](#footnote-5)

1. **IF APPOINTMENT OF COUNSEL IS NOT REQUIRED FOR ALL CHILDREN UNDER THE U.S. OR WASHINGTON CONSTITUTIONS, CONSIDERATION OF THE *MATHEWS V. ELDRIDGE* DUE PROCESS BALANCING TEST REQUIRES THE APPOINTMENT OF COUNSEL FOR [CHILD] AT PUBLIC EXPENSE.**

Should the court wish to employ a case-by-case analysis of the *Mathews v. Eldridge* factors to [Child]’s due process claims, that analysis as applied directly to [Child]’s case demonstrates the need for counsel here. As discussed in Section IV(B)(2) above, the *Mathews v. Eldridge* factors weigh in favor of appointment for all children in dependencies and especially for [Child]. [Child]’s interest in physical liberty is especially heightened here where ----, [Child]’s interest in family integrity is in play through her separation with ------, [Child]’s right to freedom from an unreasonable risk of harm is at risk by ------, and [Child]’s statutory rights to -------- are also at issue. The risk of error is high in all dependencies, but even more so here where -------; the added benefit of an attorney who can adequately inform the child of the court’s decisions, provide legal advice and counsel to the child, apply their issue spotting and legal analysis skills to the situation, and when necessary file motions and make use of appellate procedures to protect the legal rights of the child, is abundantly clear. Finally, there is no countervailing state interest here. Under this analysis, more thoroughly discussed above, it is clear that [child] has a due process right to counsel in this case.

1. **IF THE COURT IS NOT REQUIRED TO APPOINT COUNSEL UNDER EITHER THE U.S. OR WASHINGTON CONSTITUTION, IT IS IN [CHILD]’S BEST INTEREST TO BE APPOINTED COUNSEL UNDER THE COURT’S DISCRETIONARY AUTHORITY OF RCW 13.34.100(7).**

Only if this Court finds that [child] does not have a right to counsel under the due process clause of the U.S. or Washington constitutions, should it look at the discretionary authority to appoint counsel under RCW 13.34.100. Based on the facts of this case discussed at length above [and the support of child’s mental health providers, teachers, etc] [Moving Party] asks this court to so exercise its discretion and appoint counsel for [child].

1. **JUCR 9.2 REQUIRES THIS COURT TO APPOINT COUNSEL FOR [CHILD].**

When a child in dependency or termination proceedings is not represented by a CASA/GAL, Washington Juvenile Court Rule 9.2(c)(1) states that the court must provide a lawyer “[u]pon request of a party or on the court's own initiative,” as long as the juvenile is “financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family.” The Rule further provides that “[t]he ability to pay part of the cost of a lawyer shall not preclude assignment. A juvenile shall not be deprived of a lawyer because a parent, guardian, or custodian refuses to pay for a lawyer for the juvenile.” *Id*.

Here, JuCR 9.2(c)(1) mandates this Court to appoint an attorney for [Child], because [Child] was not assigned a CASA/GAL and hiring an attorney would cause substantial hardship to the Child and [his/her] family.

**V. EVIDENCE RELIED UPON**

Exhibit A: Declaration of [Client].

**VI. AUTHORITY RELIED UPON**

*Mathews v. Eldridge,* 424 U.S. 319 (1976)

*Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18 (1981)

*Santosky v. Kramer*, 455 U.S. 745 (1982)

*Rose v. Rose*, 481 U.S. 619, 625 (1987)

*In re Welfare of Myricks*, 85 Wn.2d 252 (1975)

*In re Welfare of Hall*, 99 Wn.2d 842 (1983)

*State v. Gunwall*, 106 Wn.2d 54 (1986)

*State v. Smith*, 117 Wn.2d 263, 286 (1991)

*In re Grove*, 127 Wn.2d 221 (1995)

*In re J.S*., 111 Wn. App. 796 (2002)

*Braam v. State*, 150 Wn.2d 689 (2003)

*In re Dependency of Schermer*, 161 Wn.2d 927 (2007)

*King v. King*, 162 Wn.2d 378 (2007)

*In re Dependency of M.S.R. and T.S.R.*, 174 Wn.2d 1 (2012), reconsideration denied (May 9, 2012), as corrected (May 8, 2012)

*McCleary v. State,* 173 Wn.2d 477 (2012)

*Kenny A. ex rel. Winn v. Perdue,* 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005)

Wash. Const. art. I, § 3; art. IX § 1; art. XIII, § 1

RCW 13.34.020

RCW 13.34.025

RCW 13.34.040

RCW 13.34.100

RCW 13.34.130

RCW 13.34.136

RCW 13.34.138

RCW 28A.150.510

RCW Ch. 28A.155

RCW 74.13.310

WAC 388-148-1520(8)

RPC 1.2

RPC 1.1

RPC 1.4

RPC 1.14

American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, 5 (2011)

Robin G. Munson, Ph.D., Office of Superintendent of Public Instruction, *Graduation and Dropout Statistics Annual Report* 3 (2012-2013)

Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County.* Chicago, IL: Chapin Hall Center for Children (2008)

**VII. CONCLUSION**

In this dependency proceeding, in which the Court must determine what is in [Child]’s best interest, this Court’s decision can only be equitable if all parties are given an opportunity to be heard. [Client] has requested that an attorney be appointed at public expense to represent [his/her] interest in this matter so that [he/she] can participate in this proceeding on the same footing as the Department and all other parties. Without [Child]’s participation this Court will not be able to fully understand the issues relevant to [his/her] dependency and make fully informed decisions in [his/her] best interest. [Client] therefore, requests that this Court grant [his/her] motion for a court appointed attorney.

DATED this \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_.

Presented by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. [Child] has been diagnosed as having [type of disability]. [Child] qualifies for special education services under the Individuals with Disabilities Education Act and state law, in addition to significant [mental/behavioral/physical] health services under federal and state law. As such, [Child] is a person with a disability as defined under GR 33(a)(4) because [he/she] has a [physical/mental impairment] that interferes with one or more major life activities. In [Child]’s case these include [education, activities of daily living, and access to the court system]. *See also* Americans with Disabilities Act (42 U.S.C. § 12101 *et. seq.*); RCW 49.60 *et. seq.* GR 33(a)(1)(C) specifically directs courts to appoint counsel for otherwise unrepresented parties who have a disability when such appointment is appropriate or necessary to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability [↑](#footnote-ref-1)
2. *See, e.g., Braam ex rel. Braam v. State,* 150 Wash. 2d 689, 694 (2003) (“Some children in foster care are moved frequently, which may create or exacerbate existing psychological conditions, notably reactive attachment disorder. The Washington State Legislature has specifically recognized that ‘[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support.’ RCW 74.13.310.”).; Melissa Ford Shah, MPP, et all., Youth at Risk of Homelessness: Identifying Key Predictive Factors among Youth Aging Out of Foster Care in Washington State, January 2015 (noting that youth who had two or more foster care placements were at increased risk of homelessness). [↑](#footnote-ref-2)
3. The parent’s presence in a dependency case does not mitigate the risk of erroneous decisions—the parent, or counsel for the parent, is not sufficient to protect the interests of the child. While the interests of the parent and the child may converge, the viewpoints and the situations of each are unique. The parent’s interests may favor the preservation of natural familial bonds, whereas the child’s interests may lie in continuing under the auspices and care of a foster family or other relative. Ultimately, the court’s orders have wholly different effects on a parent than on a child. The parent faces the loss of [his/her] child, but the Child faces the possibility of being moved from placement to placement, being incarcerated or committed, and being separated from siblings, schools, and foster parents. A parent’s presence cannot mitigate the risk of errors in dependency that will directly affect the child. [↑](#footnote-ref-3)
4. Attorneys also have a duty to act in a professional manner towards their clients and maintain a traditional relationship with clients with diminished capacity, including children. Despite legal presumptions of incapacity, minors often have the ability to comprehend, consider, and make decisions about the legal matters at issue. RPC 1.14, Comment [1]. Even “children *as young as 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.” *Id*. (emphasis added). It is precisely because children face difficulties in understanding complex legal proceedings that they should be provided counsel, and the RPC guide attorneys on how to address the needs of a child-client. Parentsare not denied counsel because of their capacity issues and, thus, the capacity of children should not be used as an excuse to deny them counsel. [↑](#footnote-ref-4)
5. In a recent study conducted in Palm Beach County, Florida, children represented by attorneys experienced exits to permanent homes about 1.5 times more frequently than children who were not afforded counsel. Children with their own lawyers also moved from case plan approval to permanency at approximately twice the rate of those not represented by counsel. The study examined cases where the children were age twelve or younger at the time of removal. Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County.* Chicago, IL: Chapin Hall Center for Children (2008), *available at* <http://www.chapinhall.org/research/report/expediting-permanency>. [↑](#footnote-ref-5)