*DIRECTIONS FOR USING THIS TEMPLATE:*

* *This template motion was last updated: on August 15,2017 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**

[Child] 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. Should [Child] be appointed counsel under the mandatory appointment clause of JuCR 9.2?
2. Does the due process clause require that [Child] be appointed legal counsel at public expense to represent her in her dependency proceedings?

**III. STATEMENT OF FACTS**

 [Child] 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**

JuCR 9.2(c) requires appointment of counsel for [Child] because no CASA or Guardian Ad Litem has appeared on the case. Furthermore, the due process clause of the U.S. and Washington State constitutions require that [Child] and all similarly situated children, be appointed legal counsel in their dependency proceedings.

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 and a party requests the child be appointed counsel, appointment is mandatory. “Upon request of a party or on the court's own initiative, the court *shall* appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family…” JuCR 9.2(c)(1) (emphasis added) . 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. Under JuCR 9.2(c)(1) appointment of counsel to [Child] in these circumstances is not discretionary, it is required.

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

In 2012 the Washington Supreme Court analyzed a child’s right to counsel under in a termination of parental rights proceeding and, in that circumstance, found that each child’s case must be reviewed on a case by case basis to determine whether there was a due process right to counsel and employed a *Mathews v. Eldridge* due process analysis to assess the child’s due process right to counsel in that *. In re Dependency of M.S.R. and T.S.R.*, 174 Wn.2d 1, 5 (2012), reconsideration denied (May 9, 2012), as corrected (May 8, 2012) (herein referred to as *“M.S.R.”*).

1. **An application of the *Mathews v. Eldridge* analysis requires this court to appoint counsel to [child].**

 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. At a minimum, an analysis of these factors demonstrates the need for court appointed counsel for [Child] and similarly situated children.

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

A dependency proceeding entrusts the state with power over the physical liberty of the child. 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. 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 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)).

 [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. Because [Child]’s physical liberty is at stake in these proceedings and therefore there is a presumption that due process requires counsel, the burden must shift to DSHS to establish why [Child] should not be appointed counsel in her case.

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).. 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].

The Court in *M.S.R.* concluded that the child’s liberty interest in a dependency proceeding is strong: “for the purposes of *Mathews,* the child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's” 174 Wn.2d at 17-18.

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 every dependency proceeding because courts are granted broad discretion in making these determinations. *In re J.S*., 111 Wn. App. 796, (2002). An attorney can reduce the high risk of error that exists in a dependency proceeding. The Washington State Bar Association recently recognized the additional benefit of an attorney for a child in dependency proceedings when they called for attorney representation for children at every stage of these proceedings. Exhibit B: WSBA Resolution in Support of Attorney Representation for Children in Dependency Proceedings, September 17, 2015. 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 her of the right to a fair and just hearing, as well as of the right to appeal.[[1]](#footnote-1)

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.

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.

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]].

An attorney can adequately represent a child even in the most complex cases. With legal representation, [Child] will be able to understand the dependency proceeding, assert her legal rights, and express her needs and concerns about her placement, parent and sibling visitation, permanency plans and other important court decisions.

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.[[2]](#footnote-2)

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.”).

**V. EVIDENCE RELIED UPON**

Exhibit A: Declaration of [Client].

Exhibit B: WSBA Resolution in Support of Attorney Representation for Children in Dependency Proceedings, September 17, 2015.

**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)

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

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

*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)

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

RCW 13.34.020

RCW 13.34.100

RPC 1.1

RPC 1.2

RPC 1.4

RPC 1.14

**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 [Child]’s interest in this matter. 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 for [Child].

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

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

1. 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. 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-1)
2. 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). 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-2)