

11-16-2018

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Recommended Citation

Jennifer Shannon, *The Analysis is Simple: A Child's Right to Counsel in Dependency and Neglect Proceedings Under the Montana Constitution*, 79 Mont. L. Rev. 231 (2018). Available at: <https://scholarship.law.umt.edu/mlr/vol79/iss2/4>.

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THE ANALYSIS IS SIMPLE: A CHILD'S RIGHT TO COUNSEL IN DEPENDENCY AND NEGLECT PROCEEDINGS UNDER THE MONTANA CONSTITUTION

Jennifer Shannon*

I. INTRODUCTION

Montana's Constitution provides minors the same protections as adults: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of [Article II] unless specifically precluded by laws which enhance the protection of such persons."¹ Likewise, the Montana Supreme Court has held that under this constitutional provision, "youths are entitled to the same or greater due process rights as adults."² Parents in dependency proceedings have a due process right under the Montana Constitution to court-appointed counsel, because of the substantial threat of unfair procedure in determining the termination of their parental rights.³ Thus, under Article II, Section 15 of the Montana Constitution, the child should be provided the same protections as adults in dependent-neglect proceedings—including the right to court-appointed counsel.

This comment argues that given Article II, Section 15's text, intent, and development in the courts, children must be appointed attorneys in dependency proceedings. Part II briefly explains the process of dependency proceedings, and the federal and state statutory framework that guides them. Part III first explains the rights implicated in dependency proceedings, which have been complicated by the courts. It then explains the origins of procedural due process in the federal system. Lastly, it discusses Montana's extension of procedural due process to parents in dependency proceedings, giving parents the right to counsel. Part IV discusses four Montana Supreme Court cases regarding a child's right to counsel in dependency proceedings. Part V describes how Article II, Section 15 entitles children to appointed counsel in dependency proceedings, both in its plain text and the Montana Constitutional Framer's intent. Part VI continues the analysis by examining the implications of declaring a child's right to an attorney.

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1. MONT. CONST. art. II, § 15.

2. *In re G.T.M.*, 222 P.3d 626, 630 (Mont. 2009) (citing MONT. CONST. art. II, § 15; *In re Gault*, 387 U.S. 1, 13, 27–28 (1967); *Kent v. United States*, 383 U.S. 541, 562 (1966)).

3. *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont. 1993).

ney under Article II, Section 15, and Part VII concludes that the Court must find Montana's current dependency statutory framework unconstitutional.

II. A BRIEF BACKGROUND ON DEPENDENCY PROCEEDINGS

A dependency proceeding is unique; “[i]t is civil in nature, although it contains similarities to criminal proceedings.”⁴ Before a dependency proceeding formally begins, a state child welfare agency receives information about possible abuse or neglect of a child.⁵ From there, the agency investigates and determines whether or not the child needs to be removed from the home.⁶ Within 20 days of the child being removed from the home, the State must proceed to prove at a show cause hearing that the child should continue to be in the State's protective custody.⁷

Every dependency case is different.⁸ Generally, after the court has determined the child should be held in the State's custody, the parties move forward with the ultimate goal of preserving the biological family unit whenever possible.⁹ During this stage, parents must complete their treatment plan, which is an agreement between the parent and the agency outlining the actions the parent must take to have their child returned.¹⁰ A proceeding ends when the parent completes their treatment plan and the State determines the child may return home, or when the State moves to terminate parental rights.¹¹ Under Montana statute, if a child has been out of the home for 15 of the last 22 months, the law presumes termination is in the best interests of the child.¹²

In a termination proceeding, the State must prove termination is appropriate by clear and convincing evidence.¹³ Ultimately, a court may terminate parental rights if: “(1) the court has adjudicated the child a youth in need of care, (2) the parent has failed to comply with a court ordered treat-

4. Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 CUMB. L. REV. 181, 187 (2014).

5. MONT. CODE ANN. § 41-3-101(2) (2017).

6. MONTANA CFS POLICY MANUAL: INVESTIGATION/ASSESSMENT OF REPORT, § 202-3, p. 1-3 (2015), <https://perma.cc/783Z-CHES> (<https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/202-3.pdf>) (last visited on August 6, 2018).

7. MONTANA CFS POLICY MANUAL: LEGAL PROCEDURE REQUIRED JUDICIAL HEARINGS, § 301-2, p. 1-2 (2011), <https://perma.cc/M6UN-LFLS> (<https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/301-2.pdf>) (last visited on August 6, 2018).

8. Malempati, *supra* note 4, at 189.

9. MONT. CODE ANN. § 41-3-101(b) (2017).

10. MONT. CODE ANN. § 41-3-102(30) (2017); MONTANA CFS POLICY MANUAL: LEGAL PROCEDURE COURT-ORDERED TREATMENT PLAN/STIPULATION, § 303-1, p. 1 (2009), <https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/301-2.pdf>.

11. Malempati, *supra* note 4, at 189.

12. MONT. CODE ANN. § 41-3-422(14)(b) (2017).

13. MONT. CODE ANN. § 41-3-422(5)(b)(iv).

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ment plan, and (3) the conduct or condition of the parent rendering the parent unfit is unlikely to change within a reasonable time.”¹⁴

A. Federal Statutory Framework

To receive federal funding for child abuse or neglect treatment and prevention programs, states are required by the Federal Child Abuse Prevention and Treatment Act (CAPTA) to provide each child either a Guardian ad Litem (GAL) or a Court Appointed Special Advocate (CASA).¹⁵ States are not required under CAPTA to provide children with attorneys.¹⁶ The required GAL is obligated to make recommendations regarding the child’s best interests to the court.¹⁷

CAPTA arose after the United State Supreme Court’s decision in *In re Gault*,¹⁸ which effectively split the juvenile justice system into two separate systems.¹⁹ In one, children engaged in delinquent activities were appointed attorneys to represent them before the court.²⁰ In the other, children who were involved in dependency proceedings were not entitled to appointed legal counsel.²¹

To comply with CAPTA, state legislators have developed laws to provide GALs and CASAs for children.²² They are inconsistent, however, in providing every child an attorney to represent their wishes in court.²³

B. Montana’s Statutory Framework

Prior to 2011, a Montana statute required that all children in dependent neglect proceedings be appointed an attorney and a GAL.²⁴ In 2011 that law changed, and it now provides an exception to providing children attorneys where the court appoints a GAL or CASA for the child. Montana Code Annotated Section 41–3–425 now provides:

(2) [T]he court shall immediately appoint the office of state public defender to assign counsel for: (a) any indigent parent, guardian, or other person hav-

14. *In re R.M.T.*, 256 P.3d 935, 939 (Mont. 2011) (citing Mont. Code Ann. § 41–3–609(1)(f) (2011); *In re I.B.*, 255 P.3d 56, 61 (Mont. 2011)).

15. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012).

16. *See* 42 U.S.C. § 5106a (2012).

17. 42 U.S.C. § 5106a(b)(2)(B)(xiii)(II) (2012).

18. 387 U.S. 1 (1967).

19. Malempati, *supra* note 4, at 185.

20. *Id.*; *see also* Rebecca Stursberg, *Still in Flux: Reinterpreting Montana’s Rights-of-Minors Provision*, 79 MONT. L. REV. 515–21 (2018).

21. Malempati, *supra* note 4, at 185–86.

22. *Id.* at 186.

23. *Id.*

24. MONT. CODE ANN. § 41–3–425(2)(b) (2009).

ing legal custody of a child . . . (b) any child or youth involved in a proceeding . . . when a guardian ad litem is not appointed for the child . . .

This part of the statute is known as the “GAL exception.”²⁵

The framework, however, does not merely favor the appointment of GAL over an attorney. Montana Code Annotated Section 41–3–112 states: “In every judicial proceeding the court shall appoint a court-appointed special advocate as the guardian ad litem for any child alleged to be abused or neglected.”²⁶ This bill, enacted in 2017, prioritizes that a CASA be appointed over a GAL or an attorney.²⁷ Importantly, though, there exists a major difference between CASAs and GALs.²⁸ CASAs are unpaid volunteers, whereas GALs are paid professionals, usually attorneys.²⁹ Although the statute requires that the GAL or CASA both receive “appropriate” training and, under the statute, both GALs and CASAs have the same duties to investigate, report, and advocate for the child’s best interests, neither are an attorney for the child and therefore neither operate under the lawyer’s rules of professional conduct.³⁰

While federal law requires states to provide each child a GAL or CASA, that was not the reason Montana’s legislature proposed the revision to Montana Code Annotated Sections 41–3–425 or 43–1–112. The amendment to Section 41–3–425 was introduced by Montana State Senator Larry Jent who argued that the purpose of the Bill was to provide judges with discretion regarding the appointment of children’s attorneys in dependency proceedings, particularly where “no need for individual representation” existed because the child was so young that they could not express their wishes to an attorney.³¹ The Bill’s proponents argued that the GALs already informed the court of the child’s wishes and thus an advocate attorney for a child’s wishes was unnecessary.³² Ultimately, the Bill was added as a cost-saving measure for the Office of the State Public Defender, which would no longer have to pay for a child’s attorney unless a court affirmatively deemed it necessary.³³ Likewise, Section 41–3–112’s sponsor, Representa-

25. *In re T.D.H.*, 356 P.3d 457, 472 (Mont. 2015) (McKinnon, J., dissenting).

26. MONT. CODE ANN. § 41–3–112(1) (2017).

27. Audio Hearing on Mont. H.B. 201, 65th Leg. Before H. Human Services Comm. (January 16, 2017). <https://perma.cc/MN4P-F98C> (http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=20663&meta_id=169457) (last visited August 6, 2018).

28. *Id.*

29. *Id.*

30. MONT. CODE ANN. § 41–3–112 (2017); Audio Hearing on Mont. H.B. 201, 65th Leg. Before H. Human Services Comm. (January 16, 2017).

31. Larry Jent, *Revise Guardian ad Litem Laws to Allow Judges’ [sic] Discretion in Appointed Counsel*: Hearing on Mont. S.B. 153 62d Leg. Before the S. Judiciary Comm. 1:53 (Mont. 2011) (audio available at <https://perma.cc/PSQ3-7GRD>).

32. *Id.* at 4:03.

33. *Id.* at 4:35.

tive Rob Cook, stated in his closing remarks that CASAs, unlike GALs or Attorneys, were free—and therefore the Bill would minimize the enormous costs that dependency proceedings already create for the State.³⁴

Thus, under Montana’s current statutory scheme, no framework exists requiring courts to appoint an attorney to children in a dependency proceeding. That does not mean, however, that no important rights are implicated for children in dependency proceedings.

III. THE RIGHTS ISSUE IN DEPENDENCY PROCEEDINGS

Dependency proceedings can sever the biological family relationship and thus may potentially implicate the rights of individuals. As children are the focus of dependency proceedings,³⁵ this section will first look to the rights of minors contained in Montana’s Constitution, Article II, Section 15, and Montana’s right to equal protection³⁶ which Montana’s courts have held must be read alongside Article II, Section 15.³⁷ Children, however, are not the only ones who stand to lose something in dependency proceedings, and therefore this section will also examine the right to due process and specifically, counsel, for parents in dependency proceedings in federal and Montana courts.

A. The Rights of Children in Montana under Article II, Section 15

1. *The Provision and its History*

Montana’s Constitution provides that children are equal to adults, with all of the same fundamental rights. Article II, Section 15 states:

Rights of persons not adults. The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protections of such persons.

Section 15 was created to remedy the lack of rights given to children under equal protection. Delegate Monroe, who proposed Section 15, stated that he proposed the Section because “The Supreme Court has not ruled in [children’s] favor under the equal protection clause.”³⁸ Delegate Monroe added that the Section sought to ensure “that persons under the age of ma-

34. Audio Hearing on Mont. H.B. 201, 65th Leg. Before H. Human Services Comm. (January 16, 2017).

35. MONT. CODE ANN. § 41–3–101(1)(a) (2017).

36. See Stursberg, *supra* note 20, at 515–21 (explaining how the rights-of-minors provision is read with the Equal Protection Clause of the Montana Constitution).

37. *In re T.D.H.*, 356 P.3d 457, 472 (Mont. 2015) (McKinnon, J., concurring and dissenting) (citing *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997)).

38. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1750 (1981) [hereinafter 5 CONSTITUTIONAL CONVENTION TRANSCRIPT].

majority have been accorded certain specific rights which are felt to be part of due process,”³⁹ with the “crux” of the Section being a proposal “that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults.”⁴⁰ Finally, Delegate Dahood stated “what we are doing by this article is focusing on the basic guarantees that citizens have with respect to their person, their property, and their liberty.”⁴¹

Debate surrounding the Section focused on whether it was necessary given that children were “people” already protected by Article II.⁴² Delegates Dahood and Monroe specified that Section 15 was necessary because young men and women were not provided due process particularly when being prosecuted for minor crimes.⁴³ Delegate Monroe recalled a situation he faced as a child where he was thrown in jail without being told any reason. Being incarcerated, he never got to attend his first and only basketball tournament.⁴⁴ Despite concern that Section 15 was unnecessary, it passed with 76 delegates voting aye and 11 voting no.⁴⁵ It was then incorporated into the Montana Constitution as a “new provision giving children all the rights that adults have unless a law meant to protect children prohibits their enjoyment of that right.”⁴⁶

Section 15 of the Montana Constitution is unique. Delegate Monroe hoped that Montana “[could] be the leader among all the states in recognizing the rights of people under the age of majority.”⁴⁷ Indeed, the provision itself is unique in the United States because it provides outright that children should be treated equally. The development of this provision in the courts, however, has been minute and often contrary to the intent of the framers, ultimately causing more confusion than necessary.

2. *The Court’s Interpretation of the Provision*

a. *Handling Violations of Article II, Section 15*

In order for a violation of Article II, Section 15 to be constitutional, the Court requires that the law serves a compelling state interest under strict

39. *Id.*

40. *Id.*

41. *Id.* at 1751.

42. *Id.* at 1751–52.

43. *Id.*

44. *Id.* at 1751.

45. *Id.*

46. Proposed 1972 Constitution for the State of Montana, Official Text with Explanation, March 22, 1972, p. 6.

47. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 38 at 1750.

scrutiny and also that the law enhances the rights of minors.⁴⁸ While strict scrutiny is the appropriate test for a violation of Article II, Section 15 as a fundamental right in Montana's constitution, the second part of this test is an incorrect interpretation of Article II, Section 15 that serves only to complicate the Section 15 analysis.

Strict scrutiny is the appropriate standard for analyzing violations of Article II, Section 15. The use of strict scrutiny for a Section 15 violation traces back to *In re S.L.M.*,⁴⁹ in which the Court held that if the legislature seeks to carve out an exception for treating children different than adults it "must . . . show a compelling state interest."⁵⁰ However, *S.L.M.* does not plainly provide that all violations of Section 15 require strict scrutiny; just before the Court's statement of the Section 15 test, it determined that a compelling state interest was required in *S.L.M.*'s case because applying an adult sentence to a child implicated the child's physical liberty, which is a fundamental right requiring a compelling state interest under strict scrutiny.⁵¹ The Court then stated, "[W]e must therefore apply a strict scrutiny analysis and determine whether there is a compelling state interest sufficient to justify such an infringement and whether such an infringement is consistent with the mandates of Article II, Section 15 of the Montana Constitution."⁵² The separation here of a compelling state interest from the Section 15 analysis, therefore, suggests that the compelling state interest requirement only applies in cases where a fundamental right that requires strict scrutiny, such as physical liberty, is implicated. Although the test provided in *S.L.M.* is unclear, strict scrutiny should always apply to a Section 15 challenge.

Strict scrutiny must be required to overcome a Section 15 challenge. In Montana, the default scrutiny for fundamental rights is strict scrutiny, which means that strict scrutiny applies to the fundamental rights found within Article II.⁵³ Section 15 is contained in Article II.⁵⁴ And further, looking at the provision, Section 15 grants children "all the *fundamental* rights of [Article II]"⁵⁵ Therefore, Section 15 requires a strict scrutiny analysis as it applies solely to fundamental rights, which under Montana law deserve strict scrutiny.

48. *In re T.D.H.*, 356 P.3d 457, 472 (Mont. 2015) (McKinnon, J., dissenting) (citing *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997)).

49. *In re S.L.M.*, 951 P.2d 1365.

50. *Id.* at 1373.

51. *Id.* at 1372.

52. *Id.*

53. *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997).

54. MONT. CONST. art. II, § 15.

55. *Id.* (emphasis added).

The second part of the Court's current test for analyzing a violation of Section 15, however, is inconsistent with the text of the Section. Again in *S.L.M.*, the Court held that a violation of Section 15 could only be cured if the legislature showed that the statute was "designed to enhance the *rights* of minors."⁵⁶ Looking at the Provision, however, it requires that any exception to Section 15 enhances "the *protections*" of children.⁵⁷ While it is unclear where this word-swap came from, the Court in *S.L.M.* announced this test immediately following the Bill of Right's Committee's comments that follow Section 15.⁵⁸ Nowhere in those comments did the Committee switch the words "rights" and "protections."⁵⁹ As the words "protection" and "rights" implicate two different meanings, this misinterpretation of the Section complicates the analysis of violations of Section 15 by adding a part to the analysis that is unfounded in the Section's text. This, however, is not the only way in which the Court has complicated the Section 15 analysis.

b. Alongside Equal Protection

The Montana Supreme Court has held that Section 15 "must be read in conjunction with the guarantee of equal protection found in Article II, Section 4."⁶⁰ This, the Court explains, is because the Bill of Rights Committee indicated that equal protection was a primary purpose of Section 15.⁶¹ The Bill of Rights Committee did, in fact, indicate that part of the reason for Section 15 was because "the Supreme Court has not ruled in [minors'] favor under the equal protection clause."⁶² However, there are several issues with the Court's conclusion that Section 15 must be read alongside Montana's equal protection provision.

First, equal protection is not the only right the Bill of Rights Committee noted was a purpose for Section 15. The Committee also specifically indicated that children should be accorded these rights as "a part of due process."⁶³ Under the Court's reasoning, therefore, Montana's due process provision, Article II, Section 17, should always be read alongside Section 15 as well.

Second, the statement of the Committee relied on by the Court notes a marked departure from equal protection in Section 15. The Committee

56. *In re S.L.M.*, 951 P.2d at 1373 (emphasis added).

57. MONT. CONST. art. II, § 15 (emphasis added).

58. *In re S.L.M.*, 951 P.2d at 1373.

59. *Id.* (quoting 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 635–36 (1971) [hereinafter 2 CONSTITUTIONAL CONVENTION TRANSCRIPT]).

60. *Id.* at 1374.

61. *Id.*

62. *Id.* (quoting 2 CONSTITUTIONAL CONVENTION TRANSCRIPT at 635–36).

63. *Id.* (quoting 2 CONSTITUTIONAL CONVENTION TRANSCRIPT at 635–36).

stated that Section 15 was needed because, under the Equal Protection Clause, courts had not ruled in favor of minors.⁶⁴ Rather than making Section 15 an extension of equal protection, this statement exemplified the framer's intent to create Section 15 as a right separate from equal protection which had failed to adequately protect minors in the courts.

Finally, the transcripts from the Constitutional Convention also demonstrate the framer's intent to create Section 15 as a stand-alone protection for minors, separate from equal protection or any other amendment. In the floor debate, Delegate Brown argued that the provision was unnecessary as the Bill of Rights already applied to children, stating "I don't see, really, the purpose of this article . . . This Bill of Rights covers all people, and it doesn't say only those over the age of majority."⁶⁵ Delegate Dahood responded that the provision served a definite purpose: "It merely makes sure that [children] have the basic rights that many of us assume that they do . . . and this will make sure that this Constitution and Bill of Rights does apply to all citizens regardless of age."⁶⁶ Delegate Dahood's answer provides that Section 15 serves its own independent purpose, and therefore should be read apart from other rights in Montana's Bill of Rights that presumably may apply to children, including equal protection.

For these reasons, Article II, Section 15 must not be mandatorily read alongside equal protection. Although it seems that Article II, Section 15 is an extension of equal protection, based on the text of the Bill of Rights Committee and the Constitutional Convention Transcripts, it was not the intent of the framers for Article II, Section 15 to be read along with equal protection. Article II, Section 15 provides its own, strong, independent protections specifically for minors. Indeed, reading Section 15 alongside equal protection only serves to create more confusion.

Equal protection only muddles the analysis of Section 15 because Montana's equal protection doctrine is unclear. Montana's equal protection provision, found in Article II, Section 4, reads:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

On its face, Montana's equal protection provision provides a wide array of terms and phrases to unpack. Section 4 acknowledges that private individuals, not only the State, can violate an individual's equal protection

64. *Id.* (quoting 2 CONSTITUTIONAL CONVENTION TRANSCRIPT at 635–36).

65. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 38 at 1750.

66. *Id.* at 1752.

right⁶⁷ and also provides protection based on numerous individual qualities including political ideas and social origin.⁶⁸ Finally, Section 4 includes individual dignity as part of equal protection.⁶⁹ Thus, Montana's provision is already complicated in its text by covering many different classifications of individuals without definition.

On its face, the Court's test for determining whether there has been a violation of equal protection in Montana seems simple. Montana Courts "first identify the classes involved and determine whether they are similarly situated."⁷⁰ After determining whether the classes are similarly situated, the Court decide what the appropriate level of scrutiny is.⁷¹ If the violation implicates a fundamental right present in Article II, then the court applies strict scrutiny.⁷² If not, the Court applies either intermediate scrutiny or rational basis depending on the right and the facts of the case.⁷³

While this analysis seems straightforward, it often is complicated by the fact that the Court has not settled on a definition of "similarly situated." *Donaldson v. State*⁷⁴ proved just how much confusion surrounds the phrase "similarly situated." In Justice Nelson's *Donaldson* dissent, he pointed out that Montana's courts had failed to flesh out the exact meaning of "similarly situated."⁷⁵ Thus, Justice Nelson suggested that the Montana Courts look to federal precedent.⁷⁶ Examining this federal precedent, Justice Nelson contended that being similarly situated "is not always susceptible to precise demarcation," but asked "whether the plaintiff's group is 'roughly equivalent' to the control group in 'all relevant respects' other than the factor constituting the alleged discrimination."⁷⁷ Further, Justice Nelson added, "exact correlation is neither likely or necessary, but the cases must be fair congeners."⁷⁸ Justice Nelson exposed the Court's inability to determine what similarly situated means while at the same time noting that similarly situated is nearly impossible to precisely define. This displays the confusion which flows from Montana's equal protection provision and provides the final reason why equal protection must not be read concurrently with Sec-

67. MONT. CONST. art. II, § 4.

68. *Id.*

69. *Id.*

70. *Snetsinger v. Mont. Univ. Sys.* 104 P.3d 445, 449 (Mont. 2004) (citing *Henry v. State Compensation Ins. Fund*, 982 P.2d 456, 461 (Mont. 1999)).

71. *Snetsinger*, 104 P.3d at 449–50 (citing *Henry*, 982 P.2d at 461).

72. *Id.*

73. *Id.*

74. *Donaldson v. State*, 292 P.3d 364 (2012).

75. *Id.* at 395 (Nelson, J., dissenting).

76. *Id.*

77. *Id.* (citing *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 9 (1st Cir. 2004); *Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004); *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989)).

78. *Id.* (Nelson, J., dissenting) (quoting *Tapalian*, 377 F.3d at 6).

tion 15 if the courts wish to have any clarity in providing for the rights of minors.

B. Due Process

1. Due Process Generally

Whether an individual is entitled to counsel in a civil proceeding is analyzed under the Fifth and Fourteenth Amendments.⁷⁹ These amendments, which apply to federal and state actors respectively, provide that no person shall be deprived of “life, liberty, or property, without due process of law.”⁸⁰ The Court has recognized that this due process “‘is not a technical conception with a fixed content unrelated to time, place, and circumstances,’” and thus the phrase due process expresses only a “fundamental fairness, a requirement whose meaning can be as opaque as its importance is lofty.”⁸¹

Though procedural due process is “lofty,” the United States Supreme Court in *Mathews v. Eldridge*⁸² created a three-part test for determining whether due process has been carried out under the Fifth and Fourteenth Amendments. First, a court analyzes the private interests at stake; second, it analyzes the government’s interest at stake; and third, it analyzes the risk that the procedure will result in erroneous decision.⁸³ Under this test, a 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.”⁸⁴

2. Federal Due Process and the Parental Right to Counsel in Dependency Proceedings

The U.S. Supreme Court has not recognized an express right to counsel for parents in dependency proceedings.⁸⁵ In *Lassiter v. Department of Social Services*, Lassiter’s son, William, was removed from her care by the Durham County Department of Social Services after she allegedly failed to

79. See *Lassiter v. Department of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981) (while *Lassiter* only lists the Fourteenth Amendment as a source for due process rights to counsel in civil proceedings, the Fourteenth Amendment does not apply to the States; the Fifth amendment provides due process protections from state actors).

80. U.S. CONST. amends. V, XIV.

81. *Lassiter*, 452 U.S. at 24 (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)) (internal quotation marks omitted).

82. 424 U.S. 319, 334–35 (1976).

83. *Id.* at 335.

84. *Lassiter*, 452 U.S. at 27.

85. *Id.* at 31–32.

provide William with adequate medical care.⁸⁶ Three years later the Department petitioned for termination of Lassiter's parental rights.⁸⁷ In that termination proceeding, Lassiter was not appointed an attorney.⁸⁸ Despite Lassiter's best efforts to represent herself, the trial court held that Lassiter had "willfully failed to maintain concern or responsibility for the welfare of a minor," and it was in the child's best interests to terminate Lassiter's parental rights.⁸⁹ Lassiter appealed, arguing that because she was an indigent, she was entitled under the Fourteenth Amendment to assistance of counsel.⁹⁰

The Supreme Court balanced the *Mathews* factors against the presumption that court-appointed counsel is not generally required unless there is a potential deprivation of physical liberty, and it concluded that although the *Mathews* factors weighed heavily in favor of Lassiter, the *Mathews* analysis did not ultimately show that Lassiter deserved due process in the form of appointed counsel.⁹¹ Instead, the Court held, whether a parent is entitled to counsel in dependency proceedings depends on the unique facts of the case.⁹² And, in looking at the unique facts of Lassiter's case, the Court ultimately affirmed the termination of her parental rights.⁹³

While the U.S. Supreme Court held parents generally are not entitled to counsel in dependency proceedings, it also acknowledged that "[a] wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the [federal] Constitution," and that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to assistance of appointed counsel not only in parental termination proceedings, but in dependency neglect proceedings as well."⁹⁴ The Court, therefore, left the floor open for the states to provide more due process rights to parents in dependency proceedings.

3. *Montana Due Process and the Parental Right to Counsel in Dependency Proceedings*

Indeed, Montana did rise above the federal floor to provide the right to counsel for parents in dependency proceedings under Montana's due process provision.⁹⁵ That provision reads "[n]o person shall be deprived of life,

86. *Id.* at 20.

87. *Id.* at 20–21.

88. *Id.* at 21.

89. *Id.* at 23–24 (quotations omitted).

90. *Id.* at 24.

91. *Id.* at 31.

92. *Id.* at 32 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

93. *Id.* at 34.

94. *Id.* at 33–34 (citations omitted).

95. *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont. 1993).

liberty, or property without due process of law.”⁹⁶ In *In Re A.S.A.*⁹⁷ a mother appealed after her parental rights were terminated by the district court. She argued that because she had not been appointed counsel, terminating her parental rights violated the Montana Constitution’s due process provision.⁹⁸ The Montana Supreme Court agreed.⁹⁹

The Court held that under Montana’s Constitution, a natural parent has the right and fundamental liberty interest in the “care and custody of his or her child,” which must be protected in judicial proceedings.¹⁰⁰ The Court explained:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹⁰¹

Without conducting the *Mathews* test, the Court held in *A.S.A.* that providing parents with court-appointed counsel was important to maintaining the fundamental fairness of the judicial system because “[w]ithout representation, a parent would not have an equal opportunity to present evidence and scrutinize the State’s evidence.”¹⁰² Relying on this fundamental fairness derived from Article II, Section 17 of the Montana Constitution, the Court held “that the due process clause in our State Constitution guarantees an indigent parent the right to court-appointed counsel in proceedings brought to terminate parental rights.”¹⁰³ Thus, Montana expanded the protections guaranteed by the Due Process Clause of the United States Constitution by providing court-appointed counsel to parents in dependency proceedings under the Montana Constitution.

96. MONT. CONST. art. II, § 17.

97. *In re A.S.A.* 852 P.2d at 129–30.

98. *Id.* at 128.

99. *Id.* at 129.

100. *Id.* (citing *In re R.B.*, 703 P.2d 846, 848 (Mont. 1985)).

101. *Id.* (quoting *Santosky*, 455 U.S. at 753–54).

102. *Id.*

103. *Id.* at 130.

IV. MONTANA'S INTERPRETATION OF THE RIGHTS OF CHILDREN IN
DEPENDENCY PROCEEDINGS UNDER ARTICLE II, SECTION 15

Four recent cases before the Montana Supreme Court have spoken about the rights of children to an attorney in dependency proceedings: *In re A.D.B.*,¹⁰⁴ *In re R.M.T.*,¹⁰⁵ *In re J.W.C.*,¹⁰⁶ and *In re T.D.H.*¹⁰⁷ In two of these cases, the Court was asked specifically to decide whether children must be appointed an attorney in dependency proceedings under Article II, Section 15.¹⁰⁸ Although none of these decisions have held that children have a right to an attorney, each opinion displays the Court's variety of strong opinions on the rights of minors in dependency proceedings.

A. *In re A.D.B.*

At the age of three, A.D.B. was removed from her parents' home after her mother was arrested for driving under the influence and her father was charged with deliberate homicide.¹⁰⁹ At the start of the proceedings, the district court appointed A.D.B. a GAL and an attorney.¹¹⁰ The district court also appointed A.D.B.'s parents their own respective attorneys.¹¹¹

Based on the mother's several relapses, and the father's inability to be released from prison, the State moved for the termination of A.D.B.'s mother's and father's parental rights.¹¹² Both parents and A.D.B. appealed the district court's termination order.¹¹³

The Montana Supreme Court upheld the termination of A.D.B.'s parents' rights, citing the overwhelming facts indicating termination was in A.D.B.'s best interests.¹¹⁴ The Court concluded, "[c]hildren need not be left to 'twist in the wind' before neglect may be found chronic and severe."¹¹⁵ While the majority addressed A.D.B.'s appeal of the termination, it did not address whether the Court had erred in appointing A.D.B. an attorney.¹¹⁶ This question was not before the Court.¹¹⁷

104. 305 P.3d 739 (Mont. 2013).

105. 256 P.3d 935 (Mont. 2011).

106. *Id.*

107. 356 P.3d 457 (Mont. 2015).

108. *Id.* at 463; *J.W.C.*, 265 P.3d at 1272.

109. *In re A.D.B.*, 305 P.3d at 741, 752 (McGrath, C.J., concurring).

110. *Id.*

111. *Id.*

112. *Id.* at 743.

113. *Id.* at 744.

114. *Id.* at 751.

115. *Id.* at 743 (quoting *In re M.N.*, 261 P.3d 1047, 1053 (Mont. 2011)).

116. *Id.* at 741–51.

117. *Id.* at 741.

Despite that, Chief Justice McGrath argued in his concurrence that the district court had erred in appointing A.D.B. an attorney.¹¹⁸ He noted that although the district court had ample evidence to prove termination was in A.D.B.'s best interest, A.D.B.'s attorney had argued against termination on appeal.¹¹⁹ The Chief Justice found this argument particularly troubling because A.D.B. was only three years old.¹²⁰ He asked, "How did an attorney representing a three-year old child reach this conclusion?"¹²¹

In analyzing the GAL exception in Montana Code Annotated Section 41–3–425 Chief Justice McGrath found that "as a general rule, appointment of an attorney for a child is not required unless a G.A.L. is not appointed."¹²² His concurrence then argued in favor of the discretion allowed by this statute, opining that discretion is logical when children under the age of reason are the subject of dependency proceedings.¹²³ Plainly, he argued that a child who is under the age of reason, or unable to adequately convey his or her wishes, should not be appointed an attorney to represent those wishes.¹²⁴

According to Chief Justice McGrath, "Nothing in the Montana Constitution, statutes, or case law provides a right to counsel for the child."¹²⁵ And, to prove that children do not have a right to an attorney, he turned to the rules of ethics governing lawyers, arguing:

The child is the subject of [dependency proceedings] but does not have the ability to provide direction for the attorney as to how to proceed. How does the attorney determine her client's legal position? Should it be based on the personal view of the lawyer? That is not our proper role as attorneys.¹²⁶

Explaining this argument, the Chief Justice found that a lawyer's duties under the Montana Rules of Professional Conduct regarding scope of representation, allocation of authority, and attorney-client communication are not possible when the client is "an infant or below the age of reason."¹²⁷ Ultimately, Chief Justice McGrath concluded, "[t]here are situations where an attorney's presence is not helpful or appropriate and merely serves to unnecessarily complicate or delay proceedings. This is one of those situations."¹²⁸

118. *Id.* at 751 (McGrath, C.J., concurring).

119. *Id.* at 752.

120. *Id.*

121. *Id.*

122. *Id.* at 751 (citing MONT. CODE ANN. § 41–3–425 (2011)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 752.

128. *Id.* at 753.

B. In re R.M.T.

R.M.T. was placed in foster care after his mother was incarcerated for partner or family member assault.¹²⁹ Shortly after being returned to his mother's home in 2008, R.M.T. visited the Yellowstone County Attorney's Office on his own accord and told them he feared his mother's abuse would continue, that his mother would often return home drunk, and that she had hit him in the past.¹³⁰ After confirming R.M.T.'s allegations, the State filed for emergency protective services.¹³¹ R.M.T.'s father had been absent for most of R.M.T.'s life.¹³²

The district court appointed a GAL, who also served as R.M.T.'s attorney.¹³³ The district court also assigned counsel to R.M.T.'s mother and father.¹³⁴ After two years, the State petitioned for termination of the mother and father's parental rights as both parents had failed to comply with their treatment plans.¹³⁵ Because R.M.T.'s father failed to complete his treatment plan, and termination was in the best interests of R.M.T., the district court terminated R.M.T.'s mother's and father's parental rights.¹³⁶ R.M.T.'s father appealed, arguing that the district court violated his due process rights when it declined his request to cross-examine R.M.T.'s GAL at the termination hearing.¹³⁷

The majority held that even when the child has a GAL who is also their attorney, due process requires that parents be able to cross-examine GALs who submit factual reports to the court.¹³⁸ Thus, the district court had erred.¹³⁹ The majority held, however, that the error was harmless and therefore confirmed the validity of the termination of R.M.T.'s parent's rights.¹⁴⁰

In his concurrence, Justice Nelson took the majority's analysis one step further, arguing that a GAL may not function as both a GAL and the child's attorney.¹⁴¹ Although Justice Nelson based his analysis on the pre-GAL-exception Montana Statute which required children be appointed at-

129. *In re R.M.T.*, 256 P.3d 935, 937 (Mont. 2011).

130. *Id.* at 937.

131. *Id.*

132. *Id.* at 936–37.

133. *Id.* at 937.

134. *Id.*

135. *Id.* at 938.

136. *Id.* at 939.

137. *Id.* at 939, 941.

138. *Id.* at 941.

139. *Id.* at 941–42.

140. *Id.* at 942.

141. *Id.* (Nelson, J., concurring).

torneys, his argument provided an in-depth analysis of why the protection of children's rights require attorneys and not only GALs.¹⁴²

Justice Nelson argued that a child's attorney serves a unique purpose that cannot be replaced by a GAL.¹⁴³ Specifically, Justice Nelson pointed out that GALs and attorneys have different duties under the law; GALs are factual investigators who submit reports to the court, and an attorney communicates and advocates solely for their client.¹⁴⁴ More importantly, Justice Nelson observed that Montana's courts had held many times before that a GAL advocates for the child's best interests while a child's attorney advocates for the child's wishes—which often directly contradict each other.¹⁴⁵ For these reasons, Justice Nelson determined that a child deserves both an attorney and a GAL.¹⁴⁶

C. *In re J.W.C.*

In August of 2009, an Indian mother voluntarily placed her children in foster care because she was unable to provide them food and shelter.¹⁴⁷ At the time, the children's father was incarcerated.¹⁴⁸ After their mother retained temporary housing, the children were returned to live with her until September 2009 when she was taken to the emergency room after reportedly "taking pills and making suicidal threats."¹⁴⁹ The mother was subsequently arrested on an existing warrant and was banned from her temporary housing because drug paraphernalia was found in her room.¹⁵⁰ The district court appointed the children a GAL that would also serve as their attorney.¹⁵¹ Subsequently, the mother failed to complete her treatment plan.¹⁵²

At the termination hearing, the children's GAL recommended termination of the mother's rights.¹⁵³ The mother asked that the children be appointed an attorney, which the district court refused.¹⁵⁴ The district court stated that it would assume that the children wanted to return to their mother as the GAL had expressed those were the children's wishes.¹⁵⁵ Ulti-

142. *Id.* at 942–44.

143. *Id.* at 942.

144. *Id.* at 942–43.

145. *Id.* at 943 (collecting cases).

146. *Id.*

147. *In re J.W.C.*, 265 P.3d 1265, 1267 (Mont. 2011).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1268.

153. *Id.*

154. *Id.*

155. *Id.*

mately, the district court terminated the mother's rights.¹⁵⁶ The mother appealed, arguing that the court failed to comply with ICWA transfer requirements.¹⁵⁷ The children were appointed independent appellate counsel by the Montana Supreme Court, and the children's appellate attorney appealed, arguing that the district court had erred by not granting the children an attorney to which they were entitled under Article II, Section 15 of the Montana Constitution.¹⁵⁸

The Court refused to decide whether the children were entitled to be appointed an attorney under Article II, Section 15.¹⁵⁹ It held that in light of its reversal on the ICWA error, there was no need to address the Article II, Section 15 argument.¹⁶⁰ The Court concluded, however, that there was an apparent conflict between the children's wishes and their best interests, and, thus, the Court ordered that the children be appointed counsel on remand.¹⁶¹

D. *In re T.D.H.*

On April 27, 2012, three children, T.D.H., Je.H., and Ja.H., were removed from their biological mother's home and placed in foster care due to concerns of abuse perpetrated by the children's father and the failure of their mother to protect the children from the abuse.¹⁶² In 2012, the district court appointed an attorney to represent all three children.¹⁶³ Likewise, in July of 2012, the court appointed a CASA to represent the best interests of the children.¹⁶⁴ Almost two years later, the mother had failed to complete her treatment plan and had engaged in harmful activities including drug use and inappropriate statements to the children and their service providers.¹⁶⁵ The court set a date for a termination hearing.¹⁶⁶

At a pre-hearing conference for the termination proceeding, the children's attorney advised the district court that Ja.H. had expressed he no longer wanted to be reunified with his mother.¹⁶⁷ As this position was in conflict with the attorney's other two clients (T.D.H. and Je.H.), the attorney asked the court to appoint Ja.H. independent counsel.¹⁶⁸ The attorney

156. *Id.*

157. *Id.* at 1269.

158. *Id.* at 1268; Brief of Youths at 3–5, *In re J.W.C.*, 265 P.3d 1265 (Mont. 2011) (DA 11-0227).

159. *In re J.W.C.*, 265 P.3d at 1272.

160. *Id.*

161. *Id.*

162. *In re T.D.H.*, 356 P.3d 457, 460 (Mont. 2015).

163. Brief of Appellant at 3, *In re T.D.H.*, 356 P.3d 457 (Mont. 2015) (DA 15-0036).

164. *T.D.H.*, 356 P.3d at 460.

165. *Id.* at 461.

166. *Id.*

167. *Id.*

168. *Id.* at 461–62.

stated she did not feel she could represent “two points of view that [were] . . . absolutely at odds.”¹⁶⁹ The Department objected, noting that Ja.H. “had a CASA who could represent his best interests,” and further, that because Ja.H. did not want to be reunified with his mother, his wishes were being advocated for by the attorneys who represented the Department.¹⁷⁰ After this hearing, OPD filed a Notice of Reassignment of Counsel for Ja.H. .¹⁷¹ The district court rescinded that appointment.¹⁷²

At the termination hearing, the children’s attorney again voiced her concerns about representing Ja.H.¹⁷³ She stated she hoped counsel would be appointed for Ja.H. in future proceedings.¹⁷⁴ After the termination proceeding, OPD moved to appoint Ja.H. new counsel.¹⁷⁵ On December 18, 2014, the district court denied that motion and granted the Department’s motion to terminate the mother’s parental rights.¹⁷⁶

OPD appealed to the Montana Supreme Court, asking the Court to determine that “[t]he Montana Constitution guarantees children in abuse and neglect proceedings the same right to counsel that their parents have.”¹⁷⁷ In analyzing OPD’s constitutional claim, the Montana Supreme Court did not address its merits but instead held that the issue was not justiciable.¹⁷⁸ The majority explained that because the district court had terminated the mother’s rights, and Ja.H. did not wish to be reunified with his mother, he had already received what “a dedicated advocate for his interest” would have sought.¹⁷⁹ Additionally, the majority noted that whether Ja.H.’s rights would be further violated if he was not appointed counsel was unclear because the proceedings had not yet happened.¹⁸⁰ Therefore, the majority concluded Ja.H.’s appeal was not justiciable because it was both moot and unripe, holding “[w]ere we able to conclude that Ja.H. had suffered the deprivation of a right that could be redressed through the relief sought, OPD’s and the dissent’s arguments may merit consideration.”¹⁸¹

Justice McKinnon dissented, arguing that “a competent child, possessing a fundamental liberty interest in proceedings to terminate the rights of

169. *Id.* at 470 (McKinnon, J., concurring and dissenting).

170. *Id.* at 461.

171. *Id.* at 461–62.

172. *Id.* at 462.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Brief of Appellant, *supra* note 165, at 6; Brief of Appellant [Youth J.A.H.] at 3, *In re T.D.H.*, 356 P.3d 457 (Mont. 2015) (DA 15-0036).

178. *T.D.H.*, 356 P.3d at 464.

179. *Id.* at 463–64.

180. *Id.* at 464.

181. *Id.*

his parents, is denied due process guaranteed by the Montana Constitution when his voice in those proceedings is not represented by counsel.”¹⁸² The dissent addressed the merits of OPD’s brief, finding that both the plain language and the intent behind Article II, Section 15 entitle children to counsel in dependency proceedings; ultimately, Justice McKinnon argued that the right contained in Section 15 makes Montana’s GAL exception unconstitutional.¹⁸³

Justice McKinnon’s dissent first argued that the plain meaning of Article II, Section 15, when read alongside Montana’s equal provision, entitles children to counsel in dependency proceedings.¹⁸⁴ She noted that Section 15 provides outright that children have all the same rights as adults.¹⁸⁵ Therefore, because adults have the fundamental right to an attorney in dependency proceedings, children must have a corollary right.¹⁸⁶

Justice McKinnon explained why the rights of children in dependency proceedings are corollary to the constitutional rights of adults. She argued that compared to the right of parents to fundamental fairness iterated in *A.S.A.* in dependency proceedings, a child has a “corresponding interest in his or her own safety, health, and well-being,” which includes “maintaining integrity of the family unit and having a relationship with his or her biological parents.”¹⁸⁷ Further, at-stake in a dependency proceeding for both parents and children is the right to fundamental fairness in dependency proceedings.¹⁸⁸

Justice McKinnon also argued that not providing children an attorney in dependency proceedings does not “enhance the rights of minors,” and thus, Montana’s GAL exception was unconstitutional.¹⁸⁹ GALs and attorneys, as Justice McKinnon acknowledged, do not provide the same representation to a child; while attorneys advocate for the child’s wishes, GALs only advocate for the best interests of children, which the Court has found can be directly contradictory to the child’s wishes.¹⁹⁰ Additionally, Justice McKinnon argued that attorneys are duty-bound to maintain confidentiality, while a GAL or CASA is not.¹⁹¹ Therefore, Justice McKinnon concluded that children have a fundamental liberty interest and right to live in a rea-

182. *Id.* at 469 (McKinnon, J., concurring and dissenting).

183. *Id.* at 472.

184. *Id.* at 471–72.

185. *Id.*

186. *Id.* at 472.

187. *Id.* (comparing *In re A.S.A.*, 852 P.2d 127 (Mont. 1993)).

188. *In re T.D.H.*, 356 P.3d at 472 (McKinnon, J., concurring and dissenting).

189. *Id.* at 472.

190. *Id.* at 472–73.

191. *Id.* (citing MONT. CODE ANN. § 26–1–803 (2015)).

sonably safe condition, free from emotional, physical, and psychological harm, which can only be adequately protected by an attorney.¹⁹²

Looking at the framers' intent, Justice McKinnon argued that the purpose of Article II, Section 15 was to provide children equal protection under the Montana Constitution that they were not provided under the United States Constitution.¹⁹³ Justice McKinnon delved into the constitutional convention transcripts, finding that specifically, the framers intended children to have the right to due process in court proceedings.¹⁹⁴ Finally, Justice McKinnon cited Court precedent which held “[c]learly . . . minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Montana Constitution Article II.”¹⁹⁵ Therefore, Justice McKinnon argued, the purpose of Article II, Section 15 was to provide children with the right to due process equal to that their parents receive, which could only be served by appointing a child an attorney in dependency proceedings.¹⁹⁶

V. ANALYZING THE COURT’S INTERPRETATION TO FIND A RIGHT TO
COUNSEL FOR CHILDREN IN DEPENDENCY PROCEEDINGS
UNDER ARTICLE II, SECTION 15

In his concurrence in *A.D.B.*, Chief Justice McGrath stated that “nothing in the Montana Constitution, statutes, or case law provides a right of counsel for the child.”¹⁹⁷ It is true that there is no explicit right in the Montana Constitution providing a right to counsel for children. However, the Court has held before that Article II, Section 15 “clearly” affords minors “full recognition under the equal protection clause [and allows them to] enjoy all of the fundamental rights of an adult,” including the right to an attorney under due process in Juvenile Court Proceedings.¹⁹⁸

Likewise, given the text and intent behind Article II Section 15, and particularly considering the rights of adults to counsel in dependency proceedings created in *A.S.A.*, children in dependency proceedings must be given the equal right to an attorney that their adult parents are provided under Article II, Section 17.

192. *Id.* at 473.

193. *Id.* at 471–72 (McKinnon, J., concurring and dissenting) (citing 2 CONSTITUTIONAL CONVENTION TRANSCRIPT 635–36; *In re S.L.M.*, 951 P.2d 1365, 1373. (Mont. 1997)).

194. *Id.* at 471–72 (McKinnon, J., concurring and dissenting) (citing 2 CONSTITUTIONAL CONVENTION TRANSCRIPT 635–36 (“What this means is that persons under the age of majority have been accorded certain specific rights which are felt to be a part of due process.”)).

195. *Id.* (McKinnon, J., concurring and dissenting) (quoting *In re S.L.M.*, 951 P.2d at 1373).

196. *Id.* at 471–74 (McKinnon, J., concurring and dissenting).

197. *In re A.D.B.*, 305 P.3d 739, 751 (Mont. 2013) (McGrath, C.J., concurring).

198. *In re S.L.M.*, 951 P.2d at 1373.

A. *Under Article II, Section 15, children must be appointed attorneys in dependency proceedings*

Under Article II, Section 15, children are entitled to all of the same fundamental rights as adults.¹⁹⁹ In *A.S.A.* the Court held that parents have a fundamental right under Article II, Section 17 to the appointment of counsel in dependency proceedings, because of the substantial threat of unfair procedure for a parent who stands to lose the important interest in the care and custody of their biological child.²⁰⁰ As explained below, *A.D.B.*, *J.W.C.*, *T.D.H.*, and *R.M.T.* all demonstrate that the children likewise have a significant interest in a dependency proceeding that is at risk for being overrun by unfair procedure. Therefore, following the text of the provision, the rights of children in dependency proceedings shall include the fundamental right to the appointment of an attorney.

1. *Parents have a due process right to counsel in dependency proceedings*

A parent's fundamental right to an attorney in dependency proceedings under Article II, Section 17, Due Process of Law, comes from the vital interest that parents have in the proceedings. In *In Re R.B.*,²⁰¹ the Montana Supreme Court held that a parent's right to the care and custody of their child is a "fundamental liberty interest" which must be protected by fundamentally fair procedures.²⁰² The *R.B.* Court quoted the U.S. Supreme Court in *Santosky* in defining where this fundamental liberty interest came from, saying, "a vital interest in preventing the irretrievable destruction of their family life."²⁰³ Indeed, the Court in *A.S.A.* relied on this definition of a parent's fundamental liberty interest when it mandated that all parents have the right to be appointed an attorney in dependency proceedings.²⁰⁴ Thus, a parent's right to an attorney in dependency proceedings was born of that parent's vital interest in maintaining their family life. This concept, however, is not the only reason why parents have a right to an attorney in dependency proceedings.

The parent's right to an attorney in dependency proceedings also exists because their vital interest outweighs the potential risk for unfair procedure. As the court in *A.S.A.* explained, "due process [articulated in Article II,

199. MONT. CONST. art. II, § 15.

200. *In re A.S.A.*, 852 P.2d 127, 129–130 (Mont. 1993).

201. *In re R.B.* 703 P.2d 846 (Mont. 1985).

202. *Id.* at 848 (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)).

203. *Id.* (quoting *Santosky*, 455 U.S. at 753–54).

204. *In re A.S.A.*, 852 P.2d at 129 (citing *In Re R.B.*, 703 P.2d at 848) (quoting *Santosky*, 455 U.S. at 753–54).

Section 17] requires that the parent not be placed at an unfair disadvantage during the termination proceedings.”²⁰⁵ This unfairness, the Court described, results in the substantial risk that a parent may lose their parental rights because of “intimidation, inarticulateness, or confusion” as “[i]ndigent parents often have a limited education and are unfamiliar with legal proceedings.”²⁰⁶ Here, again, the Court’s primary concern was that the parent could lose their biological child. But more importantly, this explanation provides the grounds for why due process in the form of an appointed attorney is necessary in dependency proceedings—the likelihood of intimidation, inarticulateness, or confusion. Parents, though, are not the only ones in dependency proceedings with great interests which are at risk for being overcome by the system.

2. *The child’s strong interests and the risk of unfair procedure warrant the appointment of an attorney in dependency proceedings.*

A child’s interest is of central importance to the outcome of dependency proceedings. In *T.D.H.*, the Court stated that “[a] district court must give *primary* consideration to the physical, mental, and emotional conditions and needs of the child.”²⁰⁷ In doing so, the Court recognized the primary importance of the child’s interests to the outcome of a dependency proceeding as a child’s interest must be considered above all else.

Indeed, a child’s interest in a dependency proceeding is so great that it must be considered alongside the fundamental liberty interests parents have in dependency proceedings. In *T.D.H.*, the Court held that “[a] parent’s right to the care and custody of a child is a fundamental liberty interest that must be protected However, a child’s best interests take precedence over parental rights.”²⁰⁸ The side-by-side comparison of a child’s interests and a parent’s rights in dependency proceedings displays the Court’s explicit recognition that the child’s interests in dependency proceedings are important, perhaps even more so than the due process rights of their parents. As these same due process rights gave rise to the requirement for the parent’s appointed counsel in dependency proceedings, it follows that courts must also be required to appoint counsel to protect the superior interests of the child in dependency proceedings.

A child’s interests are great enough to entitle the child to an attorney. In *T.D.H.*, the majority held that Ja.H.’s appeal, in which OPD argued that

205. *Id.*

206. *Id.* (citing *Lassiter v. Dept. of Soc. Servs. of Durham Cty.*, 452 U.S. at 47 (1981)).

207. *In re T.D.H.*, 356 P.3d 457, 463 (Mont. 2018) (quoting MONT. CODE ANN. § 41–3–609(3) (2015)) (emphasis added (internal quotation omitted)).

208. *Id.* at 463 (citing *In re D.B.*, 168 P.3d 691, 695 (Mont. 2007); *In re E.K.*, 37 P.3d 690, 697 (Mont. 2001)).

Ja.H. had been deprived of his right to an attorney granted under Article II, Section 15, was not justiciable. The Court held this because the appellants had failed to prove that Ja.H. had suffered an injury since “Ja.H.’s interests were served by terminating his parental rights,” the same result that “a dedicated advocate for his interests” would have sought.²⁰⁹ Here, by stating that Ja.H.’s appeal was unsuccessful merely because he already had an pseudo-attorney who advocated for his rights, the majority implied that a child had an interest worthy of an attorney’s protection. Further, the Court recognized in *T.D.H.* “were we able to conclude that Ja.H. had suffered a deprivation of a right that could be redressed through relief sought, OPD’s and the Dissent’s arguments may merit consideration.”²¹⁰ Here, again, the majority agreed that a child in dependency proceedings has important interests, perhaps fundamental rights, at stake. By dismissing Ja.H.’s argument on justiciability, the majority only held that Ja.H. had not proven his rights were violated, not that Ja.H.’s interests were not worthy of an attorney’s protection under Article II, Section 15.

Additionally, a child’s wishes in dependency proceedings warrant an attorney’s representation. In *J.W.C.*, while the Court held it would not decide whether children *must* be appointed attorneys under Article II, Section 15, it ultimately ordered that the children in *J.W.C.* be appointed an attorney on remand to represent their wishes, even though they had already been appointed a GAL to represent their best interests. This holding does not state that children have a right to an attorney but notes the significance of the conflict between the child’s best interests and the child’s wishes, ultimately proving through the appointment of an attorney on remand that a child’s wishes are important enough to warrant an attorney’s protection. Likewise, Justice Nelson argued in his *R.M.T.* concurrence that Montana courts have “consistently” recognized that there is a difference between what a GAL advocates for—the child’s best interests—and what the child’s attorney advocates for—the child’s wishes.²¹¹ Indeed, Justice Nelson demonstrated the importance of a child being appointed both an attorney and a GAL, because, in short, a GAL cannot adequately serve the child’s wishes, which are important to dependency proceedings.²¹² Therefore, a child’s wishes are strong enough to entitle the child to an attorney in dependency proceedings.

Finally, like their parents, children’s interests are at risk of being overcome by unfair procedure. In *A.S.A.*, the court based the parent’s need for due process on the high risk of unfair procedure in dependency proceedings

209. *Id.* at 463–64.

210. *Id.* at 464.

211. *In re R.M.T.*, 256 P.3d 935, 943 (Mont. 2011) (Nelson, J., concurring).

212. *Id.* at 942–43 (Nelson, J., concurring).

due to the parent's limited education and unfamiliarity with legal proceedings which might cause the parent to lose their child due to intimidation, inarticulateness, or confusion.²¹³ Likewise, and perhaps more so, children in dependency proceedings are at risk of being taken advantage of by the system due to their low level of education and lack of familiarity with the system. As Chief Justice McGrath explained in his *A.D.B.* concurrence, many children in dependency proceedings are "below the age of reason."²¹⁴ Although Chief Justice McGrath used this statement as part of his argument that children should not be appointed attorneys, it also serves the logical purpose of explaining why children must be appointed attorneys in dependency proceedings. Children, like indigent parents, have a low legal education level, and therefore are at substantial risk for unfair procedure which can only be corrected by the appointment of an attorney.

Thus, the text of Article II, Section 15, and the interpretation of a child's interests and wishes in dependency proceedings in Montana's case law provide that a child must be appointed an attorney in dependency proceedings. This conclusion, however, is supported by more than the text of Section 15.

B. Article II, Section 15 was intended to require that children be appointed an attorney in dependency proceedings

Although the plain text of the provision provides the clearest explanation of how Article II, Section 15 mandates a child's right to an attorney in dependency proceedings, the intent of the framers reinforces this conclusion. As the framers explained in the comments for this provision, the purpose of Section 15 was "to recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults."²¹⁵ As explained above, mandating the appointment of an attorney to children in dependency proceedings does just that; it protects children from losing the vital interest they have in maintaining their biological family where they are at risk for being overrun by the state. Even more on point, the Section was created specifically to interact with the rights provided under Montana's due process provision. As Delegate Monroe explained, Section 15 sought to ensure that children are "accorded certain specific rights which are felt to be a part of due process."²¹⁶ Providing children attorneys in dependency proceedings simply aligns with the framer's intent by giving children the same due process rights and protections as adults.

213. *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont. 1993).

214. *In re A.D.B.*, 305 P.3d 739, 751 (2013) (McGrath, C.J., concurring).

215. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 38, at 1750.

216. *Id.*

VI. TOWARDS THE FUTURE: STRIKING DOWN
MONTANA'S GAL EXCEPTION

Montana's Article II, Section 15 requires that children be appointed attorneys in dependency proceedings. What this fact means for Montana's laws and courts is examined below. As noted in the background of this article, Montana's statutory scheme currently requires courts to appoint a child an attorney in a dependency proceeding where a GAL is unavailable.²¹⁷ However, as this comment has demonstrated, all children in dependency proceedings must be appointed an attorney under Article II, Section 15. Therefore, Montana's statute violates the rights of minors. As described in Part III of this paper, to overcome a violation of Article II, Section 15, the legislature must prove both a compelling state interest and that the violation enhances the protections of minors.

A. *There is No Compelling State Interest for Not Appointing Children
an Attorney Under Montana Code Annotated
Section 41–3–425*

For a violation of Article II, Section 15 to be constitutional, the statute in question must meet strict scrutiny by being narrowly tailored to a compelling state interest.²¹⁸ A compelling government interest is one of the "highest order," for instance, matters of national security and heinous crimes.²¹⁹ Here, the interests of the State in not appointing an attorney are financial; the transcripts of the 2011 session reveal that the legislature believed it was simply a waste of resources to appoint children an attorney.²²⁰ This reason is merely financial, and far from the "highest order" of interests such as national security. Therefore, the statutes establishing a GAL exception violate Section 15 of the Montana Constitution because they do not serve a compelling state interest. As strict scrutiny is necessary to make an exception to Article II, Section 15 under Montana law, this alone is enough for the provision to be unconstitutional unless the state can provide some other compelling interest.

B. *The GAL Exception does not Enhance the Protection of Minors*

Even if the Court found that the statute met strict scrutiny, it would still not be a valid violation of Article II, Section 15 because it does not

217. MONT. CODE ANN. § 41–3–425(2)(b) (2017).

218. See Part III of this comment; see also *In re T.D.H.*, 356 P.3d 457, 471–72 (Mont. 2018) (McKinnon, J., concurring and dissenting) (citing *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997)).

219. See *Armstrong v. State*, 989 P.2d 364, 375 n.6 (Mont. 1999) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

220. Jent, *supra* note 32, at 3:30, 4:37, 7:40.

enhance the protection—or rights—of minors. Indeed, as Justice McKinnon argued in her *T.D.H.* dissent, and as Justice Nelson argued in his concurrence, an attorney provides particular protections to a child in a dependency proceeding that a GAL cannot provide.²²¹ Therefore, as an attorney provides greater protections to children, denying a child an attorney cannot enhance that child’s protection.

There is, however, a possible exception for children who are below the “age of reason,” as Chief Justice McGrath suggested in his *A.D.B.* concurrence. Chief Justice McGrath argued not only that attorneys have no place to make the appeals for children in these cases, but also noted that “[t]he child is the *subject* of litigation but does not have the ability to provide direction for the attorney as to how to proceed.”²²² In his argument, Chief Justice McGrath provided an interesting take: that children below the age of reason are the subject of the litigation, and therefore not of enough sound mind to share their opinions with the court.²²³ Under this analysis, the Court must protect children below the age of reason by not subjecting them to the “absurd[ity]” of being appointed a lawyer who cannot possibly direct their attorney on how to proceed.²²⁴ Thus, looking at Chief Justice McGrath’s argument, it is possible that an exception for children under the age of reason might serve to enhance the protections of those minors by protecting them from a proceeding prolonged and complicated by the presence of an attorney without any client direction. This exception, however, is without merit.

It is not impossible to competently represent a child under the age of reason. Because children with low cognitive function have the same important interests as other children and are at even greater risk for fundamental unfairness in dependency proceedings, a failure to appoint them an attorney simply because of their diminished capacity does not enhance their protections or rights. In 2011, the ABA adopted a new *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (The Model Act)*. First, *The Model Act* requires that all children in dependency proceedings be appointed attorneys.²²⁵ Additionally, *The Model Act* provides guidance on representing children who are of dimin-

221. *In re T.D.H.*, 356 P.3d at 472 (McKinnon, J., concurring and dissenting); *In re R.M.T.*, 256 P.3d 935, 943 (Mont. 2011) (Nelson, J., concurring).

222. *In re A.D.B.*, 305 P.3d, 739, 751 (Mont. 2013) (McGrath, C.J., concurring) (emphasis added).

223. *Id.* at 751–53.

224. *Id.* at 751–52.

225. Andrea Khoury, *ABA Adopts Model Act on Child Representation*, CHILD LAW PRACTICE, Sept. 2011, at 106, <https://perma.cc/LG3J-QFJV> (https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol30/september_2011/aba_adopts_modelactonchildrepresentation.html) (last visited August 6, 2018).

ished capacity due to their age.²²⁶ *The Model Act* instructs courts and attorneys to work together to decide if a child has the capacity to direct their representation and provides criteria for determining diminished capacity in these cases including the child's developmental stage, cognitive ability, and communication skills.²²⁷ This approach gives the attorney clear guidelines on how to best represent children of all ages and abilities in dependency proceedings.²²⁸ Further, under the Rules of Professional Conduct, attorneys who take advantage of incompetent clients are subject to professional discipline.²²⁹ Thus, not appointing an attorney to a child on the basis that an attorney may wrongfully advocate for a child who cannot direct representation is not a protection of the child worthy of an exception under Section 15.

Therefore, as Montana's Statute violates the rights of minors, does not serve a compelling state interest, and does not enhance the protections of minors, I would urge the Court to find Section 41-3-425 unconstitutional.

VII. CONCLUSION: THE ANALYSIS IS SIMPLE

While the Montana Supreme Court has avoided the issue of Article II, Section 15 it has provided all of the analysis necessary to determine that children are entitled to an attorney in dependency proceedings. The Court has already, on numerous occasions, acknowledged that a child's interest is central to a dependency proceeding and further that those interests cannot be protected by a GAL in the same way that they are protected by counsel. What, then, is stopping the Court from finding children must be appointed an attorney under Montana's Constitution? Perhaps the Court is placing too much emphasis on the need to read Article II, Section 15 alongside equal protection, or the difference between enhancing the "protections" vs. the "rights" of minors. But the analysis under Section 15 is simple. Children are entitled to the same rights as adults.²³⁰ Adults in dependency proceedings have a fundamental right through due process to an attorney.²³¹ Therefore, Children must be given that same right.

226. *Id.* at 106–07.

227. *Id.*

228. *Id.*

229. MODEL R. PROF'L CONDUCT 8.4 (AM. BAR ASS'N 2017); MODEL R. PROF'L CONDUCT 1.14 (AM. BAR ASS'N 2017).

230. MONT. CONST. art. II, § 15.

231. *In re A.S.A.* 852 P.2d 127, 130 (Mont. 1993).