

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Dependency of	)	
	)	No. 65707-1-1
A.P., DOB: 3/20/07,	)	
M.P., DOB: 1/15/06,	)	DIVISION ONE
M.W., DOB: 12/4/94,	)	
	)	UNPUBLISHED OPINION
Minor Children.	)	
	)	
ANDREA LISTER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF SOCIAL AND	)	
HEALTH SERVICES,	)	LINKED WITH
	)	
<u>Respondent.</u>	)	
	)	
In the Matter of the Dependency of	)	
	)	No. 65900-6-1 consolidated with
A.P., DOB: 3/20/07,	)	
M.P., DOB: 1/15/06,	)	No. 65901-4-1, No. 65902-2-1,
M.W., DOB: 12/4/94,	)	No. 65903-1-1, No. 65904-9-1,
	)	No. 65905-7-1, No. 65906-5-1,
Minor Children.	)	No. 65907-3-1, No. 65908-1-1,
	)	and No. 65909-0-1
ANDREA LISTER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF SOCIAL AND	)	
HEALTH SERVICES,	)	FILED: August 29, 2011
	)	
<u>Respondent.</u>	)	

Grosse, J. — Andrea Lister appeals orders of dependency for her three children, M.W., M.P., and A.P., a temporary parenting plan for M.W. entered after a dependency fact-finding hearing, and the final parenting plans for each of the children. She contends that the court denied her due process by modifying M.W.'s parenting plan without hearing additional evidence on the modification, denied her right to counsel by failing to appoint counsel to represent her on the parenting plans, and entered the dependency orders without sufficient basis. Because the temporary parenting plans are no longer in effect, her challenges to them are moot. And because the record reveals that Lister actually did receive representation on the final parenting plan actions and those actions were separate private custody actions litigated between the parents for which she was not entitled to appointed counsel, her right to counsel claims fail both factually and legally. Accordingly, we affirm.

#### FACTS

In 1994, Andrea Lister gave birth to M.W., Steven Wozeniak was the father. In 1996, the superior court entered a permanent parenting plan giving Lister residential custody of M.W. Lister later gave birth to two more children, M.P., who was born in 2006, and A.P., who was born in 2007. Samuel Pierce is the father of both and there is no court ordered parenting plan for those children. Lister never married Wozeniak or Pierce.

On February 18, 2009, the Department of Social and Health Services (Department) filed dependency petitions in juvenile court for all three children

after receiving a referral from an employee at a Community Service Office. While Lister was at the office, the employee saw her yell at the children, threaten to beat them and leave them at Child Protective Services (CPS), and hit one child in the face. Another employee saw Lister throw one of the children into a chair.

Before this referral, there were six CPS referrals for these children. One of these referrals was an incident in 2007 that was determined “founded” by CPS for neglect of M.P and A.P. when Lister became angry with Pierce, dropped both the children on the porch of his house and drove away, causing 18-month-old M.P. to run out into the street. After the dependency petitions were filed, there was an additional referral relating to M.W., which alleged that he was hit by Lister’s vehicle while she was in her vehicle. Investigation of that referral was still pending at the time of the dependency proceeding.

On February 23 and 24, 2009, the juvenile court held a shelter care hearing and ordered all three children to be placed with their respective fathers pending the dependency proceeding. The court also recommended remedial services for Lister and permitted her to have weekly unsupervised visitation with M.W. and supervised visitation with the younger children twice weekly. While the dependency petitions were pending, Lister violated several court orders, including one prohibiting her from contacting Pierce.

Meanwhile, Wozeniak filed a petition to modify the 1996 parenting plan and grant him custody of M.W.<sup>1</sup> On April 15, 2009, the Department gave written

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<sup>1</sup> The petition was first filed with the juvenile court on April 15, 2009, and then

notice to all parties that it intended to request that the superior court adopt Wozeniak's proposed parenting plan following the dependency fact-finding and filed that notice with the court. This request was based on local rule JuCR 3.16, which provides that the juvenile court has concurrent jurisdiction to consider modifying a parenting plan in a dependency proceeding.

On the first day of the dependency trial, Lister's court appointed attorney asked the court to deny the Department's request that the court consider Wozeniak's motion to modify the parenting plan. Counsel requested instead that the matter be heard separately in family law court. Counsel also stated that he would not represent Lister on the modification issue because he was appointed only to represent her during the dependency hearing. The court responded that this issue would only be addressed at the dependency disposition hearing if M.W. was found to be dependent. The court left open whether counsel would have a role in addressing Wozeniak's motion to modify the parenting plan.

Before trial, Pierce signed an agreed order that M.P. and A.P. were dependent based on Lister's conduct and his lack of legal custody. The court then heard nine days of trial testimony from 29 witnesses. Lister was represented by two court appointed attorneys during these proceedings.

The trial concluded on June 18, 2009, and the court found that all three children were dependent as defined by RCW 13.34.030(5)(b) and (c), and entered findings of fact and conclusions of law. The court found that the children had been abused and neglected by their mother, and that the mother is

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cross-filed in the superior court on May 26, 2009.

not currently capable of adequately caring for the children. The court found that the only basis for finding a dependency as to Wozeniak was that he is legally unavailable to care for M.W. as a result of the 1996 parenting order that gave sole custody to Lister.

The court then proceeded to disposition and ordered that all three children remain with their fathers. The court also addressed Wozeniak's motion to modify M.W.'s parenting plan and ruled that the juvenile court had authority to hear the modification motion under LJuCR 3.16. The court then found that there was a substantial change in circumstance in M.W.'s case and that modification of the parenting plan was in M.W.'s best interests. In doing so, the court noted that "[t]he evidence that supports a finding of dependency in fact places a higher burden of coming forward with evidence than would be true in the custody modification proceeding." Accordingly, the court ordered that a temporary custody order should be entered giving Wozeniak primary custody and sole decision making authority over M.W.'s care.<sup>2</sup> The court also granted concurrent jurisdiction with the family law court to allow Pierce to pursue a custody order for M.P. and A.P.

Lister sought direct review in our State Supreme Court of the dependency orders for all three children and the order modifying M.W.'s parenting plan.<sup>3</sup> The Supreme Court ultimately denied direct review and transferred the appeal to this

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<sup>2</sup> The court noted that this would be a temporary parenting plan until the court received the psychological evaluation Lister was ordered to undergo.

<sup>3</sup> Lister originally filed a notice of appeal in both this court and the Supreme Court. This court then transferred the case to the Supreme Court to consider direct review and her motion for accelerated review.

court.

Meanwhile, on September 3, 2009, the juvenile court held a review hearing to address the parties' compliance with the dependency order. The court also entered the temporary parenting plan order granting Wozeniak custody of M.W.<sup>4</sup> During the hearing, Lister told her attorneys they were fired and was ultimately removed from the courtroom by security after shouting obscenities at her attorneys and the court. On September 21, 2009, the juvenile court entered an order permitting Lister's counsel to withdraw and advising Lister to seek new appointed counsel. The court also set a permanency plan hearing for February 11, 2010.

Both fathers, Pierce and Wozeniak, also pursued custody actions in family law court. Each case was assigned to a separate judge. On January 8, 2010, the Department moved to consolidate the dependency matter with the custody matters and filed a referral to Unified Family Court (UFC). On January 22, 2010, appointed counsel for Lister entered a notice of appearance, and filed an opposition to the consolidation. The juvenile court granted the motion to consolidate and the case was assigned to a UFC judge.

On March 4, 2010, the family law court held a permanency plan hearing on the dependency. Lister appeared with appointed counsel, who represented her at the hearing. The court found that Lister had made no progress to correct her deficiencies, failed to engage in any of the court ordered services and chose

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<sup>4</sup> That order does not appear to be part of the record, but the Department included a copy of the order in its brief as Appendix D.

to stop visiting the children since August 2009. The court then entered a permanency planning order that approved the children's placement with their fathers under court supervision. The court also entered a temporary parenting plan granting Pierce temporary custody of M.P. and A.P.

Both fathers then filed motions for summary judgment on the custody actions, arguing that there were no material facts in dispute and they were therefore entitled to orders of permanent custody as a matter of law. The Department also filed a brief in support of the summary judgment motions. The Department further requested that the dependency actions be dismissed, based on the mother's failure to participate in remedial services and the fathers' ability to provide a stable home. Both Lister and her appointed attorney filed a response to the summary judgment motions and the Department's brief.

On July 23, 2010, the family law court heard the summary judgment motions. Lister's appointed counsel was present and indicated that she represented Lister on the dependency, but Lister told the court she was proceeding pro se as "the mother and expert of all three of my children." Pierce and Wozeniak appeared with counsel. The court heard argument from Pierce and Wozeniak, but declined to hear from the Department, noting that it was not a party to the parenting plan proceeding. Lister addressed the court pro se.

The court granted the summary judgment motions, finding that Lister's allegations against the fathers were previously determined unfounded by the juvenile court and that the mother has rejected the offered services and

visitation. The court entered findings of fact and conclusions of law on the fathers' petitions for the parenting plans, concluding that there was no genuine issue as to any material fact and the fathers were entitled to judgment as a matter of law. The court then entered a final parenting plan for M.P. and A.P., granting Pierce custody and restraining Lister from contact with the children.

The court next heard the Department's motion to dismiss the dependency. Lister's appointed counsel argued on her behalf, urging the court to allow the dependency to remain in place so that Lister could begin to participate in services. The court granted the Department's motion and dismissed the dependency.

On September 1, 2010, the court entered a final parenting plan for M.W. The plan gave Wozeniak custody and permitted Lister visitation time only with M.W.'s agreement. Lister appealed the final orders on the parenting plans and the order dismissing the dependency action.

A commissioner of this court ruled that this appeal be linked with Lister's earlier appeal of the dependency orders. Due the nature of the issues presented, we address both appeals in a consolidated opinion.

## ANALYSIS

### I. Due Process Claims

In her first appeal, Lister challenges the juvenile court's entry of the temporary plan for M.W. following the dependency fact-finding hearing. She contends that she was deprived of due process when the juvenile court modified



the parenting plan without providing her notice or an opportunity to present argument and evidence at a show cause hearing, as required by RCW 26.09.270. Lister also contends that LJUCR 3.16, the local court rule upon which the court relied in entering the modification, neither provides the juvenile court with authority to modify a parenting plan nor authorizes the court to suspend the procedural due process provided by Title 26. She further contends that she was deprived of her right to appointed counsel on the motion to modify M.W.'s parenting plan.

But as Lister acknowledged at oral argument, the temporary parenting plan for M.W. has since been replaced with a final parenting plan and is no longer in effect. Thus, this court cannot provide her any effective relief from this order and the only live issue that remains for review is her challenge to the final parenting orders, which is the subject of the second appeal. Accordingly, we dismiss as moot that portion of the first appeal challenging the temporary parenting plan orders.<sup>5</sup>

## II. Order of Dependency

Lister's first appeal also challenges the court's finding of dependency, contending that the facts do not support the court's conclusion that the children were abused or neglected or that Lister was incapable of caring for them. She

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<sup>5</sup> In any event, we note that Lister acknowledges that M.W.'s parenting plan was addressed in the dependency fact-finding hearing, during which she presented ample evidence relating to M.W.'s parenting plan and Wozeniak's suitability as a parent, and that such evidence was sufficient to support the court's modification order. We further note that the record does not support Lister's claims that she had no notice that the parenting plan would be modified at the dependency disposition hearing.

contends that the court's conclusion was based on incidents when she was under great stress, behaved inappropriately and lost her temper, and that the court ignored evidence that she took good care of her children. She further contends that the court improperly based its finding on its perception that Lister had mental issues without proof that she in fact had a mental illness that impacted her ability to care for her children.

The ultimate dismissal of the dependency orders likewise renders this issue moot because there is no relief that this court may grant Lister from the dependency orders. But because the dependency finding did provide support for the court's final parenting plan order, which is properly before us on review, we address Lister's challenge to the sufficiency of the dependency finding. We conclude that the court's finding is well supported.

The court found that the children were dependent under RCW 13.34.030(6)(b) and (c), which define a "Dependent child" as any child who:

(b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or

(c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

Under chapter 26.44 RCW, "Abuse or neglect" is defined as

sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.<sup>6</sup>

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<sup>6</sup> RCW 26.44.020(1).

“Negligent treatment or maltreatment” is further defined as

an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety. . . .<sup>7</sup>

As the Department contends, the court's detailed factual findings provide ample evidence to support the dependency finding. These findings are unchallenged and are therefore verities on appeal.<sup>8</sup> For example, the court found:

F. The mother has been observed to be verbally, emotionally, and physically abusive to her toddlers, [A.P. and M.P.], by [physically] yanking them hard by the arm ([M.P.]), slapping one of them across the face ([A.P.]) and also throwing one of them very roughly into a chair. She has been observed yelling at them, threatening to beat them and leave them with CPS, and perhaps most damaging, telling the children during a supervised visitation that she was going to leave and they were not going to see her for a long, long time.

G. When angry, the mother exhibits extremely poor judgment, which places the children at extreme risk of harm and injury. . . .

. . . .

I. Dr. [Marty] Cahn described [M.P.] as the saddest child he has ever observed.

. . . .

K. The mother's behavior during supervised visitation that she has chosen to exercise with [A.P. and M.P.] reflects a profound inability to place their best interests above her own needs. . . .

L. The mother has turned the entire issue of visitation with the children into an unnecessary and protracted battle. She has rejected all attempts to arrange visitation by the Department and she has responded to the social worker with threats. . . .

M. . . . She has repeatedly violated the court orders entered in this case .

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<sup>7</sup> RCW 26.44.020(14).

<sup>8</sup> Fuller v. Emp't Sec. Dep't of State of Wash., 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

. . . Her behavior has also resulted in criminal charges being filed, . . . including violating the no-contact order between herself and Mr. Pierce, making a false 911 report and resisting arrest. . . .

O. The mother has refused to follow the court orders regarding visitation times and rules of conduct during visitation even though this has resulted in her not seeing her children for over a month at a time. . . .

P. [M.P.] and [A.P.] are simply too young to be able to protect themselves from the negative impact of their mother's behavior. Although [M.W.] is old enough to defend himself physically, the testimony at trial raises significant concern about the on-going emotional abuse by the mother. . . .

R. The CASA and others observed the improvements in [M.W.] since he has been removed from his mother, including the fact that his behavior and grades have improved.

### III. Right to Counsel Claims

In the second appeal, Lister challenges the court's entry of the final parenting plan orders, contending that the court denied her right to counsel by failing to appoint counsel to represent her on the parenting plan actions. She contends that entry of the parenting plans was a stage of the dependency proceeding for which she was entitled to counsel because they were ordered "to effectuate" the dependency disposition order and were therefore "inextricably linked" to the dependency. We find no basis in fact or law to support Lister's claim.

As a threshold matter, Lister's claim lacks a factual basis. The record reveals that in fact she received representation on the parenting plan actions and does not indicate that the court otherwise denied her the right to counsel.

When the motion to modify M.W.'s parenting plan was first raised during the dependency proceedings, Lister's appointed attorney asked the court not to hear the motion and indicated that he would not represent Lister on it, but the court left open whether counsel would have a role in addressing Wozeniak's motion to modify the parenting plan:

My suggestion to everyone here, and I will hear from the parties, is I think it's appropriate for us to proceed to the dependency fact-finding with a clear understanding that Ms. Lister is represented by counsel in the dependency fact-finding.

When we get to the dispositional phase, it is at that point we can address whether or not she's actually pro se or what role your counsel can have in that proceeding. . . .

Once the fact-finding hearing concluded, Lister's appointed counsel continued to represent her through the disposition, during which the court heard the motion to modify M.W.'s parenting plan. Wozeniak's attorney presented argument in support of the motion, and urged the court to rule on the motion under the authority provided by the local juvenile court rule. Lister's appointed counsel responded that Lister should be able to present additional evidence on the modification in a separate family law proceeding because different evidentiary standards would apply:

[W]ith respect to the modification, your Honor, this hearing had limits as far as what the court was willing to entertain as evidence, and I don't believe that the mother would be able to present in this type of hearing the type of information that she would want the court to be aware of because it was not relevant in this proceeding and it may be relevant information that she has in a family law proceeding where I believe the rules of what is allowed in are much broader than the sole issue of dependency. And so if she has some allegations that weren't relevant here, she may be able to bring those in a separate action. . . . And so if there's an action pending, I'd ask the court to allow that action to go

forward.

The court ruled that it had authority under the local rule to modify the parenting plan and proceeded to do so based on the dependency finding.<sup>9</sup>

But the court did not address or otherwise rule on Lister's legal representation on the modification motion. Rather, as noted above, appointed counsel proceeded to argue on Lister's behalf that she should be permitted to present additional evidence on the modification. More importantly, the record is clear that Lister was represented by two appointed attorneys throughout the dependency fact-finding, which was the basis for the court's modification decision.<sup>10</sup> The record also shows that Lister in fact received representation from appointed counsel on the fathers' parenting plan actions during the proceedings before the UFC judge. Lister's appointed attorney filed a response to both the fathers' summary judgment motions and the Department's supporting brief on the parenting plan actions. Thus, Lister's claim that she was denied appointed counsel on the parenting plan actions is factually infirm.

Nor is there any legal basis for Lister's right to counsel claims. As our courts have recognized, there is no right to a publicly funded attorney in a

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<sup>9</sup> The court reasoned that "[t]he evidence that supports a finding of dependency in fact places a higher burden of coming forward with evidence than would be true in the custody modification proceeding."

<sup>10</sup> And as the Department points out, the requirements for modification are subsumed by the more onerous requirements for establishing a dependency. To modify a parenting plan, the court need only find a substantial change in circumstance and that modification is in the child's best interest. RCW 26.09.260(1). But in a dependency proceeding, the court must find abuse or neglect of the child that harms the child's health, welfare, and safety. RCW 13.34.030(5)(b).

private custody action when it is a private action between spouses, the entry of a parenting plan does not terminate parental rights, and the State is not a party and does not seek custody of the children.<sup>11</sup> Lister contends that this reasoning does not apply here because the State was involved in the parenting plan actions by supporting the fathers' summary judgment motions. But the record is clear that this was a parenting plan that was litigated between the parents and not with the State.

Both fathers brought the actions and were represented by their own counsel, and the State was neither a party to this action nor otherwise sought custody of the children. For precisely this reason, the court expressly declined input from the Department on the summary judgment motions and heard only from the fathers on the issue. While the Department openly supported the fathers' proposed parenting plans, this does not make it a party to the custody action. In fact, as the Department points out, by supporting the fathers' custody actions and moving to dismiss the dependency in the event the fathers were granted custody, the State was actually seeking to end its involvement with the children and the parents.

Lister further contends that even if the State was not an official party to the parenting plan actions, she was still deprived of her right to appointed

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<sup>11</sup> See Turner v. Rogers, 564 U.S. \_\_\_, 131 S. Ct. 2507 (2011) (Fourteenth Amendment's Due Process Clause does not require the State to provide counsel at a civil contempt hearing to an indigent potentially facing incarceration for nonpayment of child support where custodial parent is likewise unrepresented and the State provides alternative procedural safeguards); see also King v. King, 162 Wn.2d 378, 385-87, 174 P.3d 659 (2007).

counsel when she was forced to litigate against attorneys from the State on the family law matter. She points to the fact that the Department filed the motion to consolidate the matters in family law court and filed a brief in support of the fathers' parenting plans. But again, the record does not support her claim that she was denied counsel under these circumstances. In fact, Lister's attorney filed a response to both the Department's motion to consolidate and the Department's brief in support of the fathers' summary judgment motions. Thus, contrary to her assertions, she received representation from appointed counsel on all matters in which the Department participated.

Lister also relies on In re Dependency of E.H.<sup>12</sup> to argue that the parenting plan proceeding was "inextricably linked" to the dependency proceeding and therefore amounts to a stage in the dependency to which she had a right to appointed counsel. In E.H., the court held that the parents of a child who was found to be dependent had a statutory right to appointed counsel in a nonparental custody action.<sup>13</sup> In that case, after the child was found dependent as to both parents, the juvenile court considered the Department's proposed permanency plan at a review hearing. The Department proposed nonparental custody with another relative as the primary goal of the permanency plan with an alternate goal that the child return home to one of the parents. The Department argued against termination of parental rights because the parents had made progress in their relationship with the child.<sup>14</sup>

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<sup>12</sup> 158 Wn. App. 757, 243 P.3d 160 (2010).

<sup>13</sup> 158 Wn. App. at 767-68.

<sup>14</sup> E.H., 158 Wn. App. at 762.



A juvenile court commissioner approved nonparental custody as the primary goal of the permanency plan but did not approve the Department's alternate goal to return the child home to the one of his parents. The juvenile court also entered an order granting concurrent jurisdiction to the superior court to proceed with a nonparental custody action initiated by the relative and specified that the family law court would also decide the permanency planning issue of whether to return the child home to one of the parents.<sup>15</sup> The parents moved for discretionary review, challenging the concurrent jurisdiction order and contending that they had a right to appointed counsel in the nonparent custody petition.<sup>16</sup> The court held that because the nonparental custody action was "inextricably linked with the dependency issue of whether [the child's] return home to either parent is appropriate," the parents were entitled to appointed counsel for the family court proceedings, based on the statutory right to counsel at all stages of dependency proceedings provided in RCW 13.34.090.<sup>17</sup>

Lister contends that likewise here, because the modification was "necessary to effectuate" the dependency disposition, it was therefore inextricably linked to the dependency and she was entitled to appointed counsel. But unlike in E.H., this case did not involve the State proposing a permanency plan of return home to Lister that was being considered as an alternate plan to a nonparental custody action. Rather, the court considered the fathers' proposed parenting plans after the dependency determination was made and the court

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<sup>15</sup> E.H., 158 Wn. App. at 762.

<sup>16</sup> E.H., 158 Wn. App. at 763-64.

<sup>17</sup> E.H., 158 Wn. App. at 768.

continued to monitor the parents' compliance with the dependency order. In its grant of summary judgment, the court simply relied on the findings made during the course of the dependency proceedings and concluded that the fathers were entitled to judgment as a matter of law because Lister presented no new evidence to the contrary. The court noted that the allegations against the fathers had been previously determined to be unfounded by the juvenile court and there had been no change in the mother's progress in complying with the ordered services. Indeed, at the last permanency plan hearing, the court determined that Lister had made no progress to correct her deficiencies, failed to engage in any of the court ordered services and chose to stop visiting the children since August 2009.

Thus, unlike in E.H., the parenting plan orders were not necessary to effect the dependency disposition. In fact, it was quite the opposite: the parenting plans were a consequence of the dependency proceedings, which as noted above, involved a more onerous standard of proof that subsumed the showing required for a parenting plan modification. And as discussed above, Lister received representation from appointed counsel throughout the dependency proceedings, including a nine day fact-finding that produced ample evidence to support modification of M.W.'s parenting plan and the later review hearings in which she was found not to be in compliance with the dependency order. Additionally, appointed counsel represented Lister on the Department's motion to dismiss the dependency after the final parenting plans were approved.

Thus, the two proceedings were not “inextricably linked,” as Lister asserts, as evidenced by the court’s ability to address the two proceedings as two separate actions while preserving her right to counsel in the dependency proceedings.

Finally, we find no merit in the issues raised in Lister’s pro se brief. She first challenges the dependency determination itself and the procedures involved in the initial removal of the children from her home, contending that there was a lack of evidence that she was abusive, that a CPS interview of M.W. at school was unconstitutional because it was conducted on private property without a probable cause, and that she was denied access to documents in the beginning stage of the dependency. But she provides no support for these claims and as discussed above, the dependency finding was supported by sufficient evidence.

She further contends that her dependency attorneys refused to draft family law documents for her and submit them to court. But as discussed above, there is no right to appointed counsel in custody proceedings litigated between the parents when the State is not seeking custody. She also contends that the summary judgments were based on false and manufactured testimony. But again, she provides no support for this claim.

Finally, she contends that the summary judgment ruling was incorrect because the parties must agree to modification. But it is precisely because the parties did not agree to modification that the court was required to determine whether to grant the fathers’ parenting plan petitions. And based on the factual determinations made by the court during the dependency proceedings and a

lack of additional evidence to the contrary, the record supports the court's ruling that the fathers were entitled to custody.<sup>18</sup>

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<sup>18</sup> Amicus raises the additional issue of whether summary judgment was the proper procedure to be used to order a parenting plan. But because this issue was neither raised below nor raised by the parties to the appeal, it is beyond the scope of our review. In any event, we note that Lister presented no new evidence to dispute the dependency findings upon which the summary judgment motion was based; accordingly, there were no disputed issues of material fact and the court's summary judgment ruling is supported by the record.

We affirm.

Grosse, J

WE CONCUR:

Leach, a.c.f.

Jau, J.