

NO. 49927-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re Dependency of J.E.D.A., a Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

HELERINA MOKIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel Stahnke, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied due process when the trial court failed to follow the statutory guidelines for providing interpreters during legal proceedings.

Issue Pertaining to Assignment of Error

Appellant does not speak English. She speaks Chuukese¹ and needs an interpreter. During a motion hearing that resulted in appellate being dismissed as a party to a dependency, a Chuukese interpreter was present. However, the trial court did nothing to confirm the interpreter's qualifications, competency, and commitment to professional ethics and obligations despite strict statutory guidelines requiring it to do so. Was the trial court's failure to comply with statutes and ascertain whether the interpreter was competent structural error requiring reversal of the order and a new motion hearing, or does this error merely require remand for an evidentiary hearing before the trial court to establish whether the interpreter is competent to interpret legal proceedings?

¹ Chuukese is language of the Austronesian language family spoken primarily on the islands of Chuuk in the Caroline Islands in Micronesia. Estimates show that there are about 45,900 speakers in Micronesia. https://en.wikipedia.org/wiki/Chuukese_language (last accessed 3-13-14).

B. STATEMENT OF THE CASE

Appellant Helerina Mokis does not speak English; she speaks Chuukese. CP 2. She requires an interpreter when communicating with English-speaking persons. CP 9, 134.

Mokis is J.E.D.A.'s paternal aunt and has had custody of him since early 2012. CP 172. J.E.D.A.'s parents became involved with Hawaii's Child Protective Services when he was just three months old, and he was sent to live with Mokis in Vancouver, Washington. CP 4, 172. Mokis requested the mother send paperwork establishing Mokis' custody of the child. CP 172. With the assistance of Hawaii's CPS and legal aid, the mother signed and notarized a document titled "Power of Attorney" to facilitate what Mokis believed to be the change in custody. RP 125, 178-79.

Mokis raised J.E.D.A. for approximately four years. CP 172-73. J.E.D.A. considers Mokis his mother and is extremely bonded to her.² RP 173; RP 18-19, 40. In Mokis' culture, it is not unusual for relatives to reach out and raise a child as their own if the parents are not able to do so. RP 173.

² The CASA recognized that Mokis is J.E.D.A.'s psychological mother and thus advocated that it was in J.E.D.A.'s best interest that Mokis remain a party to the dependency. RP 18-19, 40.

On June 10, 2016, Washington CPS received a referral from Randall Children's Hospital alleging J.E.D.A. was medically neglected. CP 2. The doctor reported that J.E.D.A. had a staph skin infection that had been untreated for months, was non-verbal, and not potty trained. RP 2. J.E.D.A. was placed in protective custody and a dependency petition was filed on June 13, 2016. CP 1, 3. The Department summoned Mokis as a party to the dependency. CP 7.

On August 8, 2016, after researching the effect of the Power of Attorney document, the State moved to terminate Mokis' party status, alleging she had no legally recognizable right to custody of J.E.D.A. CP 89-90. Mokis responded, asserting she had standing in the case due to the Power of Attorney document, which she argued was intended to change legal custody, and because she qualified as a de facto parent. CP 135-139.

The motion was heard on August 18, 2016. RP 1. At the hearing, Helper Modou was introduced as a Chuukese interpreter for Mokis. RP 4. The trial court asked if he was a "legal interpreter." RP 4. When he stated that he was, the trial court did nothing further to ascertain his credentials or capabilities, his

familiarity with the code of ethics, or whether he had been administered the required oath for interpreters. RP 4-24, CP 184.

Afterward, the parties argued the merits of the matter and the trial court granted the State's motion to dismiss Mokis as a party. RP 7-24. An order to that effect was entered on October 4, 2016. CP 229-30. After the decision was upheld on revision, Mokis filed a notice of appeal. RP 287.

C. ARGUMENT

MOKIS WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO COMPLY WITH THE STATUTORY MANDATES PROTECTING THE CONSTITUTIONAL RIGHTS OF NON-ENGLISH SPEAKING PERSONS.

Under Washington statutes and constitutional due process concepts, Mokis should have been provided a competent Chuukese interpreter for all legal proceedings. To ensure that non-English speakers have meaningful access to the courts, the statutes set forth specific directives that trial courts must follow to confirm an interpreter's qualifications, competency, and commitment to professional ethics and obligations. The trial court did not comply with these in Mokis' case. As such, Mokis was denied basic due process in the legal proceeding deciding her party status.

“The purpose of [Washington’s interpreter statutes] is to uphold the constitutional rights of non-English speaking persons.” State v. Gonzales-Morales, 138 Wn.2d 374, 381, 979 P.2d 826, 829 (1999). To this end, RCW 2.43.030(1) provides:

Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

The statute requires trial courts to “use the services of only those language interpreters who have been certified by the office of the administrator for the courts, unless good cause is found and noted on the record by the appointing authority.” RCW 2.43.030(1)(b). If good cause is found for using a non-certified interpreter, the court must satisfy itself on the record that the proposed interpreter is (1) capable of communicating effectively with the court and the person for whom the interpreter would interpret, and (2) has read, understands, and will abide by the code of ethics for language interpreters. RCW 2.43.030(2)(b).

Before any interpreting begins, RCW 2.43.050(2) requires that the court:

shall require the interpreter to state the person's name on the record and whether the person is a certified or

registered interpreter. If the interpreter is not a certified or registered interpreter, the interpreter must submit the interpreter's qualifications on the record.

The court must also make sure that every interpreter has taken an oath affirming that the interpreter will make a true interpretation to best of his skill. RCW 2.43.050(3).

The record here is devoid of any attempt by the trial court to follow these procedures during the hearing. Neither the transcript nor the minutes establish Modou was a certified or qualified interpreter. There was no evidence of a written waiver by Mokis. There is no on-the-record finding of a good-cause reason for not using a certified interpreter. There is nothing in the record establishing that Modou was capable of effectively communicating with the court and Mokis or that he had read and understood the code of ethics for interpreters. Finally, there is no evidence that Modou ever undertook an oath affirming that he would make a true interpretation of the proceedings. RP 4-24; CP 184.

The trial court's failure to comply with any of the statutory mandates for ensuring non-English speaking parties' meaningful access to the courts violates both Washington statutes and due process. Moreover, this was a structural error that requires reversal of the order and remand for a new hearing.

Without a competent interpreter, a legal proceeding is reduced to “a babble of voices” to the non-English speaker. U. S. ex rel. Negron v. State of N. Y., 434 F.2d 386, 388 (2d Cir. 1970). Indeed, Washington courts have long recognized that to proceed without an interpreter renders a trial “a meaningless ceremony, and the [party would be] tried in violation of the laws and constitution of the land.” Elick v. Wash. Territory, 1 Wash.Terr. 137, 140 (1861).

To the non-English speaking person, the entire conduct of a hearing from beginning to end is obviously affected by the absence of a competent interpreter. This absence affects the framework within which the hearing proceeds rather than simply constituting an error in the hearing process itself. As such, this is the type of error to which the structural error doctrine applies. Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302 (1991) (citations omitted).

While the Washington Supreme Court has determined the structural error doctrine does not apply to cases raising ineffective assistance of counsel claims for defense counsel’s decision not to provide his client with an interpreter, the door has been left open as to whether the structural error doctrine might apply in other interpreter contexts. In re Khan, 184 Wn.2d 679, 691, 363 P.3d

577, 582 (2015) (Justice Yu concurring) (recognizing that under different circumstances the structural error doctrine might apply).

This case presents one of those other contexts. A trial court's complete failure to follow the statutory mandates for ensuring competent interpretation affects the framework and fundamental fairness of the entire legal process. As such, reversal and a new hearing is the remedy in cases such as this.

Should this Court disagree that the structural error doctrine applies under these circumstances, it should direct the trial court to take new evidence under RAP 9.11(a).³ It should also direct the trial court to enter findings regarding Modou's qualifications and capabilities as a Chuukese interpreter and findings to establish

³ This case meets the criteria under RAP 9.11. (1) The additional proof is needed to fairly resolve whether Mokis was provided her statutory and constitutional right to a competent interpreter. (2) The additional evidence as to the interpreter's credentials and understanding of his ethical obligations would probably change the decision being reviewed since Mokis was constitutionally and statutorily entitled to a competent interpreter during the legal proceeding, and the record shows the trial court failed to follow the statutes to ensure this right and as it stands now, there is insufficient evidence in the record to show that this error was harmless. (3) It is equitable to excuse Mokis' failure to present this issue at trial because defense counsel could not know whether the interpreter was competent and, if Mokis did not understand what was happening in the courtroom due to incompetent interpretation, she had no way to effectively bring this up counsel or the court. (4) There is no remedy available through postjudgement motions. (5) The appellate court remedy of granting a new hearing would be suitable to Mokis but likely not to the State and would require the unnecessary expense of relitigating the merits of the matter all over in a dependency matter. (6) It would be inequitable to decide the case as it stands because the trial court's failure to follow the statute has unfairly contributed to the lack of an adequate record from which this Court might determine whether Mokis received competent interpretation as required by State law and the constitution.

whether Modou understands his ethical obligations and duties and did in fact discharge these during the motion hearing at issue. RAP 9.11(b). Only then could this court determine whether the trial court's error was harmless.

In sum, Washington law sets forth very clear requirements for the trial court to follow when a non-English speaking person is appearing in legal proceedings. The trial court made no effort to comply with those here. As such, this is structural error requiring reversal of the order dismissing Mokis as a party. Alternatively, this Court should direct the trial court to hold a hearing and determine whether the interpreter used during the hearing was qualified, familiar with the professional ethics and obligations set forth in the statutes, and provided interpretations consistent with the required oath. If the interpreter proves incompetent on any of these grounds, this Court should reverse and remand for a new hearing.

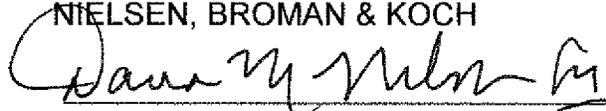
D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to either reverse the order dismissing Mokis as a party to the dependency, or order the trial court to take additional evidence before deciding the matter.

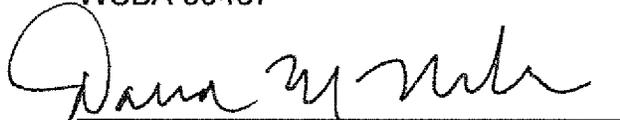
Dated this 20th day of March, 2017.

Respectfully submitted

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March 21, 2017 - 10:30 AM
Transmittal Letter

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Court of Appeals Case Number: 49927-4

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