

NO. 49927-4-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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IN RE THE INTEREST OF J.E.D.A., Jr.,

Minor Child.

H.M.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

The appellant H.M. is J.E.D.A.'s paternal aunt. She is neither the legal guardian nor the legal custodian of the child. Because she lacks party status, the Department of Social and Health Services filed a motion to dismiss H.M. from the dependency case, and the juvenile court granted the motion.

H.M.'s primary language is Chuukese, and at the hearing on the Department's motion to dismiss, a Chuukese interpreter was present. The trial court confirmed the interpreter was a legal interpreter, and the parties did not object to the interpreter, nor did they raise any questions regarding the interpretation provided. For the first time on appeal, H.M. challenges the interpreter, arguing that the trial court failed to confirm the interpreter's qualifications.

The courts of this state have repeatedly rejected the application of the doctrine of structural error to civil cases, and H.M. is not entitled to relief on this basis. The issue of interpreter qualifications is governed by state statute under RCW 2.43.030. Error, if any, can be cured by a remand under RAP 9.11(a), and the Department concurs that the case should be remanded to the trial court to take additional evidence under RCW 2.43.030(2) regarding the qualifications of the Chuukese interpreter.

## II. ISSUES

1. **Where a Chuukese interpreter was provided for the appellant at the hearing, without objection, but the trial court did not address the interpreter's qualifications on the record, should the case be remanded to the trial court under RAP 9.11(a) to take additional evidence regarding the interpreter qualifications?**

## III. COUNTERSTATEMENT OF FACTS

Five-year-old J.E.D.A. is the son of the mother J.T. and the father A.A. who lived in Hawaii. CP 2, 134. The father became incarcerated, and the mother struggled to care for the child. CP 3, 172-73. In early 2012, when he was three months old, J.E.D.A. moved from Hawaii to Vancouver to live with H.M. because of his mother's inability to care for him. CP 172-73. H.M. is J.E.D.A.'s paternal aunt. CP 172. In August 2013, the state of Hawaii Child Protective Services assisted the mother in completing a Power of Attorney granting H.M. the authority to make decisions regarding J.E.D.A.'s welfare. CP 125, 172.

J.E.D.A. came to the attention of the Washington State Department of Social and Health Services in June 2016. CP 2. Child Protective Services (CPS) received a referral from Vancouver's Randall Children's Hospital alleging medical neglect of J.E.D.A. CP 2. The hospital requested assistance from the Vancouver Police Department and referred the case to CPS after J.E.D.A.'s father brought the child to the hospital emergency department to

be examined for a skin rash. CP 2. The father had recently arrived in Washington following his release from a Hawaii prison. RP 12; CP 2. The father was not supposed to have contact with his son, but H.M. allowed unauthorized contact to occur. CP 5.

The emergency room physician reported that J.E.D.A. suffered a staph skin rash that appeared to have been untreated for months. CP 2. The child also suffered a severe case of lice. CP 3. J.E.D.A. was non-verbal and not toilet trained. CP 2. When hospital staff contacted the paternal aunt, H.M., to come get J.E.D.A., she reported she was unable to do so because her tires were slashed. CP 2.

H.M. told the hospital social worker that J.E.D.A. endured the rash for several months but he had not been to a medical appointment. CP 2-3. Since 2011, J.E.D.A. had been to the doctor just two or three times. CP 4. The aunt admitted J.E.D.A. was behind on well-child exams, was not toilet trained, and struggled with a speech delay. CP 4.

While J.E.D.A. was at the hospital, the Vancouver Police Department visited the family home to complete a child welfare check on three other children living in the home. CP 3. Officers reported the children appeared to be suffering such severe staph infections and lice that their hair was falling out and oozing sores covered their bodies. CP 3. Officers called an ambulance to have the three children taken for medical evaluation. CP 3.

Department social workers responded to the hospital and law enforcement signed a transfer of custody placing all four children into CPS protective custody. CP 3.

The Department filed a Dependency Petition, alleging J.E.D.A. should be found dependent because he had been abused or neglected and had no parent, guardian, or custodian capable of adequately caring for him. CP 1-2. The petition identified H.M. as J.E.D.A.'s legal guardian. CP 1.

At that time, the Department considered H.M. to be the alleged legal guardian or custodian based on her self-reports, but subsequent investigations revealed otherwise. CP 89-90. The Department contacted the Hawaii Department of Health and the Hawaii courts; neither had records indicating that a legal guardianship or legal custody agreement had been executed for J.E.D.A. CP 89-90. The Power of Attorney was the sole document signed regarding J.E.D.A.'s custody. CP 132. As a result, the Department requested the court enter an order dismissing H.M. from the dependency case because the investigation revealed she was not entitled to party status under Chapter 13.34 RCW and RCW 13.04.011(5). CP 89-90.

On August 18, 2016, the trial court heard the Department's motion. RP 1, 7; CP 91. H.M. was present at the hearing with her attorney, Darquise Cloutier, and a Chuukese interpreter. RP 1, 4. H.M. was born in Micronesia, and her first language is Chuukese, a language of Micronesia. CP 2, 173.

She described her English speaking ability as “not very good.” CP 174. At

the hearing, the trial court asked the following questions:

Court: And, sir, could you identify yourself, please.  
Interpreter: My name is Helper Modou...Chuukese  
interpreter.  
Court: And you're a legal interpreter here today?  
Interpreter: Yeah.  
Court: All right. Thank you. And you're interpreting  
for?  
Interpreter: I'm interpreter for [H.M.].  
Court: Okay. And that's Ms. Cloutier's client.  
Ms. Cloutier: Yes.  
Court: Okay. Go ahead sir.

RP 4.

No one objected to the interpreter's qualifications, and the hearing continued. RP 4. The Department argued that H.M.'s power of attorney was insufficient to establish her as a guardian or legal custodian of H.M. RP 8-10. The state of Hawaii required legal guardianship or legal custody be court ordered. RP 8. There was no evidence of a custody or legal guardianship order or agreement filed in Hawaii, and the power of attorney did not qualify as such. RP 8. The Department argued that there was “simply no evidence that points to a court of competent jurisdiction granting [H.M.] legal custody or legal guardianship of this child.” RP 8-9. Because H.M. presented no evidence giving her party status as the biological parent under Chapter 26.26 RCW or legal guardianship under Chapters 26.10 or 13.34

RCW, the Department argued that case law and state statute required H.M.'s party status be terminated. RP 9-10.

H.M.'s attorney acknowledged "there was no formal change in the custody," but argued H.M. was a "party necessary to the proceeding because she's a person who appears to the Court to be proper and necessary." RP 13. H.M.'s attorney asked the trial court to waive exclusive jurisdiction to allow H.M. to file for de facto parentage in family court. RP 11.

The trial court found that although H.M. had been raising J.E.D.A., she did not have legal custody of the child. RP 20. The trial court indicated H.M. would need to file a nonparental custody or de facto parentage case in family court. RP 20-21. After reviewing the motions, responses, declarations, and court records and considering the argument of counsel, the trial court found the Power of Attorney insufficient to confer legal custody of J.E.D.A. to H.M., and the court dismissed H.M. as a party to the dependency case. CP 229. The trial court allowed H.M. to have visitation with the child and ruled it would be up to H.M. to decide what she would do next. RP 21.

H.M. filed a motion for revision, and a hearing was held on October 28, 2016. RP 25; CP 263. H.M. was not present at the hearing. RP 25. On revision, the superior court noted "it's very clear [under RCW 13.34.030(10)] that a guardian means a person or agency that has been

appointed as the legal guardian of the child in a legal proceeding.” RP 30.

The court further commented:

So I don't think it's fuzzy...that in order for you to be a party to a dependency action, you need to be one of the biological parents or a guardian.

And according to the definitions, that has to have been determined not by a handshake and a wink and a nod by people. That has to be done legally. I think that's where the hang-up here is.

RP 30.

The superior court denied the motion for revision and affirmed the juvenile court order. RP 40; CP 263-65. However, the court signed an order waiving exclusive jurisdiction so that H.M. could file a legal proceeding for de facto parentage, nonparental custody or guardianship within sixty days. RP 40-43; CP 263-65. Given the Dependency Petition alleged J.E.D.A. had been abused or neglected and had no parent, guardian, or custodian capable of adequately caring for him, the superior court noted “the hill climb is going to be very difficult in a de facto parent action.” RP 41.

Following denial of her motion for revision, H.M. timely filed this appeal.

#### **IV. ARGUMENT**

Trial courts are given broad discretion in matters concerning the welfare of children. *In re Marriage of Rich*, 80 Wn. App. 252, 258, 907 P.2d

1234 (1996); *In re Dependency of C.B.*, 61 Wn. App. 280, 287, 810 P.2d 518 (1991). In any dependency proceeding initiated by the Department, the goal of the hearing is to determine the child's welfare and best interests. *In re Dependency of C.M.*, 118 Wn. App. 643, 648, 78 P.3d 191 (2003).

**A. The Case Should Be Remanded To the Trial Court To Take Additional Evidence To Confirm the Chuukese Interpreter Was Qualified as Required by Statute**

Washington statute guarantees non-English speakers involved in court proceedings the assistance of a certified court-appointed interpreter:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010.

At the August 2016 hearing at issue, a Chuukese interpreter was present to interpret for H.M. RP 1, 4. The parties did not object to the interpreter or raise any concerns about the interpretation provided. *See* RP 1-24. However, on appeal, H.M. argues that the trial court denied her due process rights when it failed to confirm the interpreter's "qualifications, competency, and commitment to professional ethics and obligations." Br. of Appellant, p. 4. It is not necessary to reach this constitutional issue. The

issue of interpreter qualifications is governed by statute under RCW 2.43.030.

Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the legislature has required that the court shall appoint a certified or a qualified interpreter to assist the person throughout the proceedings. RCW 2.43.030(1). Unless good cause is shown, Washington courts are required to appoint an interpreter who is certified by the Washington State Administrative Office of the Courts (AOC). RCW 2.43.030(1)(b). “Good cause” includes a determination that the current list of certified interpreters maintained by the AOC does not include an interpreter certified in the language spoken by the non-English-speaking person. RCW 2.43.030(1)(b)(ii).

H.M. speaks Chuukese, a language of Micronesia. CP 2. The AOC certifies interpreters in twelve languages and registers interpreters in almost 70 languages. Washington Courts, *Certified Interpreters*, [http://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=certifiedInterpreters](http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=certifiedInterpreters) (last visited May 28, 2017); Washington Courts, *Registered Interpreters*, [http://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=registeredInterpreters](http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=registeredInterpreters) (last visited May 25, 2017). The AOC does not certify or register Chuukese interpreters in Washington. *Id.*

If a certified interpreter is not available, the court must appoint a qualified interpreter. RCW 2.43.030(1)(c). A “qualified interpreter” is a person who is readily able to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English. RCW 2.43.020(5). If a qualified interpreter is appointed, the court must make a preliminary determination that the proposed interpreter is able to accurately interpret all communications to and from the person in that particular proceeding. RCW 2.43.030(2). The statute provides the court must satisfy itself on the record that the proposed interpreter:

- (a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and
- (b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

RCW 2.43.030(2).

In *State v. Aljaffar*, 198 Wn. App. 75, 392 P.3d 1070 (2017), the trial court, over the defendant’s objections, failed to appoint an available, certified Arabic interpreter for a criminal defendant and failed to make a good cause finding prior to using the services of an uncertified interpreter. *Aljaffar*, 198 Wn. App. at 78. Division III found this violated RCW 2.43.030, but concluded reversal of the criminal conviction was not

automatic. *Aljaffar*, 198 Wn. App. at 78. The Court initially found the defendant's claims held plausible merit, but it was unable to resolve the question of prejudice on the existing trial court record. *Aljaffar*, 198 Wn. App. at 80. Division III ordered a reference hearing under RAP 9.11(a) and remanded the case to the trial court to answer questions regarding the quality of the interpretation provided. *Aljaffar*, 198 Wn. App. at 80.

Here, it is clear that an interpreter was present at the hearing, that the trial court confirmed he was a legal interpreter, that there was no objection, and that he interpreted for H.M. However, the Department agrees that the record is scant and unclear regarding the interpreter's qualifications.

RAP 9.11(a) allows the appellate court to direct that additional evidence on the merits of the case be taken before the decision of a case on review if additional proof of facts is needed to fairly resolve the issues on review. RAP 9.11(a)(1). The most expedient course of action in this case is to remand to the trial court to take new evidence under RAP 9.11(a). H.M. even suggests this as a potential remedy in her brief. *See* Br. of Appellant, at 8. On remand, the trial court should take additional evidence regarding the interpreter's qualifications as set forth in RCW 2.43.030(2). The trial court should make findings as to whether the Chuukese interpreter was capable of communicating effectively with the court and H.M. and whether the interpreter read, understood, and abided by the code of ethics for

language interpreters established by court rules. If the interpreter confirms on remand that he meets these requirements, and the trial court agrees, then the failure to establish this on the record in the original hearing was harmless.

Given the facts and circumstances of this case, the Department believes that a remand under RAP 9.11(a) is the most appropriate remedy. Accordingly, the Department requests the Court enter an order, remanding the case to the trial court for additional evidence.

**B. This Is Not a Case of Structural Error**

The Department concurs the appropriate remedy here is a remand for the trial court to evaluate and confirm the interpreter's qualifications on the record. However, H.M. insists that the trial court's failure to comply with the statute is structural error that requires reversal of the trial court's decision on the merits. But structural error applies only in criminal cases. H.M. is not entitled to relief under a structural error analysis.

Structural error is error that defies a harmless error analysis and necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). By its definition, structural error applies to criminal cases. Time and time again, the Washington State

Supreme Court and the Court of Appeals have rejected application of this doctrine in civil cases.

In 2011, in *In re Detention of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011), a majority of the Supreme Court agreed that structural error does not apply to civil cases. In *D.F.F.*, the justices unanimously agreed that automatic closure of involuntary civil commitment proceedings violated article I, section 10 of the Washington State Constitution, which requires justice in all cases to be administered openly. *In re D.F.F.*, 172 Wn.2d at 48-49. However, while the four justice majority held the violation was structural error, the two justice concurrence and three justice dissent distinguished violations of article I, section 10 in a civil case and required a showing of prejudice to warrant relief. *In re D.F.F.*, 172 Wn.2d at 48-49.

Two years later, in *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 292 P.3d 108 (2013), the Supreme Court again rejected application of structural error in a civil case. In holding there was no place for a structural error analysis, the Court cited *In re D.F.F.* noting that “[f]ive justices of this court explicitly rejected the proposition that the concept of ‘structural error’ had a place outside of criminal law.” *Saleemi*, 176 Wn.2d at 386. In a 2015 civil commitment case, the Court again held that structural error does not apply to civil proceedings. *See In re Detention of Reyes*, 184 Wn.2d 340, 349, 358 P.3d 394 (2015).

The Supreme Court has repeatedly reasoned that the definition of structural error limits itself to criminal cases, based on the rationale that without such protections, no criminal punishment may be regarded as fundamentally fair. *Reyes*, 184 Wn.2d at 346; *In re D.F.F.*, 172 Wn.2d at 53 (Madsen, C.J., dissenting, joined by C. Johnson and Fairhurst, JJ.). In a criminal case, the defendant's right to confront witnesses and participate in court proceedings encompasses the right to competent interpretation services. *State v. Gonzales-Morales*, 138 Wn.2d 374, 378-79, 979 P.2d 826 (1999). But even in a criminal case, there is no constitutional right to a *certified* court interpreter. *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994). This right is conferred by statute. *State v. Aljaffar*, 198 Wn. App. at 83.

In 2015, the Supreme Court determined the doctrine of structural error did not apply to an attorney's failure to arrange for an interpreter for a criminal defendant. In *In re Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015), the defendant, a non-English speaker, was criminally charged and tried, without an interpreter, for multiple counts of child molestation and rape. On appeal, because of his attorney's decision to forgo the interpreter services, the defendant asked the Supreme Court to vacate his convictions; in the alternative, he requested the Court remand for an evidentiary hearing to develop the factual basis for his claims. *Khan*, 184 Wn.2d at 682. The Court

rejected his invitation to treat his attorney's failure to provide an interpreter as structural error. *Khan*, 184 Wn.2d at 691. In a concurring opinion, Justice Yu noted "[t]here may come a time where we hold that the lack of a language interpreter in a *criminal* proceeding constitutes [structural] error." *Khan*, 184 Wn.2d at 695 (emphasis added). In the *Khan* case, the Court determined the defendant prevented sufficient facts to warrant a reference hearing. *Khan*, 184 Wn.2d at 694. Justice Yu's suggestion that the doctrine of structural error might apply in other case circumstances was clearly limited to criminal matters.

The Court of Appeals has followed the Supreme Court's direction, repeatedly holding that a party must show prejudice to raise claims of constitutional errors in civil cases for the first time on appeal. *In re Adoption of M.S.M.-P.*, 181 Wn. App. 301, 313-14, 325 P.3d 392 (2014) (structural error does not apply to a public trial violation in a civil termination proceeding), affirmed on other grounds, 184 Wn.2d 496, 358 P.3d 1163 (2015); *In re J.A.F.*, 168 Wn. App. at 62-63 (requiring showing of prejudice for alleged violation of article 1, section 10 in termination of parental rights case); *In re Detention of Ticeson*, 159 Wn. App. 374, 386-87, 246 P.3d 550 (2011) (requiring showing of prejudice for alleged violation of article 1, section 10 in sexually violent predator civil commitment proceeding),

abrogated on other grounds by *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

Very few errors are structural, and very little error is presumed prejudicial. *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). This Court should reject H.M.'s invitation to treat this issue as one of structural error.

**C. Remand for Additional Testimony Is a Reasonable Resolution Given There Was No Objection To the Chuukese Interpreter**

H.M. did not raise her due process issue in the trial court. RAP 2.5(a) provides that an appellate court may refuse to review any claim of error which was not raised in the trial court. The principle underlying RAP 2.5(a) is that the trial court should have an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). This rule is particularly compelling in juvenile dependency cases where the rights of a child to safety and permanency are at issue. Parents or custodians may not fail to raise an issue in a timely manner in the trial court and then expect reversal on appeal. In such cases, "parties, attorneys and the court have an obligation to expedite resolution of the issues to limit the period during which children face an uncertain future." *In re Dependency of O.J.*, 88 Wn. App. 690, 696, 947 P.2d 252 (1997), *review denied*, 135 Wn.2d 1002 (1998).

If no objection was raised at trial, RAP 2.5(a)(3) permits a party to assert constitutional error for the first time on appeal provided the party demonstrates manifest error. *In re Dependency of J.A.F.*, 168 Wn. App. 653, 659, 278 P.3d 673 (2012) To demonstrate manifest error, H.M. must show actual prejudice, or that “the asserted error had practical and identifiable consequences in the trial.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Absent remand for the trial court to evaluate and determine the interpreter’s qualifications on the record, H.M. cannot prove prejudice. Even if this Court were to decline to remand the case to take additional evidence regarding the qualifications of the interpreter, the Court should instead consider a remand for a re-hearing on the merits; that is, the motion to dismiss H.M. as a party to the dependency case should be reheard.

In suggesting this alternate resolution, the Department in no way concedes this is a case where structural error would apply or has occurred. However, given the Department is likely to prevail on a hearing on the merits, and the child has a need for permanency, stability, and timely resolution of the dependency matter, this proposal would lead to a speedy resolution and avoid the need for further unnecessary delay.

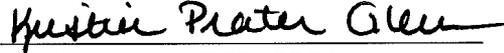
## V. CONCLUSION

The Department agrees that H.M. was entitled to a qualified Chuukese interpreter for the hearing. Such an interpreter was provided. To

confirm this fact, the Court should remand the case, under RAP 9.11(a), to take additional evidence regarding interpreter's qualifications and compliance with RCW 2.43.030(2).

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of May, 2017.

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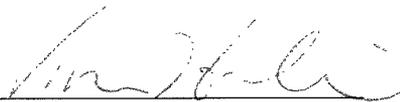
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31<sup>st</sup> day of May, 2017, at Port Angeles, WA.

  
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