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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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No. 273946

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

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In Re: Dependency of D.R. & A.R.

State of Washington, Department of Social and Health Services  
Respondent,

v.

Tonya Roberts  
Appellant

---

*Appellant*  
**BRIEF OF RESPONDENT A.R.**

---

Bonne Beavers WSBA #32765  
Attorney for A.R.  
Center for Justice  
35 W. Main Ave., Suite 300  
Spokane, Washington 99201  
Telephone: (509) 835-5211

**TABLE OF CONTENTS**

I. Introduction.....1

II. Assignments of Error and Issues Presented.....2

*Assignments of Error*.....2

1. The trial court erred by finding all necessary Services reasonably capable of correcting parental deficiencies within the foreseeable future were offered or provided. (CP 90-91.) .....2

2. The trial court erred by finding continuation of the relationship between A.R. and his mother would clearly diminish A.R.'s prospects for early integration into a permanent and stable home. (CP 91.) .....2

3. The trial court erred by finding there is little likelihood conditions will be remedied so the children could be returned in the near future because of the mother's lack of insight and the children's behaviors and conditions. (CP 91.) .....2

4. The trial court erred by finding termination was in A.R.'s best interest where these interests were inadequately represented or protected. (CP 91.) .....2

5. The trial court abused its discretion by failing to appoint an attorney for A.R. under RCW 13.34.100(6).....2

6. The trial court committed manifest error by failing to appoint an attorney for A.R. ....2

*Issues Pertaining to Assignments of Error*.....3

1. Whether all services were offered or provided reasonably capable of correcting parental deficiencies where the Department failed to offer training for parenting children with high needs or information regarding services or funding available to parents of such children. ....3

2. Whether a continued relationship with his mother clearly diminishes A.R.'s placement in a permanent and stable home where there is not a "glimmer" of a hope of a permanent placement; no evidence that his "hope" for reunification was a detriment to some imaginary placement, and evidence that Ms. Roberts had a calming effect on A.R. and that the two loved each other. ....3

3. Whether there was sufficient evidence the mother's lack of insight and the children's high needs precluded the mother as a placement option where:.....3

a. Ms. Roberts took steps to remove the children from her home for their safety, secured safe housing, domestic violence counseling, mental health counseling and evaluations and employment, and took courses to help her understand and meet her children's needs;.....3

b. Where there was no evidence regarding support services for single, low-income parents with high needs children, and .....3

c. Where Ms. Roberts had not been given any contact with her children for approximately three and a half years during which time she had made significant progress. ....3

4. Whether the trial court had sufficient evidence regarding A.R.'s best interests when his only advocate, the CASA, substantially failed to fulfill her statutory duties to conduct

	independent investigations and there was no one at trial representing A.R.'s interests.....	3
	5. Whether the trial court abused its discretion by failing to appoint an attorney for A.R. pursuant to RCW 13.34.100(6) where the CASA testified she never met A.R., spoke to him on isolated occasions only, and never contacted his parents or other relatives. ....	3
	6. Whether A.R. had a constitutional right to appointment of counsel in the dependency/termination proceedings and the failure to provide counsel so prejudiced A.R. as to constitute not only manifest but structural error. ....	4
III.	Statement of the Case.....	4
IV.	Argument.....	15
	4. The trial court erred by finding termination was in A.R.'s best interest where these interests were inadequately Represented or protected.....	16
	a. Children's interests in dependency and termination proceedings include fundamental liberty and privacy interests in a continued relationship with their parents.....	17
	b. Dependent children also have a substantive due process right to be reasonably free from harm while in State custody. ....	20
	c. Children in dependency and termination proceedings have a substantial liberty interest in not being confined unnecessarily for medical treatment. ....	24
	d. A.R.'s interests implicated in these proceedings were not adequately protected by his guardian ad litem.....	28

e.	In the absence of meaningful and effective advocacy by his CASA, the trial court was presented with only the State's position regarding A.R. ....	35
5.	The trial court abused its discretion by failing to appoint counsel for A.R. under RCW 13.34.100(6).....	37
6.	The trial court committed manifest error by not appointing and attorney to protect A.R.'s interest in these proceedings.....	43
a.	Due process requires appointment of an attorney for all children in dependency and termination actions. ....	43
b.	The failure to appoint counsel for A.R. below was manifest error. ....	46
c.	The failure to appoint counsel for A.R. constituted structural error. ....	47
V.	Conclusion.....	49

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Arizona v. Fulmanente</i> , 499 U.S. 279 (1991).....	48
<i>Bellotti v. Baird</i> , 433 U.S. 622 (1979).....	20
<i>Colyar v. Third Judicial District Court</i> , 469 F. Supp. 424 (D. Utah 1979).....	26
<i>Franz v. United States</i> , 707 F.2d 582 (1983).....	20
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	48
<i>Hodgers-Durgin v. De La Vina</i> , 199 F.3d 1037 (9th Cir. 1999).....	19
<i>Humphrey v. Cady</i> , 405 U.S. 504 (1972).....	25
<i>Kenny A. ex rel. Winn v. Perdue</i> , 356 F. Supp. 2d 1353 (N.D. Ga. 2005) 2005).....	2, 20, 21, 45
<i>Lassiter v. Dept. of Social Services of Durham County N.C.</i> , 452 U.S. 18, 28 (1981) .....	45
<i>Lessard v. Schmidt</i> , 349 F. Supp. 1078 (E.D. Wis. 1972).....	26
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	44, 46
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	17

<i>Nicolson v. Williams</i> , 181 F. Supp. 2d 182, 185 (E.D. N.Y. 2002).....	21
<i>Parham v. J.R.</i> , 442 U.S. 319 (1976).....	24
<i>Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary</i> , 268 U.S. 510 (1925).....	17
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	17
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984).....	19
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	18, 45, 46
<i>Secretary of Public Welfare v. Institutionalized Juveniles</i> , 442 U.S. 640 (1979).....	25
<i>Smith v. Fontana</i> , 818 F.2d 1411, 1416 (9th Cir. 1987), <i>cert.denied</i> 484 U.S. 935 (1987) (overruled on other grounds).....	19, 20
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	17, 20
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006).....	48
<i>Quillion v. Walcott</i> , 434 U.S. 246, 255(1978) .....	20

#### STATE CASES

<i>Amanda C. v. Case</i> , 275 Neb. 757, 749 N.W. 2d 429 (Neb. 2008).....	20
<i>Bellevue School District v. E.S.</i> , 148 Wn. App. 205, 199 P.3d 1010 (2009).....	43, 44, 46

<i>Braam v. State of Washington,</i> 150 Wn. 2d 689, 81 P. 3d 851 (2003).....	21, 39, 45, 46
<i>Burman v. State,</i> 50 Wn. App. 433, 749 P.2d 708, <i>review den'd,</i> 110 Wash.2d 1029 (1988).....	43
<i>Cagle v. Snow,</i> 56 Wn. App. 499,784 P.2d 554 (1990).....	41
<i>Dependency of A.G. and T.G. v. Grey,</i> 93 Wn. App. 268, 968 P.2d 424 (1998).....	35
<i>Espinoza v O'Dell,</i> 633 P.2d 455 (Colo. 1981).....	20
<i>In ex rel. T.B. v. CPC Fairfax Hosp.,</i> 129 Wn. 2d 439, 918 P.2d 497 (1996).....	25, 28
<i>In re Bush,</i> 164 Wn.2d 697, 193 P.3d 103(2008).....	48
<i>In re C.R.B.,</i> 62 Wn. App. 608, 814 P.2d 1197 (1991).....	18
<i>In re Custody of Shields,</i> 157 Wn. 2d 126,136 P.3d 117 (2000).....	18, 49
<i>In re Det. Of Kistenmacher,</i> 163 Wn.2d 166,178 P.3d 949 (2008).....	48
<i>In re Dependency of J.B.S.,</i> 123 Wn.2d 1, 863 P.2d 1344 (1993).....	16, 42
<i>In re Grove,</i> 127 Wn. 2d 221, 897 P.2d 1252 (1995).....	44
<i>In re Guardianship of Stamm v. Crowley,</i> 121 Wn. App. 830, P.3d 126 (2004).....	31

<i>In re Harris,</i> 98 Wn. 2d 276, 654 P.2d 109 (1982).....	25, 26, 44
<i>In re Luscier's Welfare,</i> 84 Wn. 2d 135, 524 P.2d 906 (1974).....	18, 44
<i>In re Marriage of Kovacs,</i> 121 Wn. 2d 795, 854 P.2d 629 (1993).....	41
<i>In re Parentage of L.B.,</i> 155 Wn. 2d 679, 122 P.3d 161 (2005).....	16, 17
<i>In re Pers. Restraint of Benn,</i> 134 Wn.2d 868, 952 P.2d 116 (1998).....	48
<i>In re Quesnell v. State,</i> 83 Wn. 2d 224, 518 P.2d 568 (1974).....	25
<i>In re Truancy of Perkins,</i> 93 Wn. App. 590, 969 P.2d 1101 (1999).....	43, 44
<i>Johnson v. Hunter,</i> 447 N.W. 2d 871 (Minn. 1989).....	20
<i>Matter of Commitment of N.N.,</i> 679 A.2d 1174 (N.J. 1996).....	26
<i>Matter of Guardianship of Hayes,</i> 93 Wn.2d 228, 608 P.2d 635 (1980).....	26
<i>McDaniels v. Carlson,</i> 108 Wn. 2d 299, 738 P.2d 254 (1987).....	16
<i>Parrell-Sisters MHC, LLC v. Spokane County,</i> 147 Wn. App. 356, 195 P.3d 573 (2008).....	47
<i>State ex. rel. Richey v. Superior Court for King County,</i> 59 Wn. 2d 872, 371 P.2d 51 (1962).....	25
<i>State v. Kirkman,</i> 159 Wn.2d 918, 155 P.3d 125 (2007).....	47

<i>State v. Pruitt</i> , 145 Wn. App. 784, 187 P.3d 326 (2008.).....	48
<i>State v. Santos</i> , 104 Wn. 2d 142, 702 P.2d 1179 (1985).....	18
<i>State v. Sutherland</i> , 3 Wn. App. 20, 472 P.2d 584 (1970).....	41

### CONSTITUTIONS

U.S. Const. amend. XIV.....	44
Wash. Const. Art. 1 § 3.....	44

### STATUTES

42 U.S.C. § 1983.....	18
42 U.S.C. 510a(b)(2)(A)(ix).....	29
RCW 13.34.030(5).....	1
RCW 13.34.030 (8).....	31
RCW 13.34.090.....	18, 29
RCW 13.34.100(1).....	29
RCW 13.34.105.....	30
RCW 13.34.105(1)(f).....	29
RCW 13.24.100(6).....	3, 37
RCW 13.34.130(2).....	23
RCW 13.34.136(1)(b)(ii).....	23
RCW 13.34.180(1).....	15, 16

RCW 13.34.190.....	42
RCW 13.34.190(2).....	16
RCW 13.34.320.....	40
RCW 71.34.330.....	40
RCW 71.34.355.....	40
RCW 13.34.380.....	24
RCW 71.34.610.....	40
RCW 71.34.740.....	40
RCW 74.13.031.....	22

**WASHINGTON STATE COURT RULES**

GALR 2 (a); 3(b).....	29, 31
RAP 2.5(a).....	46
RAP 2.5(a)(3).....	47
RAP 10.3(b).....	4
RPC 1.14.....	38

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American Bar Association, <i>Standards of Practice for Lawyers who Represent Children in Neglect and Abuse Cases</i> (1996), Standards B-3 and H-3 at <a href="http://www.abanet.org/child/repstandwhole.pdf">http://www.abanet.org/child/repstandwhole.pdf</a> .....	38
Braam Oversight Panel, <i>Braam Settlement: Panel Decisions on Children's Administration Revised Compliance Plan # 5</i> (Feb. 12, 2009) at <a href="http://www.braampanel.org/DecisionsCompPlan0209.pdf">http://www.braampanel.org/DecisionsCompPlan0209.pdf</a> .....	41, 46

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HB 1961, 61 <sup>st</sup> Leg. (Wn. 2009).....	22
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## I. INTRODUCTION

In February 2004, the State assumed responsibility for the health, safety and welfare of A.R. and his sister, D.R., as dependent children.<sup>1</sup> While in State care, A.R. has experienced at least thirteen changes in placement, including commitment in the most restrictive placement for children in the state, with no hope for a permanent home in the future. Concomitant with these moves, he endured the loss of continuity in community, education and health care services, the questionable administration of psychotropic drugs, the cessation of all contact with his mother, drastically reduced contact with his sister, the enforced isolation from relatives and friends, and most recently the termination of his parents' rights.

Because children in dependency and termination proceedings do not have the statutory right to counsel in Washington, they generally rely on juvenile courts to appoint a guardian ad litem to conduct independent investigations and provide the court with factual information regarding their interests, wishes and needs. "Judges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on

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<sup>1</sup> A dependent child is one who has been abandoned, abused or neglected by a person legally responsible for the care of the child, or 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. RCW 13.34.030(5).

others to provide them information about the child's circumstances."<sup>2</sup> As a result, their decisions are only as good as the information provided.

Here, A.R. argues his interests were inadequately represented by his court appointed CASA guardian ad litem resulting in an unfair and biased trial. He further argues appointment of counsel is constitutionally required to safeguard his interests and those of children like him in dependency and termination proceedings.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **Assignments of Error**

1. The trial court erred by finding all necessary services, reasonably capable of correcting parental deficiencies within the foreseeable future were offered or provided. (CP 90-91.)
2. The trial court erred by finding continuation of the relationship between A.R. and his mother would clearly diminish A.R.'s prospects for early integration into a permanent and stable home. (CP 91.)
3. The trial court erred by finding there is little likelihood conditions will be remedied so the children could be returned in the near future because of the mother's lack of insight and the children's behaviors and conditions. (CP 91.)
4. The trial court erred by finding termination was in A.R.'s best interest where these interests were inadequately represented or protected. (CP 91.)
5. The trial court abused its discretion by failing to appoint an attorney for A.R. under RCW 13.34.100(6).
6. The trial court committed manifest error by failing to appoint an attorney for A.R.

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

### Issues Pertaining to Assignments of Error:

1. Whether all services were offered or provided reasonably capable of correcting parental deficiencies where the Department failed to offer training for parenting children with high needs or information regarding services or funding available to parents of such children.
2. Whether a continued relationship with his mother clearly diminishes A.R.'s placement in a permanent and stable home where there is not a "glimmer" of a hope of a permanent placement, no evidence that his "hope" for reunification was a detriment to some imaginary placement, and evidence that Ms. Roberts had a calming effect on A.R. and that the two loved each other.
3. Whether there was sufficient evidence the mother's lack of insight and the children's high needs precluded the mother as a placement option where:
  - a. Ms. Roberts took steps to remove the children from her home for their safety, secured safe housing, domestic violence counseling, mental health counseling and evaluations and employment, and took courses to help her understand and meet her children's needs;
  - b. Where there was no evidence regarding support services for single, low-income parents with high needs children, and
  - c. Where Ms. Roberts had not been given any contact with her children for approximately three and a half years during which time she had made significant progress.
4. Whether the trial court had sufficient evidence regarding A.R.'s best interests when his only advocate, the CASA, substantially failed to fulfill her statutory duties to conduct independent investigations and there was no one at trial representing A.R.'s interests.
5. Whether the trial court abused its discretion by failing to appoint an attorney for A.R. pursuant to RCW 13.34.100(6) where the CASA testified she never met A.R., spoke to him on isolated occasions only, and never contacted his parents or other relatives.

6. Whether A.R. had a constitutional right to appointment of counsel in the dependency/termination proceedings and the failure to provide counsel so prejudiced A.R. as to constitute not only manifest but structural error.

### III. STATEMENT OF THE CASE

A.R. is satisfied with Ms. Robert's statement of the case as set forth in pages five through fifteen of her opening brief with the following additions:<sup>3</sup>

Mr. Roberts, A.R.'s father, committed A.R. to a psychiatric facility when the child was approximately four or five. (RP 665.) Upon his release, A.R. was placed 180 miles from home with a foster parent who had a doctorate in child psychology and worked in a children's psychiatric hospital. (RP 666). Upon arrival in the home, A.R. was "completely non-responsive, pretty much catatonic" and remained that way until his mother was allowed to speak with him by phone. (RP 667-68.) From that point, Ms. Roberts, with the encouragement of the foster mother, spoke to A.R. nightly for the eight or nine months of placement. (RP 668.)

A.R. moved to Washington State with his mother and sister in early 2003. Although the record is unclear, once in Washington, A.R. endured at least thirteen placements, including at least one hospitalization,

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<sup>3</sup> "Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner . . ." Wn. Rules of App. P. ("RAP") 10.3(b).

several relative placements, and numerous foster and respite homes in Stevens County, Spokane County, the Tri-Cities, Lakewood, and Burien, Washington. (RP 26, 48, 53, 54, 56, 57 59, 65, 60, 441, 520, 550.)<sup>4</sup>

On August 4, 2004, Dr. Christine Guzzardo conducted a neuropsychological evaluation of A.R. (Supplemental CP, Ex. 18.) Dr. Guzzardo questioned whether A.R.'s diagnoses were accurate. (*Id.* at 4.) She reported he was non-responsive ("refractory") to treatment with medication. (*Id.* at 2, 4.) Dr. Guzzardo acknowledged that while bringing A.R.'s aggressive behavior under control was critical, it was also critical to consider the whole picture in forming a treatment plan. (*Id.* at 3.) "He has been transitioned from his biological family to various foster families and involved for years with hospitals, doctors, and state agencies." (*Id.*) She concluded his problems were partially caused by "lack of stability and opportunity to develop an attachment to and long term relationship with a single person. Much of this child's acting out is a result of fear, abandonment, and instability. While treating the behavior, I am concerned that the emotional piece contributing to his behaviors has gone underserved." (*Id.* at 3-4.)

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<sup>4</sup> The record is confusing on the number of placements A.R. endured while in Washington, but Social Worker Monica Accord stated he was in seven foster homes and six respite homes during the dependency. (RP 550.) It is unclear whether she included CSTC, a hospital, but is likely she omitted his placement after release from CSTC as Ms. Accord testified on April 30, 2008 (RP 537) and A.R. was released from CSTC on August 13, 2008. (RP 803.)

Dr. Guzzardo recommended the following:

A "therapeutic relationship with a skilled psychologist who can develop a behavior management plan for the foster family and the school. This plan will need to be based on reinforcement for desired behavior rather than punishment for undesirable behavior....This will be no easy task initially, and his behavior may get worse before it improves, but a consistent, ongoing, salient and immediate reward system will led to improved behavior if it is implemented correctly and consistently by all parties involved in A.R.'s care. This child is at extreme risk for worsening emotional and behavioral problems.... It is critical that he receive treatment that focuses not only on controlling aggressions and violent behavior, but treatment that seeks to understand why he behaves like this (beyond the biological reasons.) He is in desparate need of a stable, affirming, calm, environment in which he can let his defenses down and be a child. Currently he acts out of fear and never knowing what is coming next."

(*Id.* at 4).

Dr. Guzzardo found A.R. a "very angry and very sad little boy."

(*Id.* at 3.) When asked to give the meaning of "leave," he responded,

"Don't cry when moms leave." (*Id.*)

Despite Dr. Guzzardo's warnings, A.R. experienced a succession of moves and was evaluated and/or treated by at least eight or more mental health specialists. (RP 552, 307, 310.) When he moved to Deer Park in 2005, counseling was terminated. (RP 101.)

While in placement, he experienced "total and complete emotional breakdowns." (RP 53.) "He would fall on the floor, kick, scream, wet his pants" and exhibit complete disregard for his own safety. (RP 53-54.) His

temper tantrums continued, at home and in school, and his behavior became more violent and sexualized. (RP 56.) As a method of control, foster parents forced A.R. to dig a ditch in the back yard. (*Id.*) Placements proved inadequate even with extra in-home support. (RP 48.)

Finally, A.R. was moved to a therapeutic home in Tri-Cities. (CP 48.) According to A.R.'s guardian ad litem, this home, though "supposedly therapeutic," "was not adequately prepared to handle someone with his deficits." (CP 48, 57.) He quickly "blew-out of that therapeutic foster home" and was returned to Stevens County to live with his maternal grandfather and step-grandmother for a second time. (RP 59.) Unfortunately, this placement failed yet again. (RP 59, 60.) In 2006, A.R. was assigned a new caseworker who testified that her main concern with A.R. was maintaining placement. (RP 549.)

Throughout the dependency, A.R. had minimal relative contact. Up to September 2004, he had supervised visits with his mother and sister. (RP 95.) The social worker described the visits as good; Ms. Roberts was appropriate and the children excited to see her. (RP 95.) Although A.R. was often hyper and difficult to control, he would eventually calm down enough for good conversations with his mother. (RP 100.) This social worker testified that the children clearly loved their mother. (RP 99.) Nevertheless, the visits were cancelled due to behavioral issues reported

by foster parents which, according to social workers, interfered with efforts to stabilize the children in their placements. (*Id.*) Although D.R. thereafter had a few therapeutic visits with her mother, it appears that A.R. did not. (RP 101.) The social worker testified that terminating visits “lessened Ms. Roberts’ chances of having her children returned to her.” (RP 142.)

In August of 2004, the paternal grandparents, who lived in Missouri, visited the area and were allowed one visit with the children, separately. (RP 117-18.) Although these grandparents were allowed contact with the children by phone and mail, the Department soon terminated calls because the grandparents broke Department rules by “asking the children questions about their foster care.” (RP 112, 118.)

From December 2005 through May 2007, A.R. received counseling from Dr. Estelle, a clinical psychologist. (RP 179.) Dr. Estelle testified that although children generally do better with their biological parents if their needs are being met, her job is not to facilitate reunion. Rather it is to “assist that child with their present circumstances, to help educate, support foster parents to relate with that child well and maintain stability . . . .” (RP 218.) Although she admitted that her therapy work could benefit a child’s return to its parents, she “perceive[s] that as being the responsibility of the state . . . .” (*Id.*) If she were specifically asked to

do that, however, she would. (RP 218-19.) She also testified that she generally has little direct involvement with biological parents and here she had little information about Ms. Roberts and no contact with her therapist. (RP 219, 220.) At the time of trial, Dr. Estelle had been out of touch with A.R. for some time and was unable to comment on his situation. (RP 245.)

On May 15, 2007, A.R. was admitted to the Child Study Treatment Center (CSTC), a locked facility and the State's most restrictive psychiatric inpatient hospital for children. (RP 329, 266; CP 48). According to Dr. Norris, a program director at CSTC, A.R.'s admission was voluntary and no court-order was required. (RP 366.) While there, A.R. had a team of providers, including three different therapists (RP 306-09). He was also subject to a no-contact directive by Monica Accord, A.R.'s "guardian" on behalf of the State, which ultimately allowed him contact with only one person outside the facility, his maternal grandfather. (RP 362-66.) Even where staff disagreed with the guardian's decision on contact or believed exploration of historical events would be therapeutically beneficial, Dr. Norris testified that CSTC defers to and takes its cue from the State regarding a child's best interests. (RP 365-67, 369 – 371.)

Dr. Norris testified, "I can certainly say it would be beneficial for [A.R.] to talk about both his history and his future in therapy." (RP 366-67.) However, he explained that A.R. was very guarded about his history and that no one at the facility had developed a rapport sufficient for him to disclose or talk about his family. (RP 354.) He also stated he did not talk with Ms. Roberts and would not have without a release from the guardian, no matter how useful it would have been. (RP 367.) Rather, where, as here, the goal is not reunification and the guardian has not given permission for family contact, the staff adjusts its plan accordingly. (RP 366-71.) This is standard practice. (*Id.*)

Dr. Norris testified that A.R. did not exhibit symptoms of all diagnoses given at admission, particularly mood disorder, Reactive Attachment Disorder, and Oppositional Defiance Disorder (ODD). (RP 358, 346.) Dr. Norris' prognosis for A.R. was good so long as his ADHD was under control. (RP 346.) He testified that upon release, A.R. should not go to a normal foster family unless there were no other children or very healthy children a couple of years older than A.R. (RP 341.) A.R. would also need ongoing SAY therapy. (RP 349.)

On August 13, 2008, A.R. was moved to a foster home with three other high needs children. (RP 803-4.) In response to the court's concern

about supervision in that setting, the social worker responded that "A.R. has come a long way in his SAY therapy . . . ." (RP 805.)

A.R.'s CASA guardian ad litem, a volunteer without a college degree or counseling training, testified she was "appointed to the case for the two children, to represent them in court." (RP 431, 478.) The CASA understood her duties were "to gather as much information revolving around the family and the case as I can," and to "provide the court with another view point than those involved in the 'courtroom setting' . . . ." Essentially, to be the court's "eyes and ears." (RP 431-32.)

In order to fulfill these duties, the CASA testified she relied largely on others. She stated she spoke with the children by phone "on some isolated incidents." (RP 433.) She didn't remember speaking to anyone in Missouri about the children, but did speak to staff at CSTC. (RP 434.) Generally, she tries to talk with parents "during the court hearing," but normally does not go to their home. "[I]f I have an opportunity to talk to them, I'll take advantage of the opportunity." (RP 437.) She never talked to Ms. Roberts. "I knew the caseworker would be covering that area." (RP 437.) She knew nothing about Ms. Roberts' housing. (RP 513.) She did not speak with Ms. Robert's counselors and never talked with Mr. Roberts. (RP 479.) She admitted she had the names and phone numbers of other family members, but only spoke with the paternal grandparents the

one time they were in the state and did not get their address. (RP 480, 521.)

She did speak with Dr. Estelle and Dr. Guzzardo, but got most of her information regarding the children's treatment in Missouri on paper. (RP 434). When asked if she was familiar with the exhibits (which included the reports of Drs. Estelle and Guzzardo, (Supp. Ex. 18, 19)), she replied, "I would have seen them before," but admitted she did not "always" have access to Dr. Estelle's reports. (RP 434, 500.) She did not speak to the children's foster parents or social workers in Missouri and did not remember why the Missouri CPS returned the children to Ms. Roberts' care. (RP 481- 82.)

She did not talk to A.R. or D.R. about their feelings regarding their mother, but left that to the therapist. (RP 485, 509.) She never asked the children whether they wanted to see their mother or go home. (RP 489.) At most, she met with D.R. three times in four years and the longest meeting was 45 minutes. (RP 485-486.) She testified twice that she never met A.R. (RP 485.)

As for tracking A.R.'s care while in placement, she relied "on the foster parents to a great degree" and the caseworker. (RP 440, 489-90.) She testified the foster placements fell apart because A.R.'s "behavior is so out of control on an almost consistent basis." (RP 441- 42.) "That's

why he is moved, is he will burn out the foster parents in the home because it – he’s just – it’s supposed to be a 24/7 job.” (*Id.*) “You just can’t take that for very long.” (RP *Id.*) She testified A.R. is “extremely destructive, hostile, defiant.” He “curses[,] . . . goes into uncontrollable tantrums,” and “just wears people down.” (*Id.*) She described him as assaultive, threatening, and unkind to animals. (RP 442-447.) “I could tell you examples from each home that are the worst.” (RP 443.) “There’s so many behaviors, it’s hard to recount everything he’s capable of.” (RP 447.) “He doesn’t seem to change his behaviors that much. It typically runs with tantrums, outbursts of anger, rage, threats, cussing. Lying, stealing. It seems to come as a package wherever he goes.” (RP 449.) As to placement at BEST,<sup>5</sup> she admitted she didn’t know what had happened, but was “sure he did a number of the usual things.” (*Id.*)

The CASA observed three visits from a distance in the summer of 2004 with Ms. Roberts and the children and supported their cancellation based on foster parent reports. (RP 457.) “A.R. would become more angry, lying and stealing, just . . . a repeat of all his repertoire, I guess you’d say, he’s carried with him since he was four.” (RP 458.) Later, she admitted his behaviors only subsided “somewhat” after cancellation. (RP 459.)

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<sup>5</sup> BEST is a hospital-based day treatment program for children with behavioral and emotional problems. <http://www.shmcchildren.org/index.php/services/101>.

She testified she knew A.R. had at least one therapeutic visit which she supported cancelling as well because Ms. Roberts had apparently shown up at the therapist's office unscheduled during A.R.'s session, after which A.R. "couldn't settle down." (RP 461.)

The CASA testified that finding a permanent placement would be hard because "there are not many children like A.R. . . . ." (RP 467.) "After all the failures that A.R. has endured...he needs a home he can feel is his own." (RP 465.) She agreed that each move was traumatic and devastating but admitted there was not a "glimmer" of hope for a permanent placement for A.R. and he could not rely on remaining with his foster parents. (RP 467, 501-02.)

While acknowledging that Ms. Roberts had improved herself during the dependency, the children "have intensified," she said. (RP 473.) She testified there "isn't really that much in the legal relationship; it's kind of like a relationship on paper. Because they don't see each other, they don't communicate...out of touch after not having seen each other now for three, maybe three and a half years." (RP 475.) In sum, she said that termination would be better for both children "[b]ecause they wouldn't be holding out hope that they were going back to their mother." (RP 476.)

On the first day of trial and several times thereafter, Ms. Roberts requested appointment of counsel for A.R.'s sister, D.R. (RP 165, 410, 411, 417, 419.) In response to this request, the trial court instructed the CASA on several occasions to speak with D.R. about the appointment. (RP 165, 410, 417, 419.) The CASA never did so in part because she was not informed how an attorney could benefit a child with significant limitations and that appointment would be a financial burden to the county. (RP 418-19.) Her program manager agreed and recommended deferring to the child's therapist. (*Id.*) The State's Attorney agreed the therapist should determine "whether or not [D.R.] could assist her representation." (RP 424.) The trial court wondered if D.R. was even aware of the trial or what was going on and agreed that, given her anxiety disorder, it "would not be right for the GAL to approach her directly." (RP 425-426.) D.R. was never asked about counsel and the trial court denied the request. "I think the overriding issue is that it will not be of any real assistance to D.R., and – to the court, to have an attorney representing this particular 12 year-old." (RP 427.)

#### IV. ARGUMENT

Before terminating a parent's rights, a court must find all six elements of RCW 13.34.180(1) by clear, cogent and convincing evidence. A.R. does not dispute the trial court's findings as to elements (a), (b), and

(c) of RCW 13.34.180(1) and hence agrees with the State these are verities on appeal. (Respondent State's Br. at 20.) He likewise agrees with Ms. Roberts that the court erred in its findings as to the next three elements (d), (e) and (f), which correspond to A.R.'s first three assignments of error. In the interest of judicial economy, A.R. adopts Ms. Roberts' arguments regarding these elements in their entirety and incorporates them by reference herein. (Appellant's Opening Br. at 17-30.) A.R. thus focuses his argument below on his assignments of error numbers four, five and six.

4. THE TRIAL COURT ERRED BY FINDING TERMINATION WAS IN A.R.'S BEST INTEREST WHERE THESE INTERESTS WERE INADEQUATELY REPRESENTED OR PROTECTED.

Even where the statutory elements of RCW 13.34.180(1) are established, a court must independently determine whether termination is in the child's best interests.<sup>6</sup> Determining whether termination is in a child's best interests is fact-specific and intensive and is not subject to mathematical calculation.<sup>7</sup> Although the standard is circumstance dependent and somewhat imprecise, "continuity of established relationships is a key consideration."<sup>8</sup>

In making this determination, trial courts need information regarding a child's interests not only from the State's viewpoint, but from

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<sup>6</sup> RCW 13.34.190(2).

<sup>7</sup> *In re Dependency of J.B.S.*, 123 Wn. 2d 1, 11, 863 P.2d 1344 (1993).

<sup>8</sup> *In re Parentage of L.B.*, 155 Wn. 2d 679, 122 P.3d 161 (*McDaniels v. Carlson*, 108 Wn. 2d 299, 312-313, 738 P.2d 254 (1987) (citation omitted)).

the child's as well. Although their interests are the central focus of these proceedings, children are powerless and voiceless without an effective advocate.<sup>9</sup> Consequently, Washington courts generally appoint a guardian ad litem to represent dependent children and provide the court with first-hand, independent information regarding their circumstances, interests and needs.

Here, A.R.'s court appointed guardian ad litem substantially failed to fulfill her statutory duties and thus had no first-hand information regarding his circumstances and interests. As a result, the information presented at trial was one-sided and the trial court lacked the information it needed to determine A.R.'s best interests.

- a. Children's interests in dependency and termination proceedings include fundamental liberty and privacy interests in a continued relationship with their parents.

It is well recognized that "[t]he liberty interest ... of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court."<sup>10</sup> To protect these bonds, parents in dependency/termination

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<sup>9</sup> *In re Parentage of L.B.*, 155 Wn. 2d 679, 712 n.29, 122 P.3d 161 (2005) ("When adjudicating the 'best interests' of the child, we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless.")

<sup>10</sup> *In re Parentage of L.B.*, 155 Wn. 2d. 679, 709-10, 122 P.3d 161 (2005) citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 (1944); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and*

proceedings in Washington are afforded party status including the right to representation by an attorney.<sup>11</sup>

Many courts have recognized reciprocal protections for children. In 1985, the Washington State Supreme Court was asked to determine whether a child's due process rights had been violated where the state, acting as guardian for the child pursuant to statute, failed to take reasonable steps to determine the accuracy of its paternity determination.<sup>12</sup> Recognizing that "it would be ironic to find issues of parent-child ties are of constitutional dimension when the parents' rights are involved but not the children's," the court stated, "The importance of familial bonds accords constitutional protection to the parties involved in judicial determinations of the parent-child relationship. These protections are found when the State seeks to terminate a parent-child relationship."<sup>13</sup>

Similarly, in the context of a federal claim under 42 U.S.C. § 1983, the Ninth Circuit held that the "constitutional interest in familial

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*Mary*, 268 U.S. 510, 534-35(1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)); accord *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

<sup>11</sup> RCW 13.34.090. See also *In re Luscier's Welfare*, 84 Wn. 2d 135, 524 P.2d 906 (1974) (Parent's right to counsel in dependency proceedings mandated by the 14th amendment and Art. 1 § 3 of the Washington State Constitution).

<sup>12</sup> *State v. Santos*, 104 Wn. 2d 142, 143, 702 P.2d 1179 (1985).

<sup>13</sup> *Id.* at 143. See also *In re Custody of Shields*, 157 Wn. 2d 126, 130, 136 P.3d 117 (2000) (Bridge, J. concurring) (recognizing constitutional protection of a child's interest in his or her familial bonds as stated in *Santos*); *In re C.R.B.*, 62 Wn. App. 608, 814 P.2d 1197 (1991) (Child has an interest in preventing the erroneous termination of parental rights) citing *Santosky v. Kramer*, 455 U.S. 745, 765 (1982) ("[T]he parents and the child share an interest in avoiding erroneous termination. . ."); *Santos*, 104 Wash.2d at 148 (child has the right to accurate determination of parentage and, accordingly, the right to counsel in a paternity proceeding).

companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.”<sup>14</sup> In fact, the court noted the argument could be made that “a child has an even greater interest in the continued life of a biological parent than vice versa because often the parent has or can have other biological children, whereas a child can never replace a biological parent.”<sup>15</sup>

*Smith*’s holding extended the substantive right beyond custody by recognizing a constitutional right to a companionship interest as well. “When, as in this case, a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationships does not, however, justify constitutional protection for one but not the other. We hold that a child’s interest in her relationship with a parent is sufficiently weighty by itself to constitute a

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<sup>14</sup> *Smith v. Fontana*, 818 F.2d 1411, 1416 (9th Cir. 1987), *cert. denied* 484 U.S. 935 (1987) (overruled on other grounds); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999). *See also* *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (“Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one’s life.”)

<sup>15</sup> *Smith*, 818 F.2d at 1418, n. 10.

cognizable liberty interest.”<sup>16</sup>

Likewise, in his dissent in *Troxel*, Justice Stevens commented on the reciprocal rights of children, opining that “it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interest be balanced in the equation.”<sup>17</sup>

- b. Dependent children also have a substantive due process right to be reasonably free from harm while in State custody.

Children’s interests during dependency and termination proceedings extend beyond that of preserving parental bonds. Dependent children placed in foster care are subject to numerous decisions of import by the State involving their care and welfare. As in this case, they often

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<sup>16</sup> *Id.* at 1419.

<sup>17</sup> *Troxel*, 530 U.S. at 71. See also *Bellotti v. Baird*, 433 U.S. 622, 626, (1979) (“Both parents and children in a familial relationship are protected by the U.S. Constitution.”); *Quillion v. Walcott*, 434 U.S. 246, 255(1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Franz v. United States*, 707 F.2d 582, 595 (1983) (“It is beyond dispute that ‘freedom of personal choice in matters of family life is a fundamental liberty interest’ protected by the Constitution...among the most important of the liberties accorded this special treatment is the freedom of the parent and child to maintain, cultivate, and mold their ongoing relationship”); *Kenny A ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353, 1360 (2005) (children have fundamental interest in maintaining the integrity of the family unit and having a relationship with their biological parents); *Amanda C. v. Case*, 275 Neb. 757, 766, 749 N.W. 2d 429 (2008) (“[I]t is clear therefore that both parents and their children have cognizable substantive due process rights to the parent-child relationship.”); *Johnson v. Hunter*, 447 N.W. 2d 871, 876 (Minn. 1989) (“Establishment and continuance of the parent-child relationship ‘is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.’”); *Espinoza v O’Dell*, 633 P.2d 455 (Colo. 1981) (recognizing a liberty interest in the mutual relationship between child and parent).

risk multiple placements, isolation from relatives, medical and mental health evaluations and treatment, and even involuntary commitment.

In recognition of these risks, the Washington State Supreme Court has held that foster care children have a substantive due process right to be reasonably safe while in State custody.<sup>18</sup> To guarantee that right, “the State, as custodian and caretaker of foster children, must provide conditions free of unreasonable risk of danger, harm, or pain and must include adequate services to meet the basic needs of the child.”<sup>19</sup>

Dependent children routinely face risks from multiple out of home placements. “The Washington State Legislature has specifically recognized that “[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support.”<sup>20</sup> As noted by the *Braam* court, frequent movements may “create or exacerbate existing psychological conditions, notably reactive attachment disorder.”<sup>21</sup> “Even relatively short separations may hinder parent-child bonding, interfere with a child’s ability to relate well to others, and deprive the child of the essential loving affection critical to emotional maturity.”<sup>22</sup>

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<sup>18</sup> *Braam v. State of Washington*, 150 Wn. 2d 689, 700, 81 P.3d 851 (2003). *See also* *Kenny A.*, 356 F. Supp. at 1360 (children have fundamental liberty interests at stake in deprivation proceedings including an interest in their own safety, health and well-being.)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 694.

<sup>21</sup> *Id.*

<sup>22</sup> *Nicolson v. Williams*, 181 F. Supp. 2d 182, 185 (E.D. N.Y. 2002). *See also* Michael Wald, *State Intervention on Behalf of “Neglected Children”: A Search for Realistic*

Further, there is a large body of evidence that children in foster care experience adverse effects throughout their lives. Abused children in foster care are “far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population.”<sup>23</sup> As noted by the Legislature in recent amendments to chapter 74.12 RCW, Child Welfare Services:

The legislature finds that research regarding former foster youth is sobering. Longitudinal research on the adult functioning of former foster youth indicates a disproportionate likelihood that children aging out of foster care and those who spent several years in care will experience poor outcomes in a variety of areas, including limited human capital upon which to build economic security; untreated mental or behavioral health problems; involvement in the criminal justice and correction systems, and early parenthood combined with second-generation child welfare involvement.<sup>24</sup>

A dependent child’s right to safety thus necessarily includes

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*Standards*, 27 Stan. L.Rev. 985, 993-94 (1975) (“Removing a child from his family may cause serious psychological damage – damage more serious than the harm intervention was supposed to prevent.”); Failure to Protect Working Group, *Charging Battered Mothers with ‘Failure to Protect’: Still Blaming the Victim*, 27 Fordham Urb. L.J. 849, 857 (2000) (noting that removing children who have witnessed domestic violence from their non-abusive mother re-victimizes the children and increases their fear of abandonment.)

<sup>23</sup> See Joseph Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, Abstract (2007) (citations omitted), [http://www.mit.edu/~jdoyle/doyle\\_fosterlt\\_march07\\_aer.pdf](http://www.mit.edu/~jdoyle/doyle_fosterlt_march07_aer.pdf). See also National Coalition for Child Protection Reform, *Foster Care v. Family Preservation: The Track Record on Safety and Well-Being* available, <http://www.nccpr.org/newissues/1.html> (finding that nearly one-third of foster children in Oregon and Washington State report being abused in a foster home; that in two counties in Georgia, among children whose case goal was adoption, 34% experience abuse, neglect, or other harmful conditions in foster care; and that on every measure, children left within their own homes did better than comparably maltreated children placed in foster care.)

<sup>24</sup> HB 1961, 61st Leg. (Wn. 2009) (Sec. 1, amending RCW 74.13.031, effective October 10, 2010).

interests in accurate medical and mental health evaluations, appropriate education plans, caseworkers who are adequately trained and supervised, placements well matched to the child's needs, caregivers with relevant information and adequate skills to address the child's needs, and appropriate support services in placement to avoid disruptions and multiple moves.<sup>25</sup>

Because removal from their homes is often a traumatic event, dependent children also have interests protected by statute which help preserve family ties. These include the right to be placed with relatives and the right to family visitation where appropriate.<sup>26</sup> According to the Washington State Office of Public Defense, children are ultimately harmed by the suspension of visitation.<sup>27</sup> "Regardless of the ultimate permanency outcome, parental visitation and contact should be encouraged throughout the case so the child is not made to feel abandoned. Even if the case is set for termination rather than reunification,

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<sup>25</sup> Eric Pitchal, 2006 Edward v. Sparer Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L.Rev. 663, 680-82 (2006).

<sup>26</sup> RCW 13.34.130(2) (Placement with relatives shall be given preference); RCW 13.34.136(1)(b)(ii) (Visitation is the right of the family, including the child and parent and "early, consistent, and frequent visitation is crucial for maintaining parent-child relationships.").

<sup>27</sup> Washington State Office of Public Defense, *Dependency and Termination Equal Justice Committee Report*, pp. 19-22 (December 2003) (recommending appropriate levels of visitation taking into account individualized circumstances), <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2003%20DTE%20Report.pdf>.

until the court enters a termination order, family visitation remains the right of the child and the parent and should be facilitated, considering the health, safety and welfare of the child.”<sup>28</sup> Moreover, the frequency and quality of visitation are strong indicators of successful reunification.<sup>29</sup> Thus, dependent children have an interest in appropriate relative placement and appropriately scheduled visitation, structured by trained caseworkers and visitation supervisors.<sup>30</sup>

- c. Children in dependency and termination proceedings have a substantial liberty interest in not being confined unnecessarily for medical treatment.

According to the United States Supreme Court, it is undisputed “that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.”<sup>31</sup> Recognizing that involuntary commitment represents “a massive curtailment of liberty,” the Washington State Supreme Court found “[t]here is no question that due process guaranties must accompany involuntary

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<sup>28</sup> *Id.* at 19, 20. See also Failure to Protect Working Group, *Charging Battered Mothers with 'Failure to Protect': Still Blaming the Victim*, 27 Fordham Urb. L.J. 849, 857 (2000) (noting that removing children who have witnessed violence from their non-abusive mother revictimizes children and increases their fear of abandonment).

<sup>29</sup> *Dependency and Termination Equal Justice Report*, *supra* at 19.

<sup>30</sup> RCW 13.34.380 (“In order to aid social workers and courts in fulfilling these requirements, the department is charged with developing policies and protocols based on current research regarding the structure and quality of visitations and to provide training for caseworkers, visitation supervisors, and foster parents.”).

<sup>31</sup> *Parham v. J.R.*, 442 U.S. 319, 335 (1976).

commitment for mental disorders . . . .”<sup>32</sup> Due process protections are critical not only because they are constitutionally required but because they protect against unnecessary and detrimental commitments.<sup>33</sup> These due process rights extend to minors and adhere, even in the parent-initiated context.<sup>34</sup> In fact, several United States Supreme Court justices have opined that where parents sought to commit a child *under the age of 13*, the federal constitution would require representation for the child and a reasonably prompt post-admission hearing.<sup>35</sup>

Further, in 1962, the Washington State Supreme Court found these due process rights adhere to dependent children facing commitment.<sup>36</sup> In that case, although there was a hearing attended by the minor, the Court found the commitment unconstitutional where the minor was not represented by his own attorney.<sup>37</sup> And, in another context, the Washington State Supreme Court ruled that a parent must seek court

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<sup>32</sup> *In ex rel. T.B. v. CPC Fairfax Hosp.*, 129 Wn. 2d 439, 918 P.2d 497 (1996) citing *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *In re Harris*, 98 Wn. 2d 276, 279, 654 P.2d 109 (1982). See also *In re Quesnell v. State*, 83 Wn. 2d 224, 238-239, 518 P.2d 568 (1974) (holding that full guarantee of due process is necessary in civil commitment proceedings).

<sup>33</sup> *Fairfax*, 129 Wn.2d at 452 (1996) (citations omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640, 651 (1979) (Brennan, J., Marshall, J. and Stevens, J. dissenting).

<sup>36</sup> *State ex. rel. Richey v. Superior Court for King County*, 59 Wn. 2d 872, 878, 371 P.3d 51 (1962).

<sup>37</sup> See also *In re Quesnell*, 83 Wn. 2d 224 (1973) (court invalidates commitment of adult child by her parents where guardian ad litem waived child's right to jury demand, failed to apprise her of the allegations of mental illness, and child was not allowed to be present during entire hearing).

approval before sterilizing a mentally retarded minor child.<sup>38</sup>

These protections are critical because “[e]ven beneficial commitment involves deprivations that have accompanying harmful effects that can be manifested in a very short time.”<sup>39</sup> Freedom of movement is curtailed and closely monitored, evaluations and medications prescribed, and contact with the outside world highly regulated. Upon release, “the stigma of being a former ‘mental patient’ . . . may have grave and lasting consequences for the rest of the person’s life.”<sup>40</sup>

Judicial oversight reduces erroneous commitment by ensuring that admission decisions “are based on sound clinical judgment, family history, a serious mental health need that can’t be met in a less restrictive environment, and the threat of danger to oneself or others.”<sup>41</sup> Erroneous commitment decisions can be even more harmful, if not tragic, for children. “The primary purpose of psychiatric treatment is to alter the patient’s thoughts and behaviors, which has profound implications for adolescents in the critical stages of identity formulation . . . and the use of

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<sup>38</sup> *Matter of Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635 (1980). See also *Matter of Commitment of N.N.*, 679 A.2d 1174 (N.J. 1996) (minor under 14 could not be committed by State in the absence of clear and convincing evidence that minor, without institutional care, was a danger to himself or others).

<sup>39</sup> *Harris*, 98 Wn. 2d at 279.

<sup>40</sup> Kelli Schmidt, “Who are you to Say What My Best Interest Is?” *Minors’ Due Process Rights When Admitted by Parents for Inpatient Mental Health Treatment* (Hereinafter “Who are you to Say?”), 71 Wash. L.Rev. 1187, 1205 (1996) citing *Colyar v. Third Judicial District Court*, 469 F. Supp. 424, 430 (D. Utah 1979); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972).

<sup>41</sup> *Who Are You to Say?*, 71 Wash. L.Rev. at 1215.

psychotropic medications can have a grave impact on an adolescent's physical development."<sup>42</sup> Evidence also suggests that clinicians tend to over-diagnose in the case of adolescents in general and may make inappropriate treatment recommendations.<sup>43</sup>

Oppositional Defiance Disorder is frequently applied to adolescent inpatients, as it was to A.R.<sup>44</sup> According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), ODD is more common in families with marital discord, or where a parent has an emotional disorder, such as maternal depression or substance abuse problems. "An associated feature of ODD may be a 'viscous cycle in which the parent and child bring out the worst in each other . . . . The DSM-IV describes the prevalence of this 'cycle' in families in which child care is given by a succession of different caregivers or in which harsh, inconsistent, or neglectful child rearing practices are common."<sup>45</sup> Accordingly, criticism is emerging regarding the designation of these behaviors as "mental disorders" which merely serves to "pathologize what is ordinarily seen as fairly common adolescent behavior[,]" behavior which would, in adults, be viewed as appropriate in

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<sup>42</sup> *Id.* at 1205-06 citing Peter Broggin & Ginger Ross, *The War Against Children* (1994) (discussing neurological damage and growth inhibition caused by Ritalin).

<sup>43</sup> *Who are you to Say?*, 71 Wash. L.Rev. at 1215 citing Gary B. Melton., *Family and Mental Hospitals as Myths: Civil Commitment of Minors*, Children, Mental Health, and the Law 151, 157 (1984).

<sup>44</sup> *Id.* at 1210 citing Lois Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. Rev. 773, 790, n. 98 (1988).

<sup>45</sup> *Id.* citing Weithorn, *supra* at 93.

response to abuse and neglect. Yet, diagnoses of these “disorders” “continues to be grounds for involuntary inpatient admissions today.”<sup>46</sup>

These findings explain why the DSM-IV is coming under “strong criticism for its increasing number of vague and elastic ‘diagnoses’ of ‘disorders’ that almost exclusively affect children and adolescents.”<sup>47</sup> And they underscore why commitment of juveniles requires judicial oversight, even with parental consent.<sup>48</sup>

d. A.R.’s interests implicated in these proceedings were not adequately protected by his guardian ad litem.

All the interests and rights listed above were implicated in this case. During these proceedings, A.R was subjected to and will continue to be subject to uncertain placements with changes in caregivers, schools, friends, services and providers. He was committed to a state psychiatric hospital for over a year without judicial oversight (RP 308, 329, 366); he underwent numerous evaluations, diagnoses, the administration of psychotropic drugs, and health care by an ever evolving number of providers (RP 61,312, 315-325, 359-61; Supp. CP Ex. 18); visitation with his mother ended in September 2004 (RP 94) and all contact ceased by February 2005 (Supp. CP Ex. 7; RP 362-65, 376); and he had very little

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<sup>46</sup> *Id.* at 1211 (citations omitted).

<sup>47</sup> *Id.* (citations omitted).

<sup>48</sup> *See also Fairfax*, 129 Wn. 2d at 444, n.2 (citing scholarly publications criticizing as unreliable and invalid the methods and mode of prior DSM classification systems).

contact with his sister or other relatives or friends. (RP 362 – 667, 376, 461-62.) Finally, after four years in State care, his right to a continued relationship with his mother has been lost in large part because his needs are deemed too high. (CP 90.)

Despite the gravity of these interests, most of which are legal, children in dependency/terminations do not have the right to notice, to be heard, nor do they have the right to representation by an attorney. RCW 13.34.090; 100 (6). Rather, in Washington, their only advocate is a non-lawyer guardian ad litem.<sup>49</sup>

Federal law states that it is the role of the guardian ad litem “to obtain first-hand, a clear understanding of the situation and needs of the child, and to make recommendations to the court concerning the best interests of the child.”<sup>50</sup> To that end, Washington courts generally appoint a guardian ad litem to “represent and be an advocate for the best interests” of dependent children.<sup>51</sup> The duties and responsibilities of guardians ad litem under Title 13 are delineated by statute and include the following:

- a. To investigate, collect relevant information about the child's situation, and report to the court factual information regarding the

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<sup>49</sup> This right is not absolute. Washington is the only state which allows a court to *not* appoint a guardian ad litem where the court, for good cause, finds such appointment unnecessary. RCW 13.34.100(1); Office of the Family and Children's Ombudsman (OFCO), *Report on Guardian Ad Litem Representation of Children in Child Abuse and Neglect Proceedings* at 4 (1999),

[http://www.governor.wa.gov/ofco/reports/ofco\\_199901.pdf](http://www.governor.wa.gov/ofco/reports/ofco_199901.pdf).

<sup>50</sup> 42 U.S.C. 510a(b)(2)(A)(ix).

<sup>51</sup> RCW 13.34.105(1)(f); GALR 2(a).

best interests of the child;

- b. To meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court;
- c. To monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order;
- d. To report to the court information on the legal status of a child's membership in any Indian tribe or band;
- e. Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties.<sup>52</sup>

Guardians ad litem must also perform the responsibilities set forth in the Washington State Superior Court Guardian Ad Litem Rules

(GALR). These include the following duties:

- a. To investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child;
- b. To maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom;
- c. To make reasonable efforts to become informed about the facts of the case;
- d. To contact all parties, perform duties in a timely manner, and to examine material information and sources of information, taking into account the positions of the parties;

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<sup>52</sup> RCW 13.34.105.

- e. To treat all parties with respect, courtesy, fairness and good faith, and
- f. To explore concurrent planning and make a timely recommendation to the court for the permanent plan for the child.<sup>53</sup>

Not only are these laws and rules the only procedural safeguard most children subject to dependency/termination proceedings possess to ensure their rights are protected against arbitrary or harmful state action, they are also the primary procedural safeguard courts have to ensure the proceedings are fair and balanced. These laws and rules evince the recognized importance and benefit of the guardian ad litem's independent investigation and recommendations to a dependency court.<sup>54</sup>

In this case, the guardian ad litem was a Court Appointed Special Advocate, or "CASA" volunteer, without a college degree and no legal or counseling training. (RP 431, 478.)<sup>55</sup> Unfortunately, the CASA substantially failed to fulfill her responsibilities to the trial court and to the children, particularly to A.R. As her testimony showed, she failed to meet, interview or observe the children in any meaningful sense. (433, 485-86.) Indeed, she stated she *never* met A.R. and was thus in no position to independently evaluate his needs or interests. (RP 485.) By not

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<sup>53</sup> GALR 2; GALR 3(b).

<sup>54</sup> *In re Guardianship of Stamm v. Crowley*, 121 Wn. App. 830, 91 P.3d 126 (2004).

<sup>55</sup> A CASA volunteer has the same duties and responsibilities as a guardian ad litem in ch. 13.34 RCW proceedings. RCW 13.34.030 (8).

visiting A.R. in his placements, she was incapable of reporting factual and independent information to the trial court about his well-being therein and the suitability of his care. (RP 440, 489-90.)<sup>56</sup> She never spoke with A.R. or D.R. about their mother but left that to the therapist and so had no first-hand information for the court regarding the children's views or hopes regarding reunification or potential benefits from the continuation of their relationships. (RP 485, 509.)<sup>57</sup>

She did not contact all the parties. She *never* spoke to either parent, but relied exclusively on the social worker. (RP 437, 479-81) She never spoke to any of the children's care providers, foster parents, or social workers in Missouri. (RP 434, 481-82.) She did not remember speaking with Ms. Roberts' counselors (RP 478-79) and did not visit her in her home. (RP 513.) She did not contact the children's relatives, had only "slight knowledge" of the maternal grandparents (RP 483-84), and only spoke to the paternal grandparents once when they visited Washington from Missouri. (RP 480, 521.) Without speaking to or visiting relatives, it was impossible for the CASA to form her own opinion regarding relative contact or placement. Without visiting the mother,

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<sup>56</sup> Apparently she never spoke to these foster parents. Her records on A.R. show contact with only one foster parent by phone on 1/8/08 which was during A.R.'s placement at CSTC. (Supp. CP Ex. 201.)

<sup>57</sup> She did report that A.R. asked about a "trust thing" with his mother, which she interpreted to mean the termination. (Supp. CP 41 at 10, 86).

relatives or foster parents, she could not fulfill her duty to engage in meaningful concurrent permanency planning or make independent recommendations regarding visitation.

As to A.R.'s interests and wishes, she deferred to his therapists. Dr. Estelle, however, admitted she had been out of touch with A.R. and was thus unable to comment on his circumstances. (RP 245.) Dr. Norris testified that A.R. was extremely guarded about his history and disclosed very little to staff. (RP 354.) Moreover, both therapists testified that, by State directive, their treatment focused not on the biological family but on stabilization for placement elsewhere. (RP 218-219, 365-67, 369 – 371.) By allowing the State to substitute its judgment as to what was in A.R.'s best interests, these therapists had little to no information regarding A.R.'s interest and wishes regarding his family or historical knowledge of their relationships.

Further, the CASA's testimony regarding A.R.'s behaviors showed a distinct lack of courtesy and respect. Had she made an effort to meet this child and to understand first hand his situation and needs, she might not have accepted at face value the derogatory reports by others. Instead, she had not one positive thing to say about this child at trial. (RP 441-443, 447.)

Dr. Guzzardo's 2004 evaluation identified important elements for a

potentially successful treatment plan for A.R. (Supp. CP Ex. 18.) Therein she questioned the diagnoses and prescribed medications as of 2004 and emphasized the importance of addressing not just his behaviors but the emotional piece – his loss, abandonment and fears. She cautioned that a behavior plan must provide rewards for good behavior and not simply punishment and warned of the dangers of further placements and hospitalizations.

Had the CASA visited A.R. in his placements and schools prior to commitment, she could have assessed whether a behavioral plan in conformity with Dr. Guzzardo's recommendations had indeed been implemented. She would at least have been positioned to question whether A.R.'s behaviors were caused solely by early trauma or perhaps causally linked to environmental factors such as unskilled caregivers, enforced isolation from family, lack of continuity in educational, medical and mental health services, or inappropriate discipline (e.g. digging ditches (RP 56)). Without on the ground knowledge, she was unequipped to advocate for reevaluation of diagnoses, medications, therapists, visitation and placements during the dependency as needed.

Given the multiple failed placements attributed to A.R.'s behaviors, it is reasonable to ask whether he would have needed in-patient treatment in a locked facility for over a year had he actually received

appropriate services. Further, had A.R. had an advocate capable of enforcing his right to implementation of an appropriate treatment plan at the beginning of the dependency, his behavior may have moderated by the time of trial such that his behavior would not have been cited as a primary barrier to visitation and reunification with his mother.

Without an effective advocate, A.R. was at risk, not only of harm while in the State's custody, but of that harm contributing to the termination of his right to a relationship with his family. Without a voice, his interests were not adequately protected and represented to the trial court.

- e. In the absence of meaningful and effective advocacy by his CASA, the trial court was presented with only the State's position regarding A.R.

In a 1998 Washington Court of Appeals Case, a mother asked the court to vacate an order terminating her rights based in part on the court's failure to appoint a guardian ad litem.<sup>58</sup> The mother failed to appear at trial and the only evidence provided was by the State. The court expressed its dismay that in over four years of proceedings, "[N]o one was present to investigate the circumstances or speak on behalf of the children. We are not certain that the one-sided story presented to the trial court is ultimately fair to [the mother] and the children because we cannot be confident that

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<sup>58</sup> *Dependency of A.G. and T.G. v. Grey*, 93 Wn. App. 268, 968 P.2d 424 (1998).

the decision fully serves the best interests of the children when they had no advocate.”<sup>59</sup> Although the court declined to vacate the order, it found some evidence of a relationship between the mother and children and remanded for a hearing to determine the prejudice to the children. *Id.* at 430. “If the court determines there was prejudice, it should vacate, appoint a guardian, and hold another termination hearing.” *Id.*

Here, unlike *A.G.*, there was testimony beyond that of the State’s social workers - two therapists, the CASA, and Ms. Roberts. Dr. Norris, was formerly a DSHS employee (RP 307) and is now employed by a state facility. (RP 329.) Dr. Estelle contracts with the State for at least a third of her practice. (RP 177.) Both testified that the State dictated treatment goals. The CASA had almost no first hand knowledge, but relied almost exclusively on the therapists, the social workers and foster parents, all of whom were paid for and directed by the State.<sup>60</sup> Ms. Roberts having been denied contact with A.R. for almost four years, was unable to speak to A.R.’s current circumstances.

Thus, as in *A.G.*, the facts as to A.R.’s interests were almost exclusively from the State and its agents and no one was present to speak on behalf of this child.

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<sup>59</sup> *Id.* at 281.

<sup>60</sup> The CASA’s activity report shows contact with only one foster parent – by phone on January 8, 2008. (Supp. CP Ex. 201 at 3.)

5. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO APPOINT COUNSEL FOR A.R. UNDER RCW 13.34.100(6).

Although Washington courts generally rely on a guardian ad litem to represent children in dependencies and terminations, the courts have discretion to appoint counsel for these children. "If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position."<sup>61</sup>

While no one asked for such appointment for A.R., Ms. Roberts did request counsel for D.R. (RP 165, 410.) In the court's colloquy with the parties on this issue, the record shows that neither the CASA, the State's attorney, nor the trial court appreciated the risks at stake for dependent children in these proceedings. Rather, their concern focused on D.R.'s emotional state and capacity to direct counsel. (RP 418-19, 424-426.) This evinces a concerning lack of understanding regarding the interests and risks faced by dependent children.

According to the American Bar Association (ABA), "many service providers do not understand or recognize the nature of the role of a lawyer

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<sup>61</sup> RCW 13.34.100(6).

for the child or that person's importance in court proceedings."<sup>62</sup>

Recognizing that fundamental interests are at stake, the ABA's position is that all children subject to court proceedings involving allegations of abuse and neglect should have legal representation.<sup>63</sup>

The issue is not whether the children have the capacity to direct representation. Indeed attorneys routinely represent children of varying stages of development and capacity when their legal interests are at risk and, under the rules, attorneys are charged with determining the extent to which the child can direct the lawyer and, to the extent possible maintain a normal-client relationship with the child.<sup>64</sup> Rather, the issue is the risk of harm to children's legal interests without counsel.

As argued herein, the risk of erroneous decisions within the dependency is high. In *Braam*, the court expressly refused to find a private right of action for the failure of the State to provide adequate and statutorily required services for the benefit of foster children. Rather, a child aggrieved by multiple placements, inappropriate treatment or wrongful visitation decisions is expected to raise these issues during the

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<sup>62</sup> American Bar Association, *ABA Standards of Practice for Lawyers who Represent Children in Neglect and Abuse Cases* (1996), Standard H-3, <http://www.abanet.org/child/repstandwhole.pdf>.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> Wn. State Rules of Professional Conduct (RPC) 1.14; ABA Standard B-3.

dependency.<sup>65</sup> Clearly, without effective legal representation, neither A.R. nor any other child is able to do so.

A.R. was powerless to challenge the care and custody decisions impacting his interests without an advocate who was willing and able to bring issues of concern before the court and to litigate these as necessary. Arguably, even if the CASA had endeavored to investigate A.R.'s circumstances on the ground, it is doubtful she had the training or capacity to safeguard these interests.

With counsel, however, A.R. could have challenged the adequacy and efficacy of services provided, including the professional standards of evaluators, the administration of psychotropic medications, the no-contact orders, the lack of appropriately structured visitation, and the multiple placements with the concomitant loss of continuity in education, community and services. In addition, he could have challenged his admission to an in-patient psychiatric hospital.

In-patient mental health treatment for minors in Washington is governed by chapter 74.13 RCW. Under this chapter, once admitted, a child has the right to visitors at reasonable times, reasonable access to a telephone, both to make and receive confidential calls, to have ready access to letter-writing materials, including stamps, to send and receive

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<sup>65</sup> *Braam*, 150 Wn. 2d at 711-12 citing RCW 13.34.120, 130 (additional citations omitted.)

uncensored correspondence through the mail, and to adequate care and individualized treatment.<sup>66</sup> A child may also petition a court for release under specified circumstances.<sup>67</sup> And a child who was involuntarily committed has the right to a commitment hearing with full due process rights including the right to appointment of counsel.<sup>68</sup>

At trial, Dr. Norris testified that court oversight was unnecessary for A.R.'s admission to CSTC because it was *voluntary*. (RP 366.) In Washington, parental consent is required for admission of a dependent minor for in-patient mental health treatment.<sup>69</sup> The record is silent as to whether either of A.R.'s parents gave consent and whether this consent, if given, was made with the aid of counsel. Nevertheless, it is clear A.R. had no attorney and no judicial oversight regarding his admission or his fourteen months of in-patient psychiatric care.<sup>70</sup>

By contrast, with an attorney, A.R. could have challenged his admission, including his admitting diagnoses, his lack of contact with family and friends, and his release from CSTC into a home that does not conform to Dr. Norris' recommendations. (RP 341, 345.) Under the *Braam* settlement agreement and DSHS policy, children identified as SAY

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<sup>66</sup> RCW 71.34.355.

<sup>67</sup> RCW 71.34.610.

<sup>68</sup> RCW 71.34.330; .740.

<sup>69</sup> RCW 13.34.320.

<sup>70</sup> A.R. entered CSTC on May 15, 2007 and was released on August 13, 2008. (RP 308, 803.)

“*must* be placed with caregivers who have received specialized training and have a plan to address safety and supervision issues.”<sup>71</sup> If his current home does not conform to these requirements, A.R. is at risk of another failed placement.

Without an attorney, A.R. was not only unaware of his legal interests, he was and remains unable to protect them. All of these interests ultimately bear on whether or not his high needs render placement with his mother impossible and whether a continued relationship with her is in his best interest. As a real party in interest, he would have had the right to notice as to the decisions being made about him, to be present at court hearings, to have his views known and to testify as appropriate in the dependency and termination actions.

A juvenile court abuses its discretion “if its decision is manifestly unreasonable or based on untenable grounds, considering the purposes of the trial courts discretion.”<sup>72</sup> Discretion is abused where no reasonable person would take the court’s view.<sup>73</sup>

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<sup>71</sup> See Braam Oversight Panel, *Braam Settlement: Panel Decisions on Children’s Administration Revised Compliance Plan # 5* at 8 (Feb. 12, 2009), <http://www.braampanel.org/DecisionsCompPlan0209.pdf> (emphasis added); DSHS Policy Manual, Practices and Procedures, § 45363(C) at [http://www.dshs.wa.gov/ca/pubs/mnl\\_pnpg/chapter4\\_4530.asp](http://www.dshs.wa.gov/ca/pubs/mnl_pnpg/chapter4_4530.asp).

<sup>72</sup> *In re Marriage of Kovacs*, 121 Wash. 2d 795, 801, 854 P.2d 629 (1993). See also *Cagle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s decision).

<sup>73</sup> *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584, 585 (1970).

In Washington, there is no requirement that a party request appointment of counsel for a child; a court may do so *sua sponte*. “It is the role of the court to ensure that the state is acting in the best interests of each child who is the subject of a child and abuse neglect hearing,” and, to that end, “courts are to regularly review the provision of state services to every dependent child and his or her family to ensure they are receiving services for which they are eligible.”<sup>74</sup>

Here, the same judge presided over the dependency and termination proceedings from 2004 through trial and should have previously recognized the risk to A.R. without counsel, particularly in light of his multiple failed placements and ultimate commitment. (Supp. CP Ex. 5, 7, 8, 10, 11, 14, 15, 16, 17.) Although the trial court did not appoint an attorney for A.R. during the dependency, its duty to do so was surely triggered when the CASA testified at trial that in almost four years, she had never met A.R. and had only spoken to him on isolated occasions.

According to the Washington State Office of the Family and Children’s Ombudsman, CASAs must have “regular in person contact with the child sufficient to have an in depth knowledge of the case, the child’s progress, well being and appropriateness of placement to make fact

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<sup>74</sup> Washington State Family and Children’s Ombudsman, *Report on Guardian ad Litem Representation of Children in Child Abuse and Neglect Hearings* at 9 citing *In re Dependency of J.B.S.*, 123 Wn.2d at 8-11; RCW 13.34.190.

based recommendations to the court.”<sup>75</sup> Reasonable persons could not differ that the CASA’s failure to initiate and maintain in person contact with A.R. constituted ineffective representation requiring appointment of counsel. The trial court abused its discretion by failing to appoint counsel for A.R.

6. THE TRIAL COURT COMMITTED MANIFEST ERROR BY NOT APPOINTING AN ATTORNEY TO PROTECT A.R.’S INTEREST IN THESE PROCEEDINGS.

- a. Due process requires appointment of an attorney for all children in dependency and termination actions.

Whether due process requires that a child be provided an attorney in dependency/termination proceedings is a matter of law reviewed *de novo*.<sup>76</sup> The essential requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case.<sup>77</sup>

In general, courts undertake the *Mathews v. Eldridge* analysis

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<sup>75</sup>Washington State Office of the Family and Children’s Ombudsman, *Loss of Confidence: A Crisis of Confidence in the Child Welfare System in Colville*, p. 48 (May 2009), [http://www.governor.wa.gov/ofco/reports/colville\\_investigation\\_2009.pdf](http://www.governor.wa.gov/ofco/reports/colville_investigation_2009.pdf). See also *Child Welfare Policy Manual*, § 2.1D CAPTA, Assurances and Requirements, Guardians ad Litem (May 7, 2009) citing (Cong. Rec. H11149 (daily ed. Sept. 25, 1996) (noting that guardians ad litem often had no contact with children and made uninformed recommendations to courts, Congress added language to clarify that such individuals must have first-hand understanding of the situation in order to make informed recommendations to courts) at

[http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp\\_pf.jsp?id=2](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?id=2).

<sup>76</sup>*Bellevue School District v. E.S.* 148 Wn. App. 205, 211, 199 P.3d 1010 (2009) citing *In re Truancy of Perkins*, 93 Wn. App. 590, 593, 969 P.2d 1101 (1999).

<sup>77</sup>*Burman v. State*, 50 Wn. App. 433, 440, 749 P.2d 708, review den’d, 110 Wash.2d 1029 (1988).

when determining what process is due under a certain circumstance.<sup>78</sup>

Under this test, courts consider: (1) the private interest at stake, (2) the risk that the procedure used will result in error and the probable value of additional or substitute procedural safeguards, and (3) the government's interest in the procedure used and the fiscal or administrative burden of substitute or additional procedural safeguards.<sup>79</sup>

“The right to appointed counsel in a civil case depends on whether the individual will be deprived of a fundamental liberty interest.”<sup>80</sup> As argued above, children have fundamental liberty and privacy interests at stake in dependency/termination proceedings, including the right to familial relationships and the right to be reasonably free from harm while in State custody. Further, a child's liberty interests are at risk where, as the result of parental termination, the child may be committed to the care of an institution.<sup>81</sup> These rights trigger constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution and/or Art. 1, § 3 of the Washington Constitution.<sup>82</sup>

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<sup>78</sup> E.S., 148 Wn. App. at 212, 213 citing *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>79</sup> *In re Harris*, 98 Wn. 2d 276, 285, 654 P.2d 109 (1982) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)).

<sup>80</sup> *In re Truancy of Perkins*, 93 Wn. App. at 594, abrogated on other grounds by *Bellevue School District v. E.S.*, 148 Wn. App. 205, 199 P.3d 1010 (2009).

<sup>81</sup> *In re Lucier's Welfare*, 84 Wn. 2d 135, 139, 524 P.2d 906 (1974).

<sup>82</sup> Although the Wash. Const. Art. 1 § 3 is identical to the Fourteenth Amendment, it has been interpreted to provide greater protection with respect to the right to counsel in cases where fundamental rights are at risk. See *In re Grove*, 127 Wn. 2d 221, 237, 897 P.2d 1252 (1995) (no right to appointed counsel when only financial or property interests are

Under the current scheme, children are not provided notice or an opportunity to be heard. Yet as noted by the *Braam* court, their interests implicated in these proceedings, many of which may lead or contribute to an ultimate finding of termination, must in general be litigated during the dependency.<sup>83</sup> Non-attorney guardians ad litem are not trained to recognize legal interests, nor are they charged with representing a child's legal interests. Thus they are generally ill-equipped to carry out the tasks necessary to protect these interests.

Moreover, these risks are not mitigated by the appearance of parents or the State. Although the State, parents, and children all have a common interest in protecting the child's welfare and avoiding erroneous termination, their interests are not coterminous. The State also has pecuniary, institutional and programmatic needs that may conflict with the specific needs of a child.<sup>84</sup> Likewise, parents' interests diverge from their children's when a dependency order is entered.<sup>85</sup> Without party status and counsel of their own, the risk of error is high that erroneous decisions will

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at stake as these are not fundamental liberty interests). *See also In re Lucier's Welfare*, 84 Wn. 2d at 137 (interested parties must be afforded full panoply of due process safeguards in deprivation hearings).

<sup>83</sup> *Braam*, 150 Wn. 2d at 712 (citations omitted.)

<sup>84</sup> *Kenny A.*, 356 F. Supp. at 1359, n.6. *See also Lassiter v. Dept. of Social Services of Durham County N.C.*, 452 U.S. 18, 28 (1981) (State has pecuniary interest in avoiding expense of appointed counsel and lengthened proceedings caused thereby);

<sup>85</sup> *Santosky*, 455 U.S. at 761 (1982).

be made regarding dependent children.<sup>86</sup>

The risk of error is also high based on the subjective “best interest” standard. According to the United States Supreme Court, this standard is imprecise, “leaves determinations unusually open to the subjective values of the judge” and serves to “magnify the risk of erroneous fact finding.”<sup>87</sup>

Applying these factors to the case at hand, the State’s, parents’ and children’s interests in safeguarding children’s health, welfare and safety while in State care and preventing erroneous terminations are great and outweigh the one countervailing interest – the State’s administrative and fiscal interests. “Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard.”<sup>88</sup> Without counsel, children’s interests during dependencies and terminations are inadequately protected. Due process requires the right to counsel for children in dependency/termination proceedings.

b. The failure to appoint counsel for A.R. below was manifest error.

Generally, an issue may not be raised for the first time on appeal.<sup>89</sup>

However, an exception is made allowing consideration of a manifest error

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<sup>86</sup> Given the Braam Panel’s recommendations regarding reducing risks to foster children in Washington and their concerns regarding the State’s compliance with these, there is reason to believe children in foster care remain at risk. See e.g. Braam Oversight Panel website available at <http://www.braampanel.org/>.

<sup>87</sup> *Santosky*, 445 US. at 762.

<sup>88</sup> *E.S.*, 148 Wn. App. at 219 citing *Mathews v. Eldridge*, 424 U.S. at 348.

<sup>89</sup> RAP 2.5(a).

affecting a constitutional right.<sup>90</sup> To be “manifest,” a constitutional error must cause actual prejudice to the litigant.<sup>91</sup> Actual prejudice requires a plausible showing that the asserted error had practical and identifiable consequences in the case.<sup>92</sup>

A.R. has substantive due process rights to be reasonably free from harm while in the State’s custody and to a constitutionally protected interest in his continued relationship with his parents, both of which were inadequately protected below in the absence of counsel. The practical and identifiable consequences were argued in the sections above and show that without counsel, A.R. was unable to secure the services and visitation he needed to address the high needs identified by the trial court as preventing his return to his mother and the trial court was unable to secure the independent analysis regarding A.R.’s best interests necessary for a fair trial. As such, the failure to appoint counsel for A.R. was manifest error.

c. The failure to appoint counsel for A.R. constituted structural error.

A.R. argues that the failure to appoint counsel to protect his constitutional liberty interests was error. Generally, when a trial error is of constitutional magnitude, the decision will be upheld only if it is

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<sup>90</sup> RAP 2.5(a)(3).

<sup>91</sup> *Parrell-Sisters MHC, LLC v. Spokane County*, 147 Wn. App. 356, 195 P.3d 573 (2008).

<sup>92</sup> *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

harmless.<sup>93</sup> However, where the error is structural such that the entire trial mechanism is affected, it is not subject to harmless error analysis.<sup>94</sup>

“Structural errors are those which create ‘defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’ ”<sup>95</sup> For example, according to the United States Supreme Court, the total deprivation of the right to counsel in a criminal trial can never constitute harmless error because the entire trial is affected from beginning to end.<sup>96</sup> In *United States v. Gonzalez-Lopez*, the Court also found the deprivation of the *choice* of particular counsel (arguably a lesser deprivation than complete deprivation) was also a structural error defying analysis under harmless error.<sup>97</sup> Justice Scalia explained such a deprivation was distinct from ineffective assistance of counsel, subject to harmless error analysis, because for the latter “we can assess how those mistakes affected the outcome.”<sup>98</sup> To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to engage in “a speculative inquiry into what might have occurred in an alternate universe.” *Id.* at 150.

While analogous to the denial of counsel in a criminal trial, the

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<sup>93</sup> *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); *State v. Pruitt*, 145 Wn. App. 784, 788, 187 P.3d 326, 328 (2008.)

<sup>94</sup> *In re Bush*, 164 Wn.2d 697, 193 P.3d 103, 108 (2008) (citation omitted).

<sup>95</sup> *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008.)

<sup>96</sup> *Arizona v. Fulmanente*, 499 U.S. 279, 307 (1991) citing *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>97</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

<sup>98</sup> *Id.* at 150.

situation presented here is, in reality, much worse. Here, A.R.'s interests went unprotected not only in a single trial, but through countless dependency hearings over more than three years. It would be impossible to reconstruct what would have happened had A.R.'s interests been represented below. The denial of counsel here, and in other similar cases, creates a defect in the dependency proceedings framework under which the legal interests of children are adjudicated in their absence. Such a defect in this process presents structural and not reversible error.

## V. CONCLUSION

In her concurring opinion in *Shields*, Washington State Supreme Court Justice Bridge stated,

"I recognize that the present case does not give this court the opportunity to fully flesh out what rights a child may hold in circumstances like those presented here. But I hope that if and when the time comes to define what role the child must play in a decision about his or her life, the contours of that role will be informed by the recognition of some degree of constitutional protection the child holds to stable and healthy family relationships. Moreover, I would hope that in the future our state's courts and our family and child welfare laws move more cohesively toward a recognition of the child's independent rights in questions concerning his or her living arrangement and associations. Such considerations should be manifestly proper in a proceeding where it is ultimately the child who has the most at stake."<sup>99</sup>

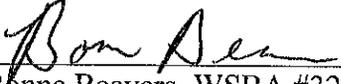
A.R. argues the opportunity is at hand in this case to reach these

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<sup>99</sup> *Custody of Shields*, 157 Wn. 2d at 151-54 (Bridge, J. concurring.)

issues. A.R. and his sister had legal interests and rights which were inadequately protected without representation by counsel in these proceedings. Without effective representation, the proceedings were inherently flawed. A.R. respectfully requests this Court to reverse the termination orders in this case and to remand with orders to appoint counsel for A.R. and D.R. in the ongoing dependency proceedings below.

Respectfully submitted this 3<sup>rd</sup> day of June, 2009.

  
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Bonne Beavers, WSBA #32765  
Center for Justice  
Attorney for Respondent A.R.

## CERTIFICATE OF SERVICE

I declare under penalty of perjury and the laws of the State of Washington that the following statements are true:

1. On June 5, 2009, I caused to be served a true and correct copy of the Brief of Respondent A.R., by sending it via office e-mail with copy receipt to the following:

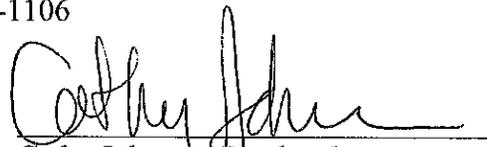
Casey Trupin WSBA # 29287  
Staff Attorney  
emailto:Casey.Trupin@ColumbiaLegal.org

Erin K. Shea McCann WSBA # 39418  
Attorney at Law  
Equal Justice Works Fellow  
Columbia Legal Services  
emailto:Erin.SheaMcCann@columbialegal.org

Jan Trasen WSBA 41177  
Washington Appellate Project  
emailto:jantrasen@gmail.com

2. On June 5, 2009, I caused to be served a true and correct copy of the Brief of Respondent A.R., by hand delivering it to the following:

Kelly E. Konkright  
Washington State Attorney General Office  
1116 W. Riverside Avenue  
Spokane, WA 99201-1106



Cathy Johnson, Paralegal  
Center for Justice  
35 W. Main, Suite 300  
Spokane, WA 99201