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No. 27394-6-III

84132-2

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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

STATE OF WASHINGTON,

Respondent,

v.

TONYA ROBERTS,

Appellant.

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

APPELLANT CHILD D.R.'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED..... 2

A. Assignments of Error..... 2

B. Issues Pertaining to Assignments of Error 2

III. STATEMENT OF THE CASE..... 3

IV. SUMMARY OF ARGUMENT..... 10

V. ARGUMENT..... 13

**A. All Children Have a Due Process Right to Counsel in
 Dependency and Termination Proceedings..... 13**

 1. Every Court That Has Addressed the Issue to Date Has Found
 That Dependent Children Have a Due Process Right to Counsel..... 13

 2. Under the Federal Due Process Test of *Mathews v. Eldridge*
 Dependent Children are Entitled to Counsel 16

 a) Foster Children Have Significant Private Interests at Stake in
 Dependency and Termination Proceedings 17

 (1) Foster Children’s Fundamental Interests Include Their
 Interest in Family Integrity As Well As in Their Own Safety,
 Health, and Well-being 17

 (2) In Addition to Fundamental Liberty Interests, Foster
 Children Have Significant Physical Liberty Interests at Stake in
 Dependency and Termination Proceedings 21

 b) The Significant Risk of an Erroneous Decision in Dependency
 and Termination Proceedings Justifies a Due Process Right to
 Counsel 25

 (1) Foster Children Face a High Risk of Erroneous Deprivation
 of Liberty Interests When Denied Legal Counsel..... 25

 (2) Only By Providing Attorneys for Dependent Children Can
 the State Adequately Mitigate the Risk of Erroneous Deprivation

 30

 c) The Government Can Cite No Countervailing Interest That
 Outweighs the Interests of a Dependent Child 39

(1) Washington State Guarantees Counsel to Children in Less Invasive Civil Proceedings	39
(2) Overwhelming National Consensus Favors Providing Counsel to Dependent Children	40
B. Protection of the Substantive Due Process Rights of Dependent Children Requires Appointment of Counsel.....	42
C. Washington State’s Current Procedure for Appointing Counsel for Dependent Children Fails to Implement Their Constitutional Right to Counsel	43
D. Denial of D.R. and A.R.’s Constitutional Right to Counsel Is Structural Error and Requires That the Order Terminating Parental Rights Be Reversed as a Matter of Law	46
VI. CONCLUSION	49

TABLE OF AUTHORITIES

CASES

Bellevue School District v. E.S., 148 Wn. App. 205, 199 P.3d 1010 (2009) ----- passim

Braam v. State, 150 Wn.2d 689, 81 P.3d 851 (2003) ----- passim

DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998)28

In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006)----- 18

In re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007)-----25

In re Dependency of Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995)-----23

In re Dependency of Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974) -----22

In re Detention of Kistenmacher, 163 Wn.2d 166, 178 P.3d 949 (2008) -49

In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005)----- 1, 16

In re Parentage of Q.A.L., 146 Wn. App. 631, 191 P.3d 934 (2008) ----- 18

In re Sumey, 94 Wn.2d 757, 621 P.2d 108 (1980)----- 19

In re Welfare of G.E., 116 Wn. App. 326, 65 P.3d 1219 (2003)-----22

In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005)-----22

King v. King, 162 Wn.2d 378, 174 P.3d 659 (2007) -----23

State v. Britton, 27 Wn.2d 336, 178 P.2d 341 (1947) -----47

State v. Decker, 68 Wn. App. 246, 842 P.2d 500 (1992)----- 37

State v. Frost, 160 Wn.2d 765, 161 P.3d 361 (2007)-----47

State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996)-----49

State v. Santos, 104 Wn.2d 142, 702 P.2d 1179 (1985)----- 18

Vo v. Pham, 81 Wn. App. 781, 916 P.2d 462 (1996)-----28

Welfare of Myricks,85 Wn.2d 252, 533 P. 3d 841 (1975) ----- 23, 27

OTHER CASES

Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989)----- 20

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302
(1991)----- 47, 48

<i>Bell v. Cone</i> , 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) ----	48
<i>Graham v. Portuondo</i> , 506 F.3d 105 (2d Cir. 2007) -----	49
<i>Hereford v. Warren</i> , 536 F.3d 523 (6th Cir. 2008) -----	48
<i>In re Bridget R.</i> , 49 Cal. Rptr. 2d 507, 41 Cal. App. 4th 1483 (1996) ----	18
<i>In re Derick Shea D.</i> , 804 N.Y.S.2d 389, 22 A.D.3d 753 (2 Dept. 2005)	49
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) -----	21, 22
<i>In the Matter of Jamie TT</i> , 599 N.Y.S.2d 892, 191 A.D.2d 132 (App. Div. 1993)-----	15
<i>Kenny A. ex rel v. Perdue</i> , 356 F.Supp.2d 1353 (N.D. GA 2005) ---	passim
<i>Lassiter v. Dep't of Soc. Servs. of Durham County</i> , 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)-----	22, 27
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) -----	12, 16, 17, 40
<i>Matter of T. M. H.</i> , 1980 Okla. 92, 613 P.2d 468 (1980) -----	36
<i>Roe v. Conn</i> , 417 F. Supp. 769 (1976) -----	14
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) -----	29
<i>State ex rel. T.H. by H.H. v. Min</i> , 802 S.W.2d 625 (Tenn. App. 1990)----- -----	26, 27
<i>Taylor ex rel. Walker v. Ledbetter</i> , 818 F.2d 791 (11th Cir. 1987)-----	24
<i>United States v. Cronic</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 48	
<i>V.F. v. State</i> , 666 P.2d 42 (Alaska 1983) -----	22
L.Ed.2d 409 (2006) -----	36, 48
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) -----	36, 48

STATUTES

20 U.S.C. § 1400 et seq.....	20
------------------------------	----

RCW 7.21.030(1)(e)	24
RCW 13.32A.192(1)(c)	40
RCW 13.34.100(6).....	12, 40, 43, 44
RCW 13.34.105	11
RCW 13.34.138	32
RCW 13.34.165	24, 25
RCW 13.34A.160(1)(c)	40
RCW Chapter 28A.155	20
RCW 28A.225.090(2).....	24
RCW 71.05.300(2).....	40

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV-----	17, 21, 49
Wash. Const. art. I, § 3-----	12, 22, 49
Wash. Const. art. IX, § 1-----	20

RULES

Federal Rule of Criminal Procedure 8(c) -----	48
Juvenile Court Rule 9.2 -----	12, 43
RPC 1.1-----	38
RPC 1.2-----	38
RPC 1.4-----	38
RPC 1.14 -----	38

OTHER AUTHORITIES

A Child’s Right to Counsel: First Star’s National Report Card on Legal Representation for Children (2007)-----	40
American Bar Association Center on Children and the Law, Unique Functions of a Lawyer Appointed to Represent a Child -----	37

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Children's Bureau, Admin. on Children, Youth and Families, Dept. of Health and Human Servs., Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children VII-11 (1999) -----	41
Erik Pitchal, Children's Constitutional Right to Counsel in Dependency Cases, 15 Temp. Pol. & Civ. Rts. L. Rev. 663 (2006) -----	passim
Jacob Ethan Smiles, A Child's Due Process Right to Legal Counsel in Abuse and Neglect Proceedings, 37 Fam. L. Q. 485 (2003) -----	12, 17
Joseph Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 Am. Econ. Rev. 1583 (2007)-----	30
Lisa Hunter Romanelli et al., Best Practices for Mental Health in Child Welfare: Parent Support and Youth Empowerment Guidelines, 88 Child Welfare League of Am. 189 (2009) -----	41, 42
Mason Burley & Mina Halpern, Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care, Washington State Institute for Public Policy (2001) -----	30
National Association of Counsel for Children (NACC), Recommendations for Representation of Children in Abuse and Neglect Cases (2001) ---	41

I.

INTRODUCTION

As *parens patriae*, the government's overriding interest is to ensure that a child's safety and well-being are protected. ... [S]uch protection can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and [termination of parental rights] proceedings. Therefore it is in the state's interest, as well as the child's, to require the appointment of a child advocate attorney.

Kenny A. ex rel. v. Perdue, 356 F.Supp. 2d 1353, 1361 (N.D. GA 2005)

(internal citations omitted).

The lives of D.R. and A.R., the two children who became legal orphans when the court below terminated their parents' rights, provide tragic examples of how the failure to provide Washington State's foster children with legal counsel only serves to make "the most vulnerable... powerless and voiceless" children more vulnerable, powerless and voiceless. *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005). Despite their constitutionally protected interests in having a relationship with their mother and each other, D.R. and A.R. were denied every opportunity to participate in the legal proceedings that determined who would and would not be part of their family as well as how their "own safety, health, and well-being" would be protected. *Kenny A.*, 356 F.Supp 2d at 1361. Ultimately, the court's decision to withhold legal counsel from D.R. and A.R. violated their constitutional due process rights

in a proceeding that led to a permanent loss of their relationship with their mother and father. Put simply:

Without counsel, access to justice is denied...Children cannot rely on the state or their parents for full protection of their interests in these circumstances. A system that allows the government to make decisions about individuals as fundamental as where a person will live and, if incapable of caring for himself, who will care for him without allowing that person reasonable access to the state actor decision maker is, by any definition, oppressive and tyrannical.

Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 694-95 (2006).

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. ASSIGNMENTS OF ERROR

D.R. adopts, by reference, Ms. Roberts's assignments of error 1-7.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

D.R. adopts, by reference, Ms. Roberts's issues pertaining to assignments of error 1-6 and makes the following additional issue pertaining to assignment of error 7¹:

Whether a child, in a proceeding under RCW Chapter 13.34, has a constitutional right to counsel in the dependency/termination

¹ Ms. Roberts's Assignment of Error 7 states "The court failed to appoint counsel for the adolescent D.R., despite a timely request at trial. RP 426." Opening Br. of Appellant, at 2. D.R. would restate this error to include the court's failure to appoint counsel for A.R. as well.

proceedings, and whether a court's failure to appoint an attorney is a structural error requiring reversal?²

III. STATEMENT OF THE CASE

D.R. is satisfied with Ms. Roberts's statement of the case as set forth in pages five through fifteen of her opening brief with the following additions and repetitions for context:

D.R. and her younger brother, A.R., first entered into foster care in Washington State in February 2004, under a voluntary placement agreement signed by their mother, Tonya Roberts. CP 3. Shortly after entering foster care, the children were appointed a volunteer Court Appointed Special Advocate (CASA), Lu Haynes, whose duty it was to provide the court with her opinion of what was in the best interests of the children—to be the “eyes and the ears of the court.” RP 431-32. Although it is unclear exactly how many times the Department of Social and Health Services (“the Department” or “DSHS”) moved the children from home to home, it appears that D.R. experienced at least four different placements. RP 73. D.R. was subjected to “unusual punishment” in at least one of her foster homes, which included sitting against a wall at a 90-degree angle for “up to 15 minutes or more” “for her misbehaviors.” RP 603. A.R. may

² In arguing that all children involved in dependency proceedings under RCW Chapter 13.34 have a right to counsel, D.R. uses the term “dependent children” for ease of use, while acknowledging the term is inexact as it excludes children in dependency proceedings for whom dependency has not yet been established by the courts.

have experienced as many as 13 different out-of-home placements. RP 26, 48, 53, 54, 56, 57 59, 65, 60, 441, 520, 550.

In May 2007, with no permanent placement prospects for either D.R. or A.R., the Department filed a petition to terminate the parental rights of their mother and father. CP 1-8. The termination trial commenced in March 2008. On August 25, 2008, Judge Rebecca Baker signed an order terminating D.R. and A.R.'s relationship with their mother and father. RP 4, 784.

At the time of Ms. Haynes's testimony, in April 2008, she had not seen D.R.—then 12 years old—in four years (since “early 2004”). RP 489. Ms. Haynes had met with D.R. “at most” three times since she was assigned the case four years prior, and the longest visit lasted 45 minutes. RP 431, 486. When Ms. Haynes met with D.R., she did not ask D.R. about her feelings about her mother, whether D.R. wanted to visit her mother or return to her care. RP 485, 489. Ms. Haynes also admitted at trial that she had never met A.R. (then almost 11 years old). RP 485-87. Ms. Haynes testified that D.R. had consistently told her foster parents of her wish for resumed visitation with her mother and had stated that she wanted a relationship with her mother. RP 426, 490. Nevertheless, at trial, Ms. Haynes argued for termination of parental rights (RP 474-75), a position apparently contrary to D.R.'s expressed interests. RP 489-90.

On the first day of the termination trial in this case, March 20, 2008, trial counsel for Ms. Roberts requested that the court appoint counsel for D.R., noting that because D.R.'s 12th birthday was two days away "she could now have an attorney." RP 165. The court asked Ms. Haynes to discuss the matter with D.R. before the next appearance. *Id.* On the next trial date, April 8, 2008, D.R.'s therapist, Dr. Lisa Estelle, testified that D.R. wanted to see her mother and that contact with Ms. Roberts could be beneficial for D.R., and "certainly could impact her in a positive way." RP 238-39, 245, 250. Later in this appearance, counsel for Ms. Roberts renewed her request that the court appoint counsel for D.R., who had turned 12 years old. RP 410. The court's response to this second request was to again ask that Ms. Haynes discuss the issue of counsel with D.R., as well with D.R.'s therapist. RP 411.

On the next trial date, April 16, 2008, counsel for Ms. Roberts and counsel for Mr. Roberts renewed the request that D.R. be appointed counsel, stating that Ms. Haynes had not yet asked D.R. about this issue. RP 417. Ms. Haynes admitted that she had not complied with the court's repeated requests to discuss legal representation with D.R., and stated that she was concerned about the anxiety that such a discussion might cause D.R. RP 419. Ms. Haynes testified that she "didn't want to talk to [D.R.] about it first" so she talked to "the foster parent [who] thought the same as

I did...you could explain it to [D.R.] but she really wouldn't understand the ramifications of having a lawyer." RP 418-19. Ms. Haynes testified that she *did* discuss appointment of counsel with D.R.'s therapist, Dr. Estelle. RP 419. In an email to Ms. Haynes, Dr. Estelle admitted that:

I am not informed about how an attorney for her would benefit [D.R.] currently and do not know the legal requirements for representation of a 12-year-old who is significantly limited in cognitive skills, language, comprehension, and insight. I am confident that Judge Baker would have these answers and be the best one to decide if [D.R.] needs her own attorney.

RP 419. In considering the motion, the court stated:

If I were to deny the motion [for counsel], obviously it creates an appeal issue. But if there's a termination in spite of the fact that the lawyer hasn't been appointed and [D.R.] has been expressing through the guardian ad litem that she wants to live – and through her counselor that she wants to be with her mother, wants some relationship with her mother ... any thoughts about the state's – the Department's position on this?

RP 423. Assistant Attorney General Kelly Konkright suggested that the "topic probably should be...spoken...about with [D.R.]" and he stated that Dr. Estelle is the "appropriate person to talk to [D.R.] about it...what [D.R.]'s feelings are and what her desires are as far as whether she wants an attorney, whether she even understands what that means." RP 423-24.

Despite Mr. Konkright's suggestion to the court that Dr. Estelle speak directly with D.R., and although Dr. Estelle openly asserted her lack

of knowledge regarding the benefits and legal requirements of representation for children, her opinion was given great deference by the court, who stated, "I think we have heard from Dr. Estelle, through the guardian ad litem, and I think the guardian ad litem has approached this the right way." RP 425. The court added that its concern about talking with D.R. about an attorney was that it would "really throw [D.R.] into a tailspin" and that the court "wonder[s] and doubt[s] that [D.R.]'s *even aware of the trial and what's going on...*" RP 425-26 (emphasis added). Although the court had been asked on the first day of trial to appoint counsel for D.R., the motion was denied nearly a month later. RP 426.

Despite the children's apparent interest in reunification, attempts at maintaining a relationship between the mother and children were minimal, at best. Visits between the children and their mother were suspended in September 2004, due to complaints by foster parents that the children were more disruptive after visiting with their mother (RP 94, 97, 100), though Dr. Estelle testified a visit may have occurred between D.R. and her mother in November 2006. RP 212. Dr. Estelle testified that D.R. seemed to benefit from the visits with her mother and that she did not find the visits she observed to be harmful to the child. RP 211-12. Dr. Estelle also stated that it would be positive for D.R. to have future visitation with Ms. Roberts and that the child wanted such visits resumed. RP 237-39,

245-50. As detailed in her opening brief, Ms. Roberts made significant efforts to reunify with her children, including requesting additional training, completing online training for foster parents, and obtaining a foster parent training handbook to “gain more knowledge about my children...and be able to better care for [my children].” RP 599-601, 650-52; ex. 301.

In addition to a lack of visits with their mother, visits between the children rarely, if ever, occurred. RP 462. Ms. Haynes testified that she did not “believe [D.R. and A.R.] really saw much of each other.” RP 462. She stated that the only time she witnessed the children interact with each other was during visitation with their mother in summer 2004, but that D.R. and A.R. could exchange letters. RP 462, 489. Dr. Estelle testified that if visits between D.R. and A.R. would benefit them then she believed visits “would be a helpful experience for both of them.” RP 236.

The prospects of finding a permanent home for the children appear grim. All witnesses admit that adoption is extremely unlikely for either child. RP 118, 498-99. Prior to trial, the behavior of D.R. and A.R. deteriorated while being shuffled among several different foster placements. Both D.R. and A.R. were accused by their foster parents of vandalizing property, stealing, harming family pets, relieving themselves around the house, and being physically and sexually aggressive to other

children in the home and at school. RP 38, 53, 56, 67-69, 180, 196-99, 321-28. In 2007, A.R. was admitted to the state's most restrictive psychiatric inpatient hospital for children. RP 266, 329; CP 48. There was no court order approving admission (RP 366), and while there, A.R. was ordered by his caseworker to have no contact with anybody outside of the facility other than his maternal grandfather. RP 362-66.

At the time of trial, D.R. was residing with a stable foster home, but one that was not considered pre-adoptive. RP 590; CP 56-60. Dr. Estelle testified that D.R.'s behavior had improved to some degree, but that she still required a great deal of care and treatment. RP 201-04. Dr. Estelle also testified to D.R.'s need for a structured environment with caregivers who are experienced and stable. RP 201, 205-06. According to an August 2007 neuropsychological assessment report by Dr. Christine R. Guzzardo, D.R.'s foster mother described her as "loving" and "fun to be around," and that she has "no severe behavior problems." CP 32. Dr. Guzzardo reported that D.R. presented as "sweet and cooperative" during her interview with. CP 34. Dr. Guzzardo's report also stated that while D.R. struggles with a language disorder³, her then-current Individualized

³ Specifically, the report stated that D.R. demonstrates "a severe expressive-receptive language disorder, borderline intellectual functioning, attention and executive functioning deficits, severe academic deficits, and visual motor integration deficits." CP 36. Dr. Guzzardo's report was submitted to the trial court with the December 12, 2007, Report of the GAL. CP 20-29; CP 30-44.

Education Program (IEP) indicated that D.R. “is a focused student who does her homework and class work and turns it in 95% of the time,” and that D.R. spends 70% of the school day in a regular education classroom. CP 44.

On August 25, 2008, Ms. Roberts’s rights to D.R. and A.R., ages 12 and 11 at the time, were terminated by Judge Rebecca Baker. RP 767-80; CP 88-94. The court found that termination was in the best interest of the children and that the state had proved the statutory requirements. RP 767-82; CP 88-94. Ms. Roberts timely appealed on August 29, 2008. CP 95-96. On March 16, 2009, on an unopposed motion by Ms. Roberts, this Court appointed appellate counsel for both D.R. and A.R.

IV. SUMMARY OF ARGUMENT

The termination of parental rights will have an immense impact on D.R. and A.R.’s fundamental liberty interests—not only will they have lost their connection to their mother (and possibly to each other), they will also have been cast into long-term foster care with little hope of adoption. Decisions about their family, sibling visits, health (behavioral, mental, and physical), and education will continue to be made by the state, with some input from a volunteer CASA and with occasional oversight by the courts. The children will suffer deprivations of fundamental rights to family integrity and serious intrusions on every aspect of their daily living.

As the record demonstrates, despite the tremendous effect these proceedings will have on the two children, there has been no meaningful legal advocacy on behalf of either child during the dependency proceedings or the pendency of the termination trial. There has been no effort to protect their legal rights and little effort to ascertain their stated interests. The children were appointed a volunteer CASA, whose job was to, among other duties, “investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child.” RCW 13.34.105(1)(a). However, Ms. Haynes did not visit the children, thus failing to collect relevant information about their situation, and she failed to gather significant information about the children’s desires or wishes. Even if the CASA had taken steps to ascertain the children’s desires or wishes, volunteer CASAs do not have the requisite legal training or license to advocate for children’s legal rights in court—volunteer CASAs (or non-attorney GALs) cannot provide the level of zealous legal advocacy that an attorney can provide, nor can they guarantee a confidential and privileged relationship with the child.

Every state and federal case to examine this issue has held that because of the significant liberty interests at stake for each and every

foster child,⁴ all foster children have a constitutional right to appointment of counsel at all stages of a dependency proceeding and at the termination trial. The three-part test enumerated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), as applied to the current case, illustrates that: D.R. and A.R. had significant fundamental liberty interests at stake; D.R. and A.R. faced a high risk of an erroneous deprivation of those interests without counsel; and the government has no countervailing interest justifying the denial of counsel. By making the appointment of counsel for children discretionary, state law—RCW 13.34.100(6) and Juvenile Court Rule 9.2—fails to protect the due process rights of foster children guaranteed by Art. I § 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution.

Given the absolute denial of counsel to D.R. and A.R., this Court should find that structural error occurred and that automatic reversal of the trial court's order for termination of parental rights is required.

⁴ Advocates for children's representation have argued that, "Aside from the criminal context, few other interests in court rival the interest of a child in the outcome of his own dependency proceeding." Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Proceedings*, 37 Fam. L. Q. 485, 496 (2003).

V. **ARGUMENT**⁵

A. **ALL CHILDREN HAVE A DUE PROCESS RIGHT TO COUNSEL IN DEPENDENCY AND TERMINATION PROCEEDINGS**

1. Every Court That Has Addressed the Issue to Date Has Found That Dependent Children Have a Due Process Right to Counsel

Whether due process requires that a child be provided an attorney in dependency/termination proceedings is a matter of law reviewed *de novo*. *Bellevue School District v. E.S.* 148 Wn. App. 205, 211, 199 P.3d 1010 (2009), *petition for review pending* (Cause No. 60528-3-I, March 25, 2009) (children in truancy proceedings have a constitutional due process right to counsel).

Although Washington courts have not yet addressed the issue of a dependent child's constitutional right to counsel—and Washington statutes make appointment of counsel to dependent children merely discretionary⁶—every state and federal court that has addressed the issue has ruled that dependent children have such a right.

The most recent case to directly address this issue, *Kenny A.*, 356 F.Supp. 2d 1353, held that foster children in Georgia have a constitutional due process right to counsel and effective legal representation at every

⁵ D.R. adopts by reference, the argument of Tonya Roberts as to her assignments of error 1-6.

⁶ *See infra* section V.C, pp. 43-46.

stage of their dependency proceeding. In *Kenny A.*, unlike the present case, dependent children were appointed attorneys, but excessive caseloads made effective legal representation impossible. *Id.* at 1356. The situation in Washington is much worse—there is no guarantee that an attorney will be appointed, regardless of caseload, for a child in a dependency or termination. In fact, this case proceeded for over four years without an attorney for either D.R. or A.R.

Thirty years before *Kenny A.*, a three-judge federal district court panel held, in *Roe v. Conn*, 417 F. Supp. 769, 780 (1976), that Alabama’s challenged procedure violated due process “because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding...”

More recently, an intermediate appellate court in New York held that a child “had a constitutional as well as a statutory right to legal representation of her interests in the proceedings on the abuse petition.” *In the Matter of Jamie TT*, 599 N.Y.S.2d 892, 894, 191 A.D.2d 132 (App. Div. 1993).⁷

⁷ The *Jamie TT* court went on to note that:

Her constitutional and statutory rights to be represented by counsel were not satisfied merely by the State's supplying a lawyer's physical presence in the courtroom; Jamie was entitled to “adequate” or “effective” legal assistance. No less than an accused in a criminal case, Jamie was entitled to meaningful representation. Effective representation for Jamie included assistance by an attorney who had taken the time to prepare presentation of the law and the facts,

In addition to the overwhelming jurisprudence affirming a dependent child's right to counsel from other jurisdictions, several Washington cases support the same conclusion. For example, a recent decision in Division I of this court held that children have a constitutional right to legal counsel in their truancy proceedings because "a child's interest in her liberty, privacy, and right to education are in jeopardy...and she is unable to protect these interests herself." *E.S.*, 148 Wn. App. at 220. A truancy court's power to interfere with a child's educational rights and physical liberty (confinement through contempt) is not unlike a dependency court's powers, which are inclusive of those rights and extend further to *every other aspect* of a child's life.

Additionally, in *In re Parentage of L.B.*, an appeal of a parentage action, the Washington Supreme Court noted the *Kenny A.* decision and "strongly urge[d]" trial courts to consider appointing counsel for children in family law-type proceedings, including dependencies (where GALs were already appointed), noting:

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*.

and employed basic advocacy skills in support of her interests in the case. *Id.* (internal quotations, citations omitted).

155 Wn.2d at 712 n.29 (emphasis added). However, the Court specifically declined to consider whether counsel for children was constitutionally required in a parentage action. *Id.*

Again, no federal or state court has ruled that children *lack* a constitutional right to counsel in their dependency or termination proceedings.⁸

2. Under the Federal Due Process Test of *Mathews v. Eldridge* Dependent Children are Entitled to Counsel

The balancing test enumerated in *Mathews* continues to be the controlling due process analysis. Under *Mathews*, courts must balance: (1) the importance of the private interest at stake; (2) the risk of an erroneous deprivation of such interest under the current procedures and the probable benefits of additional or substitute procedural protections; and (3) the government's interest in the proceeding, including fiscal and administrative burdens that an additional or substitute procedural requirement would involve. 424 U.S. at 335. The *Kenny A.*, *Jamie TT*, and *E.S.* courts relied on the *Mathews* test and found that, when applied to children in dependency or truancy proceedings respectively, the test

⁸ Counsel for D.R. conducted a thorough review of available case law and found no such cases.

indicates that the failure to provide any child with an attorney in their legal proceeding violates the constitutional guarantees of due process.⁹

a) Foster Children Have Significant Private Interests at Stake in Dependency and Termination Proceedings

(1) Foster Children's Fundamental Interests Include Their Interest in Family Integrity As Well As in Their Own Safety, Health, and Well-being

Dependent children have:

fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.

Kenny A., 356 F. Supp. 2d at 1360.¹⁰

Family integrity is among the most important liberty interests that children have—an interest that the Washington Supreme Court has, on more than one occasion, emphasized. *See, e.g., State v. Santos*, 104 Wn.2d 142, 147-48, 702 P.2d 1179 (1985) (child has a fundamental interest in knowing its parentage and is thus entitled to representation in paternity proceedings); *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 636-

⁹ *See also* Smiles, *supra* note 4 (arguing that when applied to children in dependency proceedings, the *Mathews* test indicates that the failure to provide children with legal counsel violates the Due Process Clause of the Fourteenth Amendment).

¹⁰ In determining the child had a constitutional right to counsel, the court in *Jamie TT* also focused on liberty interests such as protection from sexual abuse, holding that it “would be callously ignoring the realities of [the child’s] plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process.” 599 N.Y.S.2d at 894.

37, 191 P.3d 934 (2008) (child has “constitutional right to participate in accurately determining his paternity”); *In re Custody of Shields*, 157 Wn.2d 126, 130, 136 P.3d 117 (2006) (Bridge, J., concurring) (“child has a constitutionally protected interest in whatever relationships comprise his or her family unit.”).¹¹

Children’s interests in family integrity are implicated very early on and throughout the dependency proceeding. From the beginning, the state and the dependency court make placement and service decisions and determine whether and how often dependent children can visit their siblings and their parents.¹² Thereafter, a child’s liberty interests are most severely impacted when parental rights are terminated—the integrity of the family unit is compromised, and the child’s relationship with his or her biological parents is permanently severed.¹³

¹¹ In fact, a California court found it a matter of “simple common sense” that children’s rights in their family relationships are “at least as fundamental and compelling as those of their parents.” *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 524, 41 Cal. App. 4th 1483 (1996) (emphasis added). The *Bridget R.* court went on to note that “children’s interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child’s mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.” *Id.* at 524.

¹² In this case, it is unclear when D.R. last saw her mother or her brother. That both caseworker Cheryl Grimm and Dr. Estelle testified they did not know when the last visit occurred between D.R. and her mother (RP 94, 212), is concerning given D.R.’s “constitutionally protected interest in whatever relationships comprise...her family unit.” *In re Custody of Shields*, 157 Wn.2d at 130. Additionally, it does not appear the children “really saw much of each other.” RP 461-62.

¹³ While no relationship between a child and a mother is unimportant, at the time of termination D.R. had known her mother for more than 12 years.

Courts have consistently recognized parents' strong liberty interests in family integrity, especially in dependency proceedings. The interest of children in maintaining relationships is equal to, if not greater than that of parents. The Washington Supreme Court has suggested that a parent's prerogatives must yield to a child's fundamental liberty interests. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) ("Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference...they are not absolute and must yield to fundamental rights of the child..."). This sentiment has been echoed in scholarly work as well: "Children have a greater liberty interest at stake in the initial dependency proceeding than their parents do because the risk of harm they face is irreparable." Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 676-7.¹⁴

Foster children also have an interest in their own safety, health, and well-being. These rights have been explicitly recognized by the

¹⁴ Pitchal goes on to note that:

Parents and children equally face the likelihood of trauma from separation, but the depth and pain of this trauma is arguably more acute, and the damage longer lasting, for the child. As adults, parents are better equipped to understand the proceedings, the reasons for being in court, and the reasons for any court-imposed separation. While they may disagree with absolutely everything that is happening to them and their family, their cognitive awareness and understanding of the proceedings better enables them to survive the trauma. Their children, by contrast, suffer confusion and anxiety on top of everything else.

Id.

Washington Supreme Court, which unanimously held that foster children have a substantive due process right “to be free from unreasonable risks of harm and a right to reasonable safety.” *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003). The Court went on to assert that “[t]o be reasonably safe, 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.” *Id.* at 700. Harm includes “physical or mental damage.” *Id.* (citing *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989) (due process right “to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being...”).¹⁵

In addition to family integrity, safety, health and well-being, children possess significant rights under federal (20 U.S.C. § 1400 et seq.) and state law relating to education, including a right to education under the Washington State Constitution (art. IX, § 1), and significant rights related to special education (RCW Chapter 28A.155)—the state, having replaced the parent as the child’s custodian, is required to protect these rights. When a child in foster care who receives special education, like D.R., is

¹⁵ Among the “intrusions” upon D.R.’s physical well-being, is the “unusual punishment” she suffered in at least one of her foster homes. RP 603. In that home, D.R. was required to sit against a wall at a 90-degree angle for “up to 15 minutes or more” “for her misbehaviors.” *Id.*

moved from placement to placement, protection of these rights is jeopardized.¹⁶

(2) *In Addition to Fundamental Liberty Interests, Foster Children Have Significant Physical Liberty Interests at Stake in Dependency and Termination Proceedings*

In *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the United States Supreme Court held that minors have a due process right to counsel in delinquency proceedings. The Court noted that delinquency proceedings subject children to the loss of their liberty and “may result in commitment to an institution in which the juvenile's freedom is curtailed.” *Gault*, 387 U.S. at 35, 41. Additionally, the *Gault* Court rejected the argument that changing the custody of a child from a parent to the state as *parens patriae* is simply a matter of “custody” rather than a deprivation of the child's liberty. *Id.* at 17-18, 35-37.

Years later, *Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 26-27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), while finding that the Due Process Clause of the Fourteenth Amendment *may* mandate the

¹⁶ The record documents how D.R.’s educational interests have been neglected while she has been in the state’s care. For example, Dr. Guzzardo’s 2004 recommendations regarding how to address D.R.’s language impairments had not yet been implemented when Dr. Guzzardo evaluated D.R. again in 2007—in her report, Dr. Guzzardo noted that she “again, strongly recommend[s] treatment for [D.R.’s] language disorder. It is *bewildering why no one who had access to this report three years ago took action to get [D.R.] the treatment she needed.*” CP 37 (emphasis added). Dr. Guzzardo’s report also notes several times that D.R.’s Individualized Education Program (IEP) needs to be revised and that it needed to address the fact that Dr. Guzzardo believed D.R.’s Attention-Deficit Hyperactivity Disorder (ADHD) diagnosis was incorrect. CP 37-39.

appointment of counsel to *some parents* involved in termination proceedings, the United States Supreme Court reaffirmed that due process required counsel where an individual's physical liberty is threatened:

... the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

Lassiter, 452 U.S. at 26-27.¹⁷

The physical liberty of foster children is impacted from the moment the state removes them from their biological families. No other party in a dependency is physically removed from his or her home. No other party faces the possibility (and in many cases, the certainty) that they will be forced to move from one home to another while in placement,

¹⁷ Even after *Lassiter*, Washington Courts continue to cite to art. I, § 3 as an independent source of a parent's absolute right to counsel in dependency and termination proceedings. See, e.g., *In re Welfare of G.E.*, 116 Wn. App. 326, 332 n. 2, 65 P.3d 1219 (2003) (noting that in interpreting article one, section seven of the Alaska Constitution, which is "identical to art. I, § 3 of the Washington Constitution," the Alaska Supreme Court "held that its state constitution provided a right to effective assistance of counsel in termination proceedings") (citing *V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983)); *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (finding that a parent's statutory right to counsel in termination proceedings "derives from the due process guaranties of art. I, § 3 of the Washington Constitution as well as the Fourteenth Amendment") (citing *In re Dependency of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974)). In *King v. King*, the Washington Supreme Court explained—citing *Luscier* and *Welfare of Myricks*, 85 Wn.2d 252, 533 P. 3d 841 (1975)—the interest at stake in a private custody proceeding is not commensurate with "the fundamental parental liberty interest at stake in a termination or dependency proceeding." 162 Wn.2d 378, 386, 174 P.3d 659 (2007). See also *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995).

sometimes in and out of the home of their biological parents. As the *Kenny A.* court noted, “foster children ... are subject to placement in a wide array ... of foster care placements, including institutional facilities where their physical liberty is greatly restricted.” 356 F.Supp. 2d at 1360-61. A child’s liberty interest may be affected by the often arbitrary placement process¹⁸ resulting from the lack of suitable foster homes. *Id.* The loss of liberty through an involuntary, arbitrary placement process is compounded given that “foster children are ‘involuntarily placed . . . in a custodial environment, and . . . unable to seek alternative living arrangements.’” *Braam*, 150 Wn.2d at 698 (quoting *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (comparing foster children to individuals involuntarily committed to hospitals)). From the time of removal, the state assumes physical and legal custody of the child resulting in deprivation of the child’s liberty. *See Gault*, 387 U.S. at 17-18, 35-37.

¹⁸ *See Pitchal*, 15 Temp. Pol. & Civ. Rts. L. Rev. at 682.

Children may be moved from placement to placement for reasons having nothing to do with what is best for that child, but because beds need to be freed for an incoming sibling group, or because the foster parent is retiring and moving out of state, or because the foster parent was late for court and the judge ordered the agency to move the child. Liberty includes peace of mind, and freedom means having some measure of stability in the world around you. ...Children in foster care have a physical liberty interest at stake in ongoing dependency proceedings because these very questions about their lives are constantly at issue.

This is certainly the case for D.R. From the time the dependency petition was filed in March 2004, she moved between at least four different foster placements. RP 73. Likewise, A.R. has experienced multiple placement moves and was involuntarily placed, without judicial process, in the most restrictive long-term locked inpatient hospital, restricting his physical liberty. RP 266, 329; CP 48.

Beyond arbitrary placement moves that affect foster children of all ages, a number of additional physical liberty interests exist for older foster children such as D.R. and A.R. A child in a truancy or dependency proceeding—regardless of their level of involvement in the actual legal proceeding—who disregards a court order may be subject to contempt sanctions. RCW 28A.225.090(2) (truancy); RCW 13.34.165(1),(3) (dependency); RCW 7.21.030(1)(e). In determining that children require counsel prior to the contempt phase, the *E.S.* court noted that, “[a] truancy order is a necessary and direct predicate to a later finding of contempt and imposition of a detention sanction.” 148 Wn. App. at 213.

While truancy court orders are generally limited to education-related issues, the restrictions on the actions of dependent children by dependency courts are almost limitless, and include (unlike truanancies) directives as to where the child will live and with whom he or she can visit. Like a child in a truancy proceeding, a dependent child found in

contempt can be incarcerated for days, weeks, or even months. RCW 13.34.165¹⁹; *In re Dependency of A.K.*, 162 Wn.2d 632, 174 P.3d 11 (2007) (holding, in part, that the juvenile court possesses inherent power to sanction direct or indirect contempt by punitive or remedial sanctions). Both D.R. and A.R. were (and continue to be) at risk of being judicially sanctioned (or criminally charged) for their actions while in care.²⁰

b) The Significant Risk of an Erroneous Decision in Dependency and Termination Proceedings Justifies a Due Process Right to Counsel

(1) Foster Children Face a High Risk of Erroneous Deprivation of Liberty Interests When Denied Legal Counsel

In determining whether the second prong of the *Mathews* test—the potential risk of an erroneous deprivation of fundamental interests—requires appointment of counsel for parents under *Lassiter*, courts have focused on: the parent’s ability to fully present his/her case without assistance of counsel; the parent’s cognitive abilities and education; and

¹⁹ RCW 13.34.165 states, in relevant part:

- (1) Failure by a party to comply with an order entered under this chapter is civil contempt of court as provided in RCW 7.21.030(2)(e).
- (2) The maximum term of confinement that may be imposed as a remedial sanction for contempt of court under this section is confinement for up to seven days...

²⁰ As noted above, both children were accused by foster parents of behaviors that, if continued, could lead to future contempt charges and the possibility of incarceration, RP 38, 53, 56, 67-69, 180, 196-99, 321-28.

his/her ability to understand basic court procedures. *In re "A" Children*, 119 Haw. 28, 57-59, 193 P.3d 1228 (Haw. Ct. App. 2008); *State ex rel. T.H. by H.H. v. Min*, 802 S.W.2d 625, 627 (Tenn. App. 1990). The *Min* court noted that “[w]hile the difficulty and complexity of the issues and procedures may not have been significant to the ordinary lay person, the education, intelligence and personal experience of the [parents] are so minimal that they could barely understand what was going on.” *Id.* at 627. Because the parents in these cases faced significant barriers in adequately proceeding *pro se*, the courts found that the potential risk of erroneous deprivation was significant and, thus, counsel was constitutionally required. *In re "A"*, 119 Haw. App. at 58; *Min*, 802 S.W.2d at 627.²¹

Unrepresented children in dependency and termination proceedings face an equally high—and arguably greater—risk of an erroneous deprivation without counsel. More so than their parents, children who are the subject of dependency are likely to be overwhelmed by the dependency proceedings, lack an education, and find themselves amidst a distressing and disorienting situation in which they are provided no opportunity to participate. Children, who do not have the legal and

²¹ *Lassiter* itself demonstrates that parents in child welfare proceedings are likely to have a limited education, “an uncommon difficulty in dealing with life, and . . . are, at the [termination] hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident,” and is the basis for appointment of counsel in numerous states, including Washington. 452 U.S. at 30 (citing *Myricks*, 85 Wn.2d 252).

factual capacity to effectively represent themselves, face insurmountable barriers in understanding the complex legal proceedings.

Washington courts have drawn a clear and definite distinction—both factually and legally—between the capacity of children and the capacity of adults to protect their interests in court proceedings. For example, in *E.S.*, the court emphasized that a child has no capacity, by law, to assert her rights in court and, thus, the child’s liberty interests must be protected by counsel: “Adults are legally independent and are presumed capable of understanding the proceedings. Generally, adults have the right to retain counsel, and should they decide not to do so, they are presumed able to represent their own interests.” 148 Wn. App. at 214. By contrast, the law presumes that children are incapable of understanding the proceedings because they “lack the experience, judgment, knowledge and resources to effectively assert their rights.” *Id.* (quoting *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998)); *See also, Vo v. Pham*, 81 Wn. App. 781, 916 P.2d 462 (1996) (law presumes that adults, unlike children, have the actual capacity to “comprehend the significance of legal proceedings and the effect of the relationship of such proceedings”).

The distinction between adults and children in truancy proceedings logically extends to children in dependency and termination proceedings

who are, likewise, “neither independent nor capable, in fact or in law” to assert their own rights. *E.S.*, 148 Wn. App. at 214. The unrepresented child cannot independently challenge the decisions of government authorities, decisions that affect the child’s health, safety, and well-being.

In determining that “only the appointment of counsel can effectively mitigate the risk of significant errors,” the *Kenny A.* court found that “...an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child’s most important family relationships.” 356 F.Supp. 2d at 1360. The risk of error caused by the failure to appoint counsel for the child is exacerbated by the fact that courts are granted wide discretion in making determinations in dependency proceedings. *See id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). “Such ‘imprecise substantive standards that leave determinations unusually open to the subjective values of the judge’ serve ‘to magnify the risk of erroneous factfinding.’” *Id.* Further compounding the risk, the *Kenny A.* court noted, was the “strong empirical evidence that [the Department] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children.” *Id.* at 1361.

Every child welfare system in the country, and certainly Washington’s, can cite numerous examples of the erroneous decisions in

dependency cases, decisions that have sometimes resulted in deaths of children the state was supposed to protect. Between 1997 and 2006, 827 children involved or recently involved with the Department's Children's Administration died—at least 112 were homicide victims.²² DSHS has admitted that the office which handles the case at bar, Colville, is in disarray.²³ The state as a whole is under a comprehensive court order to reform its child welfare system.²⁴ The scores of child deaths in Washington and other states are sad reminders that decisions about where and when to place foster children are difficult, fraught with error, and only as good as the information on which the state, or the court, is basing the decision. Those decisions, which will either be made unilaterally by the state or by the court based on the information before it, must be aided by counsel for the children whose physical liberty, and indeed, safety is most at stake.

²² See *DSHS Children's Administration 2007 Annual Report*, at 9. Available at <http://www.dshs.wa.gov/pdf/ca/07Report3Safety.pdf>.

²³ In a May 21, 2009, release responding to a review by the Office of the Family and Children's Ombudsman, the Department admitted to "an environment of mistrust" between the Colville office and "partners in the professional community." The Department's action plan includes a request for "mediation between [Department] staff and CASA to improve the overall working relationship." *Children's Administration Releases Corrective Action Plans for Colville Office*, available at <http://www.dshs.wa.gov/mediareleases/2009/pr09087.shtml>.

²⁴ The Braam Oversight Panel was created in 2004 to oversee a settlement agreement regarding the reform of the state's foster care system. Information available at <http://www.braampanel.org/>.

Here, both children faced (and continue to face) an extremely high risk of erroneous deprivation—even if placed in a suitable foster home, a child in foster care will likely experience physical and mental health problems and an increased possibility of poor performance in school, failure to graduate, and even homelessness.²⁵ Ultimately, one of the greatest deprivations they face is the termination of parental rights—an ongoing, lifelong loss of the relationship with their parents.

*(2) Only By Providing Attorneys for Dependent Children
Can the State Adequately Mitigate the Risk of
Erroneous Deprivation*

Washington’s current procedural safeguards in dependency and termination proceedings are insufficient to protect children from erroneous decisions. The *Kenny A.* court found that “juvenile court judges, court appointed special advocates (CASAs), and citizen review panels do not adequately mitigate the risk of such errors.” 356 F.Supp. 2d at 1361.

Guardian Ad Litem and CASA. As the court in *Kenny A.* found, non-attorney GALs and volunteer CASAs do not provide adequate procedural protections to reduce the high risk of erroneous deprivation of

²⁵ See Joseph Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583 (2007), available at http://www.mit.edu/~jdoyle/doyle_fosterlt_march07_aer.pdf; Mason Burley & Mina Halpern, *Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care*, Washington State Institute for Public Policy (WSIPP) (2001), available at <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf>.

children's fundamental liberty interests.²⁶ *Id.* While volunteer CASAs can provide an important service to the court, and while this CASA spent an impressive 838 hours on the case, this case provides a glaring example of how CASAs alone cannot protect children's fundamental liberty interests. Ms. Haynes met with D.R. "at most" three times, each visit being no more than 45 minutes long (RP 485-86) and never met A.R. RP 485-86, 532. She also did not identify either child as a "source" in any of her reports to the court. CP 20-22, 45-47.²⁷ Even had the CASA met regularly with the children, this would have been insufficient to mitigate the risk of error. Not only do CASAs/GALs lack adequate training in protecting a child's legal rights but they also often have interests in opposition to those of the child. For example, a child may prefer reunification or a specific foster placement, while the GAL/CASA may argue for termination and/or a different placement. In this case, the CASA failed to ask D.R. if she wanted to live with or visit her mother (RP 489) and, consistent with her

²⁶ As noted by one legal scholar:

Proponents of attorney representation for children don't dispute the value of CASA's [*sic*]. But proponents ask the following question: If the parents and the agency need attorneys to properly represent their views in court, why does the child, whose entire future is at stake, need something less? ...Children deserve the same level of representation as parents and agencies—legal representation.

John E. B. Myers, *Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. Davis J. Juve. L. & Pol'y 267, 270 (2004).

²⁷ It was not until the July 2008 GAL Report that the CASA listed the children as "sources"—the report was submitted after the conclusion of the termination trial on June 10, 2008. CP 77; RP 783.

role of advocating for what she believed to be in D.R.'s best interests, recommended termination of parental rights—a position in direct conflict with D.R.'s expressed wishes. RP 489-90.²⁸

Parents and Attorneys for Parents. Parents and their attorneys also fail to mitigate the risk of erroneous deprivation for two major reasons: (1) parents, who have almost all been accused of neglecting, abandoning, or abusing their children, have an actual or likely conflict with their children (the alleged victims); and (2) once parental rights are terminated, parents' counsel are no longer involved in the child's ongoing dependency case—the child's case moves forward with periodic reviewing hearings every six months until a permanent legal relationship is formed with someone other than the state. RCW 13.34.138.

Even where the interests of parents and children may converge, the viewpoints and the situations of each are always unique. The divergent interests of parents and children was recognized by the *E.S.* court, which noted that, in a truancy, a child and a parent may have opposing interests and, thus, the parent's presence may not mitigate the risk of erroneous decisions. 148 Wn. App. at 215. In dependency and termination matters, even more so than criminal or truancy proceedings, a likely conflict

²⁸ In this case, the CASA volunteer had no legal training/education beyond what the CASA program offered. RP 428.

between parents and their children arises out of the fact that it is the parents who are being accused of abuse, neglect, or being incapable of adequately caring for their children. Parents and children may not agree on reunification, and ultimately, the court's orders have wholly different effects on a parent than on a child. A parent faces the loss of his or her child, but a child faces the possibility of being moved from placement to placement, being incarcerated or committed to an institution, being separated from siblings, schools, and foster parents. Neither a parent's presence, nor a parent's attorney, can mitigate the risk of errors in dependency that will directly affect the child.

State Caseworker and Attorney for the State. Like the GAL/CASA and the parents/parents' attorney, the Department caseworker and the attorney for the state do not adequately mitigate the risk of erroneous deprivation of a child's fundamental liberty interests. The role of the state caseworker (and the attorney for the state) are often in conflict with the interests of the child, as the caseworker represents the state, not the child or any other party. As noted by the court in *Kenny A.*:

...a conflict of interests between the child and DFCS...precludes the attorneys who represent DFCS from also representing the child. This is true because the institutional concerns of DFCS may conflict with the needs of the deprived child. For example, there is evidence that a shortage of family foster homes...has lead [*sic*] DFCS to place children in inappropriate and overcrowded homes, to

shuffle children from one placement to another, and to overuse institutional placements. Because such conflicts between the broad programmatic needs of DFCS and the specific needs of the individual child may arise in every case, children are entitled to representation by separate counsel throughout the course of the deprivation proceedings.

356 F.Supp. 2d at 1359 n.6.

Conflicts can and do occur when there are limited resources from which a caseworker may draw, when the caseworker must act to protect the state from liability, and when the caseworker's decisions directly conflict with the child's expressed interests. Moreover, most of the rights that a child would seek to protect are designed to protect him or her from decisions by the state. The risk of erroneous deprivation of foster children's fundamental interests cannot be mitigated by caseworkers or attorneys for the state because all foster children are "subject to a decision making process that can be arbitrary and based on many factors other than what placement is best for the child at a given moment."²⁹

Juvenile Courts. As the *Kenny A.* court specifically found, the juvenile court cannot mitigate the significant risk of error children face in dependency and termination proceedings. 356 F.Supp. 2d at 1361. While the juvenile court is the final arbiter of the child's best interests on any issue brought to the court, its decisions are only as good as the information

²⁹ Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 682.

before it. Since the court cannot gather information on its own, only an attorney for the child can bring the unique perspective of the child to the court. A court cannot mitigate the risk of error a child faces if it lacks important information about the child and/or the child's legal rights. In addition, "although the judge has the child's interests in mind, the judge is supposed to be impartial, not an advocate for the child."³⁰

Attorney's Role in Mitigating Risk. As stated by the Oklahoma Supreme Court in a 1980 termination case:

...if a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client, with the child caught in the middle. Beneath each side's argument in terms of the best interests of the child, lies the desire to prevail for a client, who is not the child. When the court appoints an attorney for the child, testimony is presented and cross-examination done by an advocate who is only interested in the welfare of the child.

Matter of T.M.H., 1980 Okla. 92, 613 P.2d 468, 470 (1980).³¹

As the United States Supreme Court has noted, attempting to analyze whether an attorney for a party would have changed the outcome of a specific case is problematic—"a speculative inquiry into what might

³⁰ Myers, *supra* note 26, at 269-70.

³¹ The court went on to note that "[t]he matter of independent representation by counsel, so that a child may have his own attorney when his welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law." *Id.*

have occurred in an alternate universe.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).³²

One can identify, however, the numerous missed opportunities for legal advocacy in the case of any dependent child who lacks counsel, including D.R. and A.R. Such an analysis indicates that “[o]nly the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [termination] proceedings.” *Kenny A.*, 356 F.Supp. 2d at 1361.³³

With legal representation in this dependency case, D.R. and A.R. could have challenged any finding of dependency, asserted their right to live with and/or visit siblings, brought a motion to review or change placement decisions, asserted their right to a permanent plan (including placement in a pre-adoptive home), protected their rights in any mental health or behavioral evaluation (by, for example, asking for a protective

³² See *infra*. section IV.D, pp. 46-49

³³ Not only is an attorney necessary to protect the child’s rights, at least one study indicates that attorneys can expedite permanency for the child. In a recent study conducted in Palm Beach County, Florida, children represented by attorneys experienced exits to permanent homes about 1.5 times more frequently than children who were not afforded counsel. Children with their own lawyers also moved from case plan approval to permanency at approximately twice the rate of those not represented by counsel. Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chicago, IL: Chapin Hall Center for Children (2008), available at <http://www.chapinhall.org/research/report/expediting-permanency>.

order preventing self-incrimination),³⁴ challenged involuntary placement in an institutional setting, and challenged the termination of their mother's parental rights. RCW 13.34.130(3); RCW 13.34.025(1) (regarding coordination of services to children in dependency, including sibling contact and visitation); RCW 13.34.136 (regarding permanency plan).³⁵

In D.R.'s case, an attorney could have advocated for her educational interests and needs, and could have seen to it that an appropriate surrogate parent, empowered to make education decisions, was provided.³⁶ An attorney could have ensured that D.R.'s misdiagnosis of having ADHD did not prevent her from receiving appropriate cognitive

³⁴ Attorneys for children in dependencies may seek "Decker Orders," which grant use immunity for disclosures during psychological, behavioral, or sexual evaluations. See *State v. Decker*, 68 Wn. App. 246, 842 P.2d 500 (1992).

³⁵ See also American Bar Association Center on Children and the Law, *Unique Functions of a Lawyer Appointed to Represent a Child*, available at http://www.mockingbirdsociety.org/reference.php?content_id=69 (follow "Unique Functions of a Lawyer Appointed to Represent a Child, Compiled by the ABA Center on Children and the Law").

³⁶ Dr. Guzzardo noted that because the recommendations made in 2004 were not implemented:

It is now impossible to know how [D.R.'s] cognitive functioning may have improved over the last three years had she received this most essential of services, but it is likely that with three years of intensive speech and language services there most certainly would have been some, even if small, improvement in her language, academic skills, and possibly in her executive and intellectual functioning. The older [D.R.] gets, the less likely any significant improvement will take place.

treatment for other issues,³⁷ could have advocated for her desire to maintain contact with her mother, adequately represented her interests at the termination trial, and ensured that a plan for a permanent placement was created if the termination was granted. Through an attorney, D.R. could have expressed her desire to maintain a relationship with her brother and an attorney could have advocated for her right to receive regular visits and contacts with A.R. Ultimately, an attorney for D.R. may have prevented the state from making her a legal orphan.

The role of an attorney differs substantially from that of a GAL/CASA, who is not bound by Rules of Professional Conduct. Only children's attorneys are required to advocate for the child's expressed wishes, exhibit competence in the law, keep the child informed, consult with the child, or promptly comply with requests for information, among other unique duties. RPC 1.2; RPC 1.1; RPC 1.4; RPC 1.14.³⁸ In contrast

³⁷ Dr. Guzzardo noted that she did not believe D.R. was accurately diagnosed with ADHD. CP 37.

³⁸ Attorneys also have a duty to act in a professional manner towards their clients and maintain a traditional relationship with clients with diminished capacity, including children. Despite legal presumptions of incapacity, minors often have the ability to comprehend, consider, and make decisions about the legal matters at issue. RPC 1.14, Comment [1]. Even "children *as young as five or six years of age*, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." *Id.* (emphasis added). It is precisely because children face difficulties in understanding complex legal proceedings that they should be provided counsel, and the Rules of Professional Conduct guide attorneys on how to address the needs of a child-client. *Parents* are not denied counsel because of their capacity issues and, thus, the capacity of children should not be used as an excuse to deny them counsel.

to a GAL/CASA, attorneys for children have confidential and privileged relationships with the children—which allows for unfettered disclosure of issues and privileged legal advice—on issues directly relating to the dependency or on issues that overlap with it, such as criminal or contempt matters, education, or mental health.

c) The Government Can Cite No Countervailing Interest That Outweighs the Interests of a Dependent Child

The state has an overriding interest in protecting children, and because children cannot be adequately protected without counsel, it is in the government’s interest to provide representation. *Kenny A.*, 356 F. Supp. 2d at 1361.

As such, the only possible countervailing governmental interest is financial. Where fiscal constraints are the only countervailing interest, the court will not excuse a violation of due process. *Mathews*, 42 U.S. at 348; *See also Braam*, 150 Wn.2d at 710 (“Lack of funds does not excuse a violation of the constitution and this court can order expenditures, if necessary, to enforce constitutional mandates.”).

(1) Washington State Guarantees Counsel to Children in Less Invasive Civil Proceedings

Children in other similar civil proceedings possess the statutory right to counsel. These proceedings have arguably fewer, less serious, and shorter lasting consequences than most dependency proceedings. In At-

Risk Youth (ARY) and Child In Need of Services (CHINS) proceedings, children are appointed counsel as soon as a petition has been filed. RCW 13.32A.192(1)(c) (ARY); RCW 13.34A.160(1)(c) (CHINS). Children subject to involuntary commitment are also provided with attorneys from the outset. RCW 71.05.300(2). In truancy proceedings, children now have the right to counsel as well.³⁹ *E.S.*, 148 Wn. App. at 220.

The liberty interests at stake in ARY, CHINS, and truancy proceedings are fundamental—yet the interests implicated in dependency proceedings are undoubtedly greater and more numerous. Thus, it is axiomatic that any argument that there exists a more weighty countervailing government interests in failing to provide counsel to children in dependency and termination proceedings lacks merit.

(2) Overwhelming National Consensus Favors Providing Counsel to Dependent Children

In light of the fact that 36 states and the District of Columbia already mandate appointment of attorneys for all dependent children

³⁹ The *E.S.* court mistakenly asserted that: “[t]ruancy hearings are the only type of proceeding, civil or criminal, in which a juvenile respondent is not provided counsel.” *Id.* at 213 (citing RCW 13.34.100(6) as the source of dependent children’s right to counsel)

without any evidence of a detrimental effect on the children or the process, the state can show no overriding countervailing interest.⁴⁰

To protect the children's legal rights and needs as well as the child's expressed wishes, a number of national organizations—including the American Bar Association—recommend appointing an independent attorney to represent the child at all stages of child welfare proceedings.⁴¹ In general, these organizations call for the appointment of a representative who is well-trained in dependency law and trial advocacy and who has adequate time and resources to dedicate to each case.⁴² The federal agency in charge of overseeing child welfare proceedings has also acknowledged the child's need for an attorney in dependency

⁴⁰ See *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, at 5 (2007), available at <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf>. In that report, Washington received an "F" grade in providing legal representation to children in abuse and neglect cases—it was among the five worst scores in the country. The grade was based not only on Washington's failure to guarantee legal counsel, but also on the failure to: indicate that a child is a party; provide that a child has a right to be present at any proceeding; provide that a child be entitled to notice; and provide guidance on training for children's counsel, among others. *Id.* at 108-09.

⁴¹ See American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), available at <http://www.abanet.org/child/repstandwhole.pdf>; National Association of Counsel for Children (NACC), *Recommendations for Representation of Children in Abuse and Neglect Cases*, at 4 (2001), available at http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf; Lisa Hunter Romanelli et al., *Best Practices for Mental Health in Child Welfare: Parent Support and Youth Empowerment Guidelines*, 88 *Child Welfare League of Am.* 189, 202 (2009), available at http://www.thereachinstitute.org/files/documents/CWMHGuidelinesWeb3.09_000.pdf.

⁴² NACC, *supra* note 41, at 4.

proceedings.⁴³ Especially relevant in this case, these organizations argue that the need for an attorney is even more pronounced when a child has physical or mental health needs, implicating rights the child or youth would not otherwise know about. Having an attorney with training in child and youth mental issues and services empowers youth and “enhance[s] their mental health.”⁴⁴

Thus, there is a strong national consensus that no countervailing government interest overrides the child’s legal rights and needs.

B. PROTECTION OF THE SUBSTANTIVE DUE PROCESS RIGHTS OF DEPENDENT CHILDREN REQUIRES APPOINTMENT OF COUNSEL

Children also have a *substantive* due process right “to be free from unreasonable risks of harm and a right to reasonable safety.” *Braam*, 150 Wn.2d at 699. The Court went on to assert that “[t]o be reasonably safe, the State, as custodian and caretaker of foster children must provide

⁴³ Children's Bureau, Admin. on Children, Youth and Families, Dept. of Health and Human Servs., *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children*, VII-11 (1999):

We recommend that States guarantee that all children who are subjects of child protection court proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process. The attorney owes the same duties of competent representation and zealous advocacy to the child as are due to an adult client.

Available at
<http://web.archive.org/web/20030307092103/www.acf.dhhs.gov/programs/cb/publications/adopt02/02adpt7.htm>.

⁴⁴ Romanelli et al., *supra* note 41.

conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.” *Id.* at 700.

Just like the state, dependency courts must ensure that the judicial process protects those substantive due process rights. Removing a child and placing her in foster care may have drastic health and safety consequences.⁴⁵ In addition to the trauma of being removed from his or her family, the child may be abused or neglected at the hands of her caretakers.⁴⁶

**C. WASHINGTON STATE’S CURRENT PROCEDURE
FOR APPOINTING COUNSEL FOR DEPENDENT
CHILDREN FAILS TO IMPLEMENT THEIR
CONSTITUTIONAL RIGHT TO COUNSEL**

Washington's current procedure fails to adequately protect childrens' due process right to counsel. RCW 13.34.100(6) provides that “[i]f 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.” (emphasis added). Additionally, Juvenile Court Rule 9.2(c)(1) provides, in relevant part:

⁴⁵ See *supra* note 25 (highlighting the long-term barriers foster youth face, including physical and mental health problems and an increased possibility of poor performance in school, failure to graduate, and even homelessness).

⁴⁶ See Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 677. In this case, D.R. was subjected to unusual punishment in at least one of her foster homes. *Supra* note 15; RP 603.

Upon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family. [...] If the court has appointed a guardian ad litem for the juvenile, the court may, but need not, appoint a lawyer for the juvenile.

The statute makes appointment of counsel completely discretionary, providing no guidance for the court. The court rule only requires appointment when a child has no guardian ad litem, which was not the case here. Both require the issue to have come before the court, either *sua sponte*, or on motion.

Due process requires that every dependent child have counsel at every stage of the proceeding. Thus, the due process rights of children are left wholly unprotected by either the statute or the court rule.

Additionally, the case of D.R. illuminates how flawed this procedure is even for a child who might be eligible for counsel under the statute. While a child age 12 or older has a right to request counsel under RCW 13.34.100(6), this provision is meaningless unless the child knows of this right and has the maturity, access, and wherewithal to request counsel in court. This statute creates an almost insurmountable barrier for a youth to request counsel, especially when, as here, the parties intentionally refused to inform D.R. of her statutory right to request counsel—the child for whom the statute was created. RP 418-26.

Even if the youth somehow finds out about that right, and has the ability and opportunity to request counsel, appointment is wholly discretionary and without guidance. While the CASA can move for counsel, he or she does not have the legal training to understand the importance of protecting the child's legal rights through counsel.

The state correctly notes, in its response brief, that "Mr. Roberts, D.R., and/or A.R., have not appealed the decision terminating parental rights." Respondent State's Br. at 3. This assertion, while factually correct, again underscores the irrationality of Washington's current procedures. It is unclear how the state expects D.R. or A.R.—who were unrepresented by counsel, likely unaware of the trial (RP 425-26), termination order, their mother's appeal or of their rights to appeal—to have filed an appeal.⁴⁷ As the Washington Supreme Court has found, dependency statutes are for the "especial benefit of foster children" and children "believing themselves aggrieved by DSHS's failure to abide by these statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue in the context of dependency actions." *Braam*, 150 Wn.2d at 712 (citations omitted). However, as this case demonstrates, for a child to have the opportunity to

⁴⁷ Counsel for D.R. and A.R. were appointed after the mother's sought counsel for them in the appellate proceeding.

raise the issue requires that the child has adequate legal representation from the beginning of the dependency proceeding. In the case at bar, a child's right to raise a legal grievance, which is guaranteed by statute and the Washington Supreme Court, was wholly withheld from D.R. and A.R. by the CASA and the court.

D. DENIAL OF D.R. AND A.R.'S CONSTITUTIONAL RIGHT TO COUNSEL IS STRUCTURAL ERROR AND REQUIRES THAT THE ORDER TERMINATING PARENTAL RIGHTS BE REVERSED AS A MATTER OF LAW

Denying the constitutional right to counsel in a dependency or termination case is a structural error that is harmful per se and requires reversal as a matter of law. In other words, if this Court finds that a constitutional right existed, it cannot find that failure to appoint counsel was harmless error.

“Structural errors—‘defects affecting the framework within which the trial proceeds’—are not subject to harmless error review.” *State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007), *cert. denied*, 128 S.Ct. 1070 (2008) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). In contrast, trial errors—those affecting “the trial process itself”—may be reviewed for harmless error. *Id.* A harmless error exists only when the error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the

party assigning it, and *in no way* affected the final outcome of the case.”
State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) (emphasis added).

Throughout the development of the United States Supreme Court’s “harmless error” doctrine, one of the few constants has been the Court’s holding that a complete denial of counsel for the entire length of criminal proceedings requires automatic reversal because harm or prejudice from the denial is assumed. *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (noting that there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel.”); *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (trial is “presumptively unfair ... where the accused is denied the presence of counsel at a critical stage”).

Over time, Federal courts have continued to maintain that complete denial of counsel requires reversal. *Hereford v. Warren*, 536 F.3d 523, 529 (6th Cir. 2008) (“[t]he Supreme Court has ‘found structural error only in a very limited class of cases’ ... [including] total deprivation of the right to counsel ...”); *Fulminante*, 499 U.S. at 309 (complete deprivation of counsel is “structural error” that “def[ies] analysis by ‘harmless-error’ standards.”); *Gonzalez-Lopez*, 548 U.S. 140 (deprivation of the *choice* of

particular counsel was structural error defying analysis).⁴⁸ Division I of this court has held that “[a]n outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis.” *State v. Harell*, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996); *but cf. In re Detention of Kistenmacher*, 163 Wn.2d 166, 178 P.3d 949 (2008) (failure to notify sexual violent predator’s court appointed attorney of psychological exam was harmless error because outcome was not affected).

At least one court has found that, where counsel for a child advocates for what he believes is in the child’s best interests but not what the child wants, reversal is warranted. *In re Derick Shea D.*, 804 N.Y.S.2d 389, 22 A.D.3d 753 (2 Dept. 2005). Similarly, in *Jamie TT*, the court held that the fact that the child’s attorney did not take an active role in the proceedings was alone sufficient to require reversal. 599 N.Y.S.2d at 894 (reversing a dismissal of an abuse petition for failure to appoint counsel for the child).

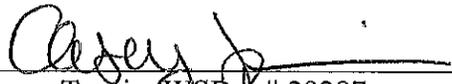
⁴⁸ Honoring the Court’s repeated concern about fundamental fairness where counsel is denied, the federal courts have overwhelmingly held that a violation of Federal Rule of Criminal Procedure 8(c) (requiring appointment of counsel for evidentiary hearings) also requires automatic reversal. *Graham v. Portuondo*, 506 F.3d 105, 107 (2d Cir. 2007) (per curiam) (noting that all seven federal appellate courts to consider the issue have held that violation of Rule 8(c) “is not subject to harmless error review and requires vacatur or reversal”). The *Graham* court rejected the argument that automatic reversal would cause “a waste of public funds or the curtailment of evidentiary hearings,” finding that in fact the appointment of counsel makes hearings *more* effective. *Id.* at 108.

Given the constitutional right to counsel for foster children and the denial of appointment of counsel to D.R. and A.R., the trial court committed structural error, and trial court's order should be reversed.

II. CONCLUSION

For the foregoing reasons, the Court should hold that the Due Process Clauses of the United States and Washington State Constitution required appointment of counsel for D.R. and A.R., as well as for all children in dependency and termination proceedings. The Court should further hold that the failure to appoint counsel to D.R. and A.R. requires reversal, vacate the order terminating the rights of Ms. Roberts, order the trial court to immediately appoint counsel for both children in the dependency proceeding, and remand for further proceedings.

Respectfully submitted this 4th day of June 2009,



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No. 27394-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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

STATE OF WASHINGTON,

Respondent,

v.

TONYA ROBERTS,

Appellant.

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

CERTIFICATE OF SERVICE

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I hereby certify that on June 4, 2009, I caused a true and correct copy of the Appellant Child D.R.'s Opening Brief to be served on the attorneys of record herein as indicated below:

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