

RECEIVED

FEB 26 2009

84132-2

ATTORNEY GENERAL'S OFFICE  
SPOKANE

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

---

APPELLANT'S OPENING BRIEF

---

DAVID DONNAN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT. .... 1

B. ASSIGNMENT OF ERROR. .... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. .... 2

D. STATEMENT OF THE CASE. .... 5

E. ARGUMENT. .... 15

THE TRIAL COURT ERRED IN GRANTING THE STATE'S  
PETITION TO TERMINATE MS. ROBERTS'S PARENTAL  
RIGHTS..... 15

1. THE STATE FAILED TO PROVE IT MEANINGFULLY  
OFFERED, PROVIDED, OR ACTIVELY SOUGHT ALL  
NECESSARY REMEDIAL SERVICES..... 17

    a. The State is mandated to meaningfully offer, by  
    active efforts, available services it claims are  
    necessary for addressing parenting deficiencies. 17

    b. The State failed to meaningfully support appellant  
    in finding appropriate services. .... 18

    c. The court erred by finding the State met its burden  
    of proof..... 20

    d. Since all necessary services were not provided, the  
    termination finding was premature. .... 21

2. THE STATE FAILED TO PROVE THERE IS LITTLE  
LIKELIHOOD THAT MS. ROBERTS'S PARENTAL  
DEFICIENCIES COULD NOT BE SOON REMEDIED,  
AND THE CHILDREN RETURNED TO HER IN THE  
NEAR FUTURE..... 24

a.	Based on Ms. Roberts's demonstrable improvement, the court improperly found little likelihood that conditions could have been remedied in the near future.....	24
b.	Due to the concrete evidence of improvement, the State did not prove that there is little likelihood conditions will not soon be remedied, resulting in reunification.....	26
3.	THE STATE FAILED TO PROVE THAT THE CONTINUATION OF APPELLANT'S PARENTAL RELATIONSHIP WOULD CLEARLY DIMINISH THE CHILDREN'S PROSPECTS FOR INTEGRATION INTO A STABLE AND PERMANENT HOME, OR THAT SUCH TERMINATION WAS IN HER CHILDREN'S BEST INTEREST.....	27
a.	There was a lack of proof that the relationship itself interferes with stability and permanency, as required by statute. ....	27
b.	Termination decisions must be governed by the best interest of the child. ....	28
c.	Termination was not in D.R. and A.R.'s best interest. ....	29
4.	THE COURT ABUSED ITS DISCRETION IN SUSPENDING VISITATION, WHICH UNDULY AFFECTED APPELLANT'S EFFORTS TOWARD REUNIFICATION WITH HER CHILDREN. ....	31
a.	Visitation is the right of a family, one that must be offered up until the time of termination, unless suspension of visits is necessary to protect the child from an actual, concrete risk of harm. ....	31
b.	It was an abuse of the court's discretion to suspend visitation.....	33

c. By abusing its discretion in suspending visitation,  
the court improperly interfered with family bonding.  
..... 36

5. THE COURT ABUSED ITS DISCRETION BY FAILING  
TO APPOINT COUNSEL FOR D.R., DESPITE TRIAL  
COUNSEL'S TIMELY REQUEST..... 37

a. There is a right to counsel for adolescents in  
dependency proceedings..... 37

b. Counsel was requested in a timely manner..... 39

c. Since it was clear that D.R.'s goals in the  
proceeding differed from those of the GAL, it was  
an abuse of discretion when the court failed to  
provide D.R. a voice in the courtroom..... 41

F. CONCLUSION..... 43

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

In re Aschauer, 93 Wn.2d 689, 611 P.2d 1245 (1980) ..... 29

In re C.B., 79 Wn.App. 686, 904 P.2d 1171 (1995), rev. denied, 128 Wn.2d 1023 (1996)..... 20

In re H.J.P., 114 Wn.2d 522, 789 P.2d 96 (1990)..... 24

In re Parentage of LB, 155 Wn.2d 679, 122 P.3d 161 (2005).. 38, 39

In re P.D., 58 Wn.App. 18, 792 P.2d 159, rev. denied, 115 Wn.2d 1019 (1990) ..... 17

Krause v. Catholic Comm'ty Serv., 47 Wn.App. 734, 737 P.2d 280, rev. denied, 108 Wn.2d 1035 (1987) ..... 17

MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)..... 41

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 41

State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645 (1941) ..... 41

State v. Maxfield, 125 Wn.2d 378, 886 P.2d 123 (1994) ..... 20

State v. Santos, 104 Wn.2d 142, 702 P.2d 1179 (1985) ..... 37

**Washington Court of Appeals Decisions**

In re Charupe, 43 Wn.App. 634, 719 P.2d 127 (1983) ..... 28

In re Dependency of A.V.D., 62 Wn.App. 562, 815 P.2d 277 (1991) ..... 16, 29

In re Dependency of T.L.G. I, 126 Wn.App. 181, 108 P.3d 156 (2005) ..... 25, 26, 31, 34

<u>In re H.W.</u> , 92 Wn. App. 420, 961 P.2d 963 (1998) .....	18, 21
<u>In re Welfare of C.B.</u> , 134 Wn.App. 942, 143 P.3d 846 (2006)	24, 26
<u>In re Welfare of J.D.</u> , 42 Wn.App. 345, 711 P.2d 368 (1985) ...	27
<u>In re Welfare of Hauser</u> , 15 Wn. App. 231, 548 P.2d 333 (1976) ..	32
<u>In re Welfare of S.V.B.</u> , 75 Wn.App. 762, 880 P.2d 80 (1994).	15, 16
<u>Halsted v. Sallee</u> , 31 Wn.App. 193, 639 P.2d 877 (1982) .....	15

### Court Rules

RCW 13.34.030.....	15, 16
RCW 13.34.065(5) .....	36
RCW 13.34.100(6) .....	37
RCW 13.34.145.....	17
RCW 13.34.180.....	16, 17, 27, 28
RCW 13.34.190.....	16
RCW 13.34.136(2)(b)(ii) .....	31, 33, 34, 36

### Other Authorities

David Fanshel & Eugene Shinn, <u>Children in Foster Care: A Longitudinal Investigation</u> (Columbia University Press) (1978) ..	33
Dependency and Termination Equal Justice Committee Report (2003), at 19-20 (available at <a href="http://www.opd.wa.gov/Reports/DT-Reports.htm">http://www.opd.wa.gov/Reports/DT-Reports.htm</a> ).....	31, 32

Peg Hess & Kathleen Proch, Visiting: The Heart of Reunification, in  
TOGETHER AGAIN: FAMILY REUNIFICATION IN FOSTER CARE 122  
(Barbara Pine, et al. eds., 1993) ..... 35

Inger P. Davis, et al., Parental Visiting and Foster Care  
Reunification, 18 Child & Youth Servs. Review 363 (1996) ..... 33

Wendy Haight, et al., Understanding and Supporting Parent-Child  
Relationships During Foster Care Visits: Attachment Theory and  
Research, 48 SOCIAL WORK 195 (Apr. 2003)..... 35

A. SUMMARY OF ARGUMENT.

Despite undisputed evidence that Tonya Roberts had actively participated in counseling and parenting programs offered by the State, and despite uncontroverted evidence that she had made significant improvement in each of the areas highlighted as a parenting deficiency, the State sought to prematurely terminate Ms. Roberts's rights in the absence of sufficient evidence. The termination order must be reversed, as the State failed to demonstrate current parental unfitness that would preclude Ms. Roberts from parenting her children in the near future; because Ms. Roberts sufficiently complied with ordered services; because termination is not in the best interest of the children; because the State interfered with reunification by improperly suspending visitation; and because the court failed to provide representation during the proceedings for the adolescent, D.R.

B. ASSIGNMENT OF ERROR.

1. The court's order terminating Ms. Roberts's parental rights is contrary to the requirements of due process of law.
2. The State did not prove there was little likelihood that conditions could not be remedied in the near future, particularly

based on Ms. Roberts's improvement and compliance with all required services.

3. The State did not prove that the children's stability required termination of Ms. Roberts's parental rights, nor that her parental relationship would clearly diminish the children's prospects for integration into a stable and permanent home.

4. The State did not prove that termination was in the best interests of the children.

5. The court improperly entered Finding of Fact 11, as it is not supported by substantial evidence in the record. CP 91.<sup>1</sup>

6. The court improperly entered Finding of Fact 17, as this finding overlooks substantial evidence in the record that the Guardian ad Litem here inadequately represented the interests of either D.R. or A.R. CP 91.

7. The court failed to appoint counsel for the adolescent D.R., despite a timely request at trial. RP 426.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Before determining that a parent's rights to the care and custody of a child should be terminated, the State must prove that it

---

<sup>1</sup> The Findings of Fact and Conclusions of Law are attached as Appendix A, and Clerk's Papers are referred to herein as "CP." One set of findings was entered as to both D.R. and A.R.

actively sought to remedy recognized parenting deficiencies and offered all reasonably available services necessary to rehabilitate the parent. In this case, despite Ms. Roberts's parenting challenges, as well as those presented by her high-needs children, Ms. Roberts immediately and actively engaged in parenting and counseling services, and made significant positive changes to her personal and professional life. However, the State failed to acknowledge her progress, and instead moved ahead with termination proceedings. Did the court err by finding the State adequately met its burden of proof when the State refused to allow Ms. Roberts to continue on the path of reunification, before terminating her rights? (Assignments of error 1, 2, 3, 5, 6)

2. The court may not terminate a parent's right to care for her children absent evidence that there is little likelihood conditions can be remedied in the near future. In the case at bar, Ms. Roberts responsibly sought services, even at her own expense, to correct her parental deficiencies, but the State opposed reunification based on her lack of "insight" and the significant needs of her children. Since Ms. Roberts completed her service plan and showed undeniable improvement, did the court err by finding Ms. Roberts

would not be able to parent her children in the near future?

(Assignments of error 1-6)

3. When a parent makes significant improvement in overcoming parental deficiencies, the State may not rely upon past performance to prove that there is little likelihood of reunification in the near future. Considering Ms. Roberts's improvement during the course of the proceedings, including completing her service plan, finding and maintaining employment and housing, and overcoming depression, did the court impermissibly rely on past performance in finding that there was little likelihood that Ms. Roberts would be able to parent her children in the near future? (Assignments of error 1-6)

4. The State must prove that continued custody would clearly diminish a child's prospects for integration into a stable and permanent home. Here, neither child was in a pre-adoptive foster home, and there was no indication that any stable foster placement would be found in the foreseeable future. Nor was there evidence that terminating the children's relationship with Ms. Roberts would improve their chances for permanency elsewhere. Did the court err by finding that this termination factor was proven? (Assignments of error 2, 3, 4)

5. Termination of parental rights may not occur without proof that it is in the best interest of the child. Did the trial court err by finding the children's best interests were met by irrevocably severing their ties with their mother? (Assignments of error 2, 3, 4).

6. When a court determines that a child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position. Where it was clear that the appointed Guardian ad Litem inadequately advocated for the best interests of either child, did the trial court abuse its discretion by failing to appoint counsel, particularly in the case of twelve year-old D.R.? (Assignment of error 7)

D. STATEMENT OF THE CASE.

Tonya Roberts gave birth to her daughter, D.R., on March 22, 1996. CP 1-8. A.R., a boy, was born on April 30, 1997. CP 105-13. Both children were the products of Ms. Roberts's marriage to Larry Roberts, Jr. CP 2, CP 106; RP 39.<sup>2</sup> Both children were born and spent their first few years with their parents in Missouri. RP 24. By the time the children were approximately ages three and four, it became clear that A.R. had severe behavioral issues. RP

---

<sup>2</sup> The verbatim report of proceedings consists of five volumes of consecutively paginated transcripts from March 20, 2008, to August 25, 2008, and will be referred to herein as "RP," followed by the page number.

656-57, 662. Ms. Roberts concluded that A.R. might be reacting to the dissolution of his parents' marriage, which had included episodes of domestic violence. RP 656-57. After A.R., age three, hit Ms. Roberts in the head with a dinner plate and verbally threatened her, she took A.R. for a psychiatric evaluation, and A.R. was diagnosed with ADHD. RP 656-57, 662. CPS opened a neglect file on the family in Missouri. RP 37, 662. The children were not removed at this time, and the CPS case was closed after Ms. Roberts obtained an evaluation and services for A.R. RP 662-63. Ms. Roberts also obtained services for her daughter D.R. while in Missouri, including speech therapy and reading assistance for her, and participated in the completion of an IEP. RP 660.

Shortly after the Missouri CPS case was closed, Ms. Roberts, feeling overwhelmed, sent both children to live with their father, Mr. Roberts. RP 664.<sup>3</sup> Larry Roberts almost immediately had four year-old A.R. committed to a psychiatric facility, where he stayed for approximately four weeks. RP 665. Shortly thereafter, D.R. disclosed that her younger brother, A.R., had attempted to

---

<sup>3</sup> Ms. Roberts testified that her decision to send the children to live temporarily with their father resulted in a voluntary placement order, at Mr. Roberts's insistence. RP 663-64. Ms. Roberts states that her ex-husband insisted that he would only take the children on the condition that she sign them into care, so that "the state could have control" of the custody agreement. Id.

have sex with her. Id. Due to this allegation, D.R. was immediately removed and placed with her kindergarten teacher as a foster parent. RP 665.

After an eight-month stay in a therapeutic foster home, A.R. was returned to Ms. Roberts, as was D.R. RP 668. Ms. Roberts again had full custody of both children, despite several CPS investigations, based upon complaints by Mr. Roberts, mainly consisting of dirty house and hygiene allegations. RP 670-71.

Upon the arrest and incarceration of Mr. Roberts (due to a probation violation for repeated DWI's), Ms. Roberts and the children relocated to Stevens County, Washington, in early 2003, where Ms. Roberts's father and stepmother live. RP 675-76.

Shortly after her arrival in Washington, Ms. Roberts became involved with a new partner, Philemon Perry, who was verbally and emotionally abusive. RP 648. Before the abuse could turn physical, Ms. Roberts voluntarily placed her children in foster care, in order to protect them from her own abuser. Id. Unfortunately, as she had feared, this partner soon became physically abusive, beating Ms. Roberts and threatening her life, as well as the lives of her children, who were still in care. RP 644-45. At the suggestion of her case worker, Ms. Roberts obtained a restraining order

against her abuser. RP 644. This enraged Mr. Perry, who held her hostage at knife-point for several hours, and repeatedly stalked her, finding her in both friends' homes and in shelters. RP 644-45.

Ms. Roberts was despondent about her situation, and attempted suicide in the home.<sup>4</sup> In February 2004, Ms. Roberts voluntarily placed both children with the Department of Children and Family Services (the Department). RP 679. Although Ms. Roberts initially requested that D.R. and A.R. reside with her father and stepmother, she soon asked for them to be moved to a foster placement, due to her concerns about her own father's disciplinary methods. CP 3-4; CP 107-08; RP 679. An order of dependency and a dispositional order were entered on May 7, 2005, by which certain services were ordered to be provided by the Department. RP 84-85. The services to be provided to Ms. Roberts included a chemical dependency assessment and treatment (if necessary), random urinalysis (UA, if necessary), a mental health assessment and counseling, a parenting assessment and courses, and home visits. RP 85; Ex. 3.

---

<sup>4</sup> Testimony indicated that when Ms. Roberts attempted to overdose on prescription medications, the children were home, but not witness to her condition. It was established that after Ms. Roberts returned home from the hospital, the children were informed that she had attempted suicide. RP 647.

According to Ms. Roberts's CWS case worker, Cheryl Grimm, Ms. Roberts "actively engaged right off the bat with services." RP 90. This worker also testified that "Tonya very much gave it her best shot," and "truly loves her children." RP 99. Ms. Grimm also stated that she observed several visits between Ms. Roberts and her children, and found that Ms. Roberts "was very appropriate" with the children, who were always "excited to see her." RP 95. Despite this, visits were suspended by September 2004, due to complaints by foster parents that the children were more disruptive after visiting with their mother. RP 97, 100.

D.R.'s own therapist, Dr. Lisa Estelle, testified that D.R. seemed to benefit from the visits with her mother, and 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 to this day, the child still wants such visits resumed. RP 237-39, 245-50.

Ms. Roberts complied with each of the Department's service requirements, completing the chemical dependency assessment and providing clean UA's. RP 85-86.<sup>5</sup> Ms. Roberts also completed a psychological assessment in March 2004, which resulted in a

---

<sup>5</sup> Ms. Roberts was not found not to have any drug or alcohol dependency issues that required a treatment program. RP 85.

diagnosis of depression and PTSD, due to the trauma caused by domestic violence. RP 86, 380-82; ex. 22. The same psychologist who completed the 2004 assessment, Dr. Paul Wert, completed an updated assessment of Ms. Roberts in February 2008. RP 280-82; ex. 23. At trial, Dr. Wert testified that Ms. Roberts had made considerable improvement which he found "really quite striking," and that her symptoms of PTSD and depression had resolved, due to her doing "really good work" in therapy. RP 384.

In addition, Ms. Roberts completed a parenting assessment, as required by the service plan, and successfully finished all parenting classes offered through the Stevens County Counseling Center. RP 88.

During the period of dependency, D.R. and A.R. were shuffled among several different foster placements, and their behavior deteriorated. 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. Both children were, at times, home-schooled due to their behavior, and A.R., particularly, was eventually admitted to the Children's Study and Treatment

Center (CSTC), the most restrictive placement for a child his age. RP 307. A.R.'s treating psychologist at CSTC, Dr. Jeremiah Norris, testified that A.R. takes three medications daily to treat his ADHD, impulsivity, and depression. RP 360. Dr. Norris also testified that A.R. is likely to be discharged to another facility, rather than a foster home, due to his high risk factors. RP 340. He noted that in addition to A.R.'s other needs, his classification as a sexually-aggressive youth (SAY) mandates specialized therapy and supervision. RP 341.

At the time of trial, D.R. was residing with a stable foster home, but one that is not considered pre-adoptive. RP 590; CP 56-60. D.R.'s therapist, Dr. Estelle, testified that D.R.'s behavior has improved to some degree, but that she still requires a great deal of care and treatment, in a setting with no younger children. 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.

Due to the Department's insistence that D.R. and A.R. needed a high level of care, Ms. Roberts attempted to obtain additional training. Ms. Roberts repeatedly asked the Department to provide her with the same courses given to therapeutic foster

parents, but was told unequivocally that the Department does not offer those types of classes to biological parents. RP 127, 598. The Department even told Ms. Roberts that perhaps if she applied to become a licensed foster parent, she could receive the special training reserved for foster parents. RP 600. Ms. Roberts took the initiative and prepared herself for what she hoped would be the eventual reunification of her family. She studied a friend's foster parent training handbook, and completed all of the tests at the end of each chapter. RP 651. She went online and completed videotaped training courses for foster parents, again taking the exams at the end of each course and making copies of her certificates. RP 650. She studied for and completed the coursework for sexually-aggressive youth (SAY) and domestic violence training at the Resource Family Training Institute, and received another certificate. RP 651-52; ex. 301.

Despite all of her efforts, Ms. Roberts was told by the Department that she was not eligible for foster parent training, and that there were simply no services that could be offered to help her get her children back. RP 103; 143-44. Rather, the State's witnesses testified that D.R. and A.R. need to know that "the story with their mom is done," and that the children need "closure" on

their relationship with their mother. RP 468, 476. The State's witnesses even stated that it was preferable for the children to effectively be orphaned – since all witnesses admit that adoption is extremely unlikely for either child -- than to maintain any relationship with Ms. Roberts. RP 118, 498-99.

In addition, the appointed GAL, Lu Haynes, testified that D.R. has consistently told her foster parents of her wish for resumed visitation with her mother, and has stated that she wants a relationship with her mother. RP 426, 490. At trial, the GAL advocated a position contrary to her own client's wishes, and admitted that she had not seen D.R., her client, in four years.<sup>6</sup> RP 489. The GAL also admitted that she had never met A.R., in over four years of representation. RP 485-87.

On the first day of trial, March 20, 2008, trial counsel for Ms. Roberts requested that the court appoint counsel for D.R., whose twelfth birthday was two days away. RP 165. The court asked the GAL, Lu Haynes, to discuss this matter with her client, D.R., before the next appearance. Id. On the next trial date, April 8, 2008, the court heard testimony from Dr. Lisa Estelle, D.R.'s therapist. Dr.

---

<sup>6</sup> The GAL testified that she had only met with D.R. three times in over four years on the case, and that the last interview had been in 2004 – four years before the date of trial.

Estelle testified that D.R. wants 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 was now twelve years old. RP 410. The court's response to this second request was to again ask that the GAL discuss the issue of counsel with D.R. and with her 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 the GAL had not yet asked D.R. about this issue. RP 417. The GAL admitted that she had not complied with the court's repeated requests to discuss representation with D.R., but merely stated that she was concerned about the anxiety that such a discussion might cause D.R. RP 419. Despite the fact that the court had been asked on the first day of trial to appoint counsel for D.R., the motion was ultimately denied. RP 426. In its decision, the court noted that although this denial of counsel would raise an appellate issue, and although D.R. had repeatedly indicated her desire for a relationship with her mother,

that it was simply "too late in the game" for another lawyer to catch up with the progress of the case. Id.

At a trial commencing March 20, 2008, Ms. Roberts's rights to D.R. and A.R. were terminated by Judge Rebecca Baker. RP 767-82; CP 88-94. The court found that termination was in the best interests of the children, and that the State had proved the statutory requirements. Ms. Roberts timely appeals.

E. ARGUMENT.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S PETITION TO TERMINATE MS. ROBERTS'S PARENTAL RIGHTS.

A court may terminate parental rights only after a series of procedural protections are met, culminating in a fact-finding hearing in which the requisite elements are proven by clear, cogent, and convincing evidence. In re Welfare of S.V.B., 75 Wn.App. 762, 768, 880 P.2d 80 (1994); Halsted v. Sallee, 31 Wn.App. 193, 196, 639 P.2d 877 (1982).<sup>7</sup>

---

<sup>7</sup> To prevail in a petition to terminate parental rights, the State must prove:

- (1) That the child has been found to be a dependent child under RCW 13.34.030(2); and
- (2) That the court has entered a dispositional order pursuant to RCW 13.34.130; and
- (3) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a

Even if the statutory elements of RCW 13.34.180 are met, termination is not appropriate unless the State proves by a preponderance of the evidence that termination of parental rights is in the best interest of the child. RCW 13.34.190(3); S.V.B., 75 Wn.App. at 775.

Here, it is undisputed that the procedural elements of RCW 13.34.180(1), (2), and (3) were met. Ms. Roberts contends, however, that all reasonable services were not meaningfully offered and provided, and that she substantially complied with her service plan; that any remaining deficiencies could have been remedied in the near future, had the State provided appropriate services; that her relationship with her children would not clearly diminish their

---

period of at least six months pursuant to a finding of dependency under RCW 13.34.030(2); and

(4) That services ordered under RCW 13.34.130 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided; and

(5) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(6) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable permanent home.

RCW 13.34.180. Each of the above elements must be proven by clear, cogent, and convincing evidence. RCW 13.34.190(2); In re S.V.B., 75 Wn.App. at 768; In re Dependency of A.V.D., 62 Wn.App. 562, 568, 815 P.2d 277 (1991).

prospects for early integration into a stable and permanent home; and that the termination of her parental rights was not in the best interest of the children.

1. THE STATE FAILED TO PROVE IT MEANINGFULLY OFFERED, PROVIDED, OR ACTIVELY SOUGHT ALL NECESSARY REMEDIAL SERVICES.

a. The State is mandated to meaningfully offer, by active efforts, available services it claims are necessary for addressing parenting deficiencies. The primary purpose of a dependency adjudication is to allow courts to order remedial measures to preserve and mend family ties, and to alleviate the problems which prompted the State's initial intervention. Krause v. Catholic Comm'ty Serv., 47 Wn.App. 734, 744, 737 P.2d 280, rev. denied, 108 Wn.2d 1035 (1987). In order to meet this obligation, the State must offer all services, if reasonably available, designed to correct the identified parenting deficiencies. In re P.D., 58 Wn.App. 18, 29, 792 P.2d 159, rev. denied, 115 Wn.2d 1019 (1990).

Under Washington law, the State is obligated to provide, or offer, services to an unfit parent. RCW 13.34.145; RCW 13.34.180. The State must demonstrate "clear, cogent, and convincing evidence that [the parent] was offered or provided all reasonably

available, potentially efficacious services." In re Dependency of H.W., 92 Wn.App. 420, 428, 961 P.2d 963 (1998). The burden does not rest on the parent in need of services to seek them out. Id.

b. The State failed to meaningfully support appellant in finding appropriate services. Here, Ms. Roberts's most pressing parenting deficiencies arose from her history of depression and PTSD caused by domestic violence. RP 383-84. Ms. Roberts duly complied with assessments for parenting skills, mental health, and chemical dependency. RP 85-88. Ms. Roberts's compliance with parenting courses, as well as with counseling and successful visitation were all acknowledged by providers and by the court. RP 767.

Ms. Roberts's impressive progress was also noted by the psychologist who administered her mental health evaluations in both 2004 and 2008. Dr. Wert called Ms. Roberts's progress "really quite striking," and noted that she was symptom-free in 2008, due to the hard work she had done in therapy. RP 384. Dr. Wert also stated that Ms. Roberts was "certainly capable" of understanding parenting classes, if she were only permitted to attend them. RP 392.

Once it was clear that Ms. Roberts had fulfilled her obligations under the service plan, she began to seek out additional training from the Department. RP 598, 650-53. Since the Department told her that her children needed supervision from someone with special training, she sought out courses and books that the Department regularly provided for therapeutic foster parents. RP 650-53. Ms. Roberts completed online courses with exams, and read the foster parent handbook loaned to her by a friend. RP 650-51. She even completed sexually-aggressive youth (SAY) training and received a certificate, in order to better prepare herself for her children's diagnosed needs. RP 651-52; ex. 301.

Despite her efforts, she was told in no uncertain terms that these types of classes were not available to biological parents, but only to licensed foster parents, and that she could not receive any credit for her work.<sup>8</sup> RP 127, 598-601. She was also told by the Department that there was basically nothing else she could do to get her children back. RP 143-44.

---

<sup>8</sup> This statement was somewhat ironic, as the dependency finding, itself, makes Ms. Roberts ineligible to obtain a foster care license, even if she attempted to do so.

c. The court erred by finding the State met its burden of proof. A trial court's findings of fact entered following a termination hearing must be supported by substantial evidence in the record, and must, in turn, support the trial court's conclusions. In re C.B., 79 Wn.App. 686, 692, 904 P.2d 1171 (1995), rev. denied, 128 Wn.2d 1023 (1996). The determination of whether substantial evidence exists must be made in light of the required degree of proof, i.e., clear, cogent, and convincing evidence. Id. Where findings of fact are not supported by substantial evidence, they are not binding on the reviewing court. See State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

Here, the court erred by entering Finding of Fact 11, as to appellant's ability to parent with additional services and training, stating:

The mother argued she wanted training such as what foster parents would receive, but even this would likely be unsuccessful in the reasonable future due to the mother's lack of insight and children's behaviors and conditions.

CP 91. The court's dismissive conclusions in Finding of Fact 11, as to appellant's ability to parent with additional services and training, are without foundation. The court seems to discredit Ms. Roberts's painstaking attempts to seek services and education in furtherance

of parenting her own children, and to discount the undeniable progress that she has made during the period of dependency.

There is nothing in the record to indicate that Ms. Roberts has faltered during the dependency period, nor that she has shown any signs of the depression or instability that initially troubled the State in this matter. Since Ms. Roberts has fully complied with her service plan, and has essentially fully corrected the parenting deficiencies itemized by the State, it is unclear on what foundation the court made its findings.<sup>9</sup> Thus, the record does not support the court's findings and these portions of the findings must be stricken.

d. Since all necessary services were not provided, the termination finding was premature. The State plainly failed to prove by the "high probability" required, that all necessary services were provided. In re Dependency of H.W., 92 Wn.App. at 426. The services deemed essential to remedying the parental deficiencies were not expressly offered and provided here, by the State's active efforts. See id. at 427-28.

---

<sup>9</sup> Surely the court's discussion of Ms. Roberts's "risk of depression" must be disregarded. RP 774. Apparently, the court decided that despite the fact that Ms. Roberts's current mental health evaluation pronounced her free of all depressive symptoms, her history of depression disqualifies her from parenting forever. Clearly, this type of draconian reasoning is without legal support.

Ms. Roberts plainly succeeded in addressing her own mental health needs; she secured a safe and child-appropriate home; she has maintained and been promoted at a stable job for almost two years; she has freed herself of any dangerous partners and educated herself about domestic violence; and she has asked for additional training, completing all the courses she could find, with very little assistance from the State. RP 384, 392, 500, 639-42, 650-53, 728. Rather than assisting Ms. Roberts in finding special needs parenting programs and pursuing its statutory obligation to work toward reunification of this family, the State has insisted from the beginning on termination. Indeed, even specially licensed therapeutic foster parents are provided with intensive services for children with special needs. RP 557. Without providing Ms. Roberts with the same services that the State would provide within a foster or institutional setting, the State failed to meet its burden to show it provided all necessary remedial services.

As to the State's burden to offer all reasonable services, the court's discussion of futility must be addressed. In its findings, the court acknowledged Ms. Roberts's dedicated pursuit of specialized services, but noted that "we cannot wait ... for Ms. Roberts to complete a B.A. and a Ph.D. in psychology – if she were capable of

doing that.” RP 778-79. The court continued that “it’s sort of that level of person, or at least someone with a very in-depth understanding of child development and trauma, who needs to have the necessary insight in order to be – be that calm, consistent caregiver that has a complete understanding [of] these children.” Clearly, there is no legal basis for the court’s requirement of higher education to parent one’s own children, however specialized their needs. Such inappropriate efforts to shift the burden to the mother only indicate the measure by which the State has utterly failed to prove its case.<sup>10</sup>

Since the State failed to meet its burden here, and since it is undisputed that Ms. Roberts complied with all services ordered, the court’s findings should be vacated and its order reversed.

---

<sup>10</sup> The court’s findings, which lack any basis in law, continued:  
[T]here is always hope for Ms. Roberts in the future that she will have some benefit from all of the things that she’s learned from this. And she obviously has been doing some serious work in counseling, and having a good job, and being away from an abusive male, and recognizing she doesn’t need to have a man in her life to – or any other adult in her life in order to survive and be of use to her community. And that’s – she’s come a long way. And that is not to be trifled with. But it’s simply not enough for these children who are high needs, special needs children with need of a highly skilled, specialized and structured environment that Ms. Roberts, with her work schedule and her limitations in terms of insight would never be able to provide these children. RP 781-82.

2. THE STATE FAILED TO PROVE THERE IS LITTLE LIKELIHOOD THAT MS. ROBERTS'S PARENTAL DEFICIENCIES COULD NOT BE SOON REMEDIED, AND THE CHILDREN RETURNED TO HER IN THE NEAR FUTURE.

In proving that there is little likelihood that conditions will be remedied so a child can be returned to her parent, the State must show that, at the time of the termination hearing, there were parental deficiencies that were unlikely to be cured in the near future, i.e., proof of present parental unfitness. Krause, 47 Wn.App. at 742-43; see In re H.J.P., 114 Wn.2d 522, 530, 789 P.2d 96 (1990).

a. Based on Ms. Roberts's demonstrable improvement, the court improperly found little likelihood that conditions could have been remedied in the near future. The State bears the burden of proving that it is highly probable the parent would not have improved in the near future. In re Welfare of C.B., 134 Wn.App. 942, 955-56, 143 P.3d 846 (2006).

In C.B., the court found that despite the valid concern that the mother had a long way to go, as she had maintained her sobriety for only four months, the State did not meet its burden of proving "little likelihood" existed that she would not improve within the one-year time frame that constituted the reasonably

foreseeable future in that case.<sup>11</sup> The State contended the mother would need to engage in certain services, continue her sobriety, and maintain a clean and safe home, but offered no evidence that these requirements could not be accomplished within one year. *Id.* at 956-57. In light of her progress, the court found it unreasonable to conclude that there was little likelihood she could not address her parenting deficiencies in the near future. *Id.* at 958.

As in C.B., Ms. Roberts has made undeniable progress. The court seems to have based its criticisms of Ms. Roberts based upon the specialized needs of her children, rather than the progress Ms. Roberts has made during the past few years. During the pendency of this matter, Ms. Roberts has shown that she has the initiative to find stable housing, employment, and to address her own mental health needs. RP 781-82; 728; Ex. 302. She has also impressed providers with her abilities to learn new skills and to use her new insight in parenting her children.

Ms. Roberts's past performance cannot justify the court's finding that there is little likelihood she could be reunited with her children in the near future. If the State had actually offered the

---

<sup>11</sup> What constitutes the "near future" varies from case to case, depending on the age of the child and circumstances of the case, but is not generally viewed as less than six months to one year. T.L.G.I., 126 Wn.App. at 205.

requested services designed to reunify this family, it is hard to imagine that Ms. Roberts could not be reunited with her children within less than a year.

b. Due to the concrete evidence of improvement, the State did not prove that there is little likelihood conditions will not soon be remedied, resulting in reunification. The State may not simply rely upon Ms. Roberts's past mental health problems to terminate her parental rights in light of the clear evidence of her improvement. C.B., 134 Wn.App. at 959. Ms. Roberts's recent performance is in "stark contrast" to cases where the continued provision of services was useless based on the plain lack of benefit from such services. In re Dependency of T.L.G. I, 126 Wn.App. 181, 205, 108 P.3d 156 (2005). Based on Ms. Roberts's willingness to address her problems and her distinct improvement, the State did not prove there is little likelihood conditions could not be remedied in the near future – indeed, the State did not even prove what Ms. Roberts's remaining deficiencies actually may be.

3. THE STATE FAILED TO PROVE THAT THE CONTINUATION OF APPELLANT'S PARENTAL RELATIONSHIP WOULD CLEARLY DIMINISH THE CHILDREN'S PROSPECTS FOR INTEGRATION INTO A STABLE AND PERMANENT HOME, OR THAT SUCH TERMINATION WAS IN HER CHILDREN'S BEST INTEREST.

- a. There was a lack of proof that the relationship itself

interferes with stability and permanency, as required by statute.

RCW 13.34.180(6) provides:

That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

(emphasis added). This factor reflects the Legislature's recognition that, even in cases where there is little chance the parent will ever be able to resume custody, it is better to maintain the parent-child relationship so long as it does not actually interfere with the permanence and stability of the child's home. The harsh finality of termination, with its potential emotional and mental impact on both the child and the parent should be avoided whenever possible.

See In re J.D., 42 Wn.App. 345, 350, 711 P.2d 368 (1985). The State must show that the child's relationship with a parent (not custody) would be so harmful or disruptive as to clearly diminish the child's prospects of early integration into a stable home. RCW 13.34.180(6).

Here, neither D.R. nor A.R. were in stable placements; both children had been moved from placement to placement, without any real prospect of permanency. RP 340. The State's witnesses testified that sadly, at this stage, there was no realistic hope that either child would be adopted, and A.R., particularly, was likely to reside in a facility for quite some time. RP 340, 498-99, 602.

No testimony was offered by State witnesses that continued contact with their mother would adversely affect either D.R. or A.R.'s prospects for permanency. In fact, the only testimony addressing this issue suggested the exact opposite. Dr. Estelle, D.R.'s therapist, testified repeatedly that contact with Ms. Roberts could be beneficial to both children, and that continued work on the relationship "certainly could impact [D.R.] in a positive way." RP 245-50.

b. Termination decisions must be governed by the best interest of the child. Even if the requirements of RCW 13.34.180(1)-(6) are established by clear, cogent, and convincing evidence, the court has the discretion not to order termination if it finds that termination is not in the child's best interest. In re Charupe, 43 Wn.App. 634, 719 P.2d 127 (1983). The best interest findings must be supported by a preponderance of the evidence. In

re A.V.D., 62 Wn.App. 562, 568, 571, 815 P.2d 277 (1991); RCW 13.34.231

Washington courts have held that the factors involved in determining the best interest cannot be specified; the best interest inquiry depends upon the facts of the individual case. In re Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); A.V.D., 62 Wn.App. at 572.

c. Termination was not in D.R. and A.R.'s best interest. Although the GAL was appointed specifically to protect the best interests of both D.R. and A.R., this particular GAL contributed to a grave miscarriage of justice. Rather than actually ascertaining her clients' needs, the GAL failed to meet with either child for years at a time. At the time of trial, she had failed to meet with D.R. for over four years, and she had never even met A.R., even once. RP 485-89. Despite the GAL's purported duty to advocate for the children's best interests, her testimony and conclusions must be disregarded.

Ms. Roberts experienced extremely unfavorable circumstances during the early years of her children's lives, and for some of their hardships, she certainly shares the blame. However, Ms. Roberts came to understand her own challenges and

succeeded in turning her life around, so that she could be a healthy parent to her children. Rather than give any priority to Ms. Roberts as the biological mother of D.R. and A.R., or credit to Ms. Roberts for all that she has achieved, the State merely found placements and facilities for these children, and sought termination of Ms. Roberts's parental rights.

Had Ms. Roberts been provided with consistent access to the necessary programs and services as she had requested, she would have been in a far better position to be reunified with her children, and to ease their transition from foster homes to her own home. Based upon Ms. Roberts's efforts to retain and improve her parental relationship with her children and her undisputed success with her service plan, and based upon the State's lack of reasonable efforts to accommodate and rectify her parental deficiencies, it was not in the best interests of the children to prematurely terminate Ms. Roberts's parental rights. Therefore, the trial court's conclusion that termination was in the children's best interest is not supported by the record and should be stricken.

4. THE COURT ABUSED ITS DISCRETION IN SUSPENDING VISITATION, WHICH UNDULY AFFECTED APPELLANT'S EFFORTS TOWARD REUNIFICATION WITH HER CHILDREN.

a. Visitation is the right of a family, one that must be offered up until the time of termination, unless suspension of visits is necessary to protect the child from an actual, concrete risk of harm. According to statute, "[v]isitation is the right of the family" during a dependency proceeding. RCW 13.34.136(2)(b)(ii); T.L.G., 139 Wn. App. at 4, 16-17. An essential part of the statutory mandate is the provision of "[e]arly, consistent, and frequent visitation." Id. The statute requires the Department to encourage maximum parent and child contact and prohibits courts from limiting or denying visitation without a showing of risk of harm. Id.

Visitation may be limited or denied only if the court determines it is necessary to protect the child's health, safety, or welfare. RCW 13.34.136(2)(b)(ii). Nor may visitation be limited as a sanction for a parent's failure to comply with court orders or services. Id. Even when a termination petition is pending, courts may not restrict visitation -- visitation remains the right of the family and should be facilitated up until a termination order is entered. Dependency and Termination Equal Justice Committee Report (2003), at 19-20

(available at <http://www.opd.wa.gov/Reports/DT-Reports.htm>)<sup>12</sup>; In re Welfare of Hauser, 15 Wn. App. 231, 236, 548 P.2d 333 (1976).

The frequency of parental visits strongly correlates to the likelihood of reunification. Dependency and Termination Equal Justice Committee Report, supra. This in turn inevitably shapes the historical events of the dependency, with the denial or limitation of visits actually playing a part in weakening the parent-child bond, rather than fulfilling the mandate to work toward reunification.

Santosky v. Kramer, 455 U.S. 745, 762 n.12, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (noting a court "possesses unusual discretion to underweigh probative facts that might favor the parent"); id. at 763 n.13 (noting that one of the ways in which the State might structure evidence for termination is by denying visitation and preventing parent-child contact); Hauser, 15 Wn. App at 236 (recognizing the injustice that would exist if a trial court were permitted to enter a finding that no parent-child bond exists based merely upon

---

<sup>12</sup> This committee, led by former Washington Supreme Court Justice Bobbe Bridge, noted research studies that show visiting frequency to be a strong predictor of family reunification.

evidence showing the absence of visitations – an absence caused by the Department's suspension of visits).<sup>13</sup>

In sum, family ties cannot be mended when parents and children are not permitted to see and interact with each other. RCW 13.34.136(2)(b)(ii). Thus, visitation is a right of all family members and is essential to family reunification; visits may be limited only if necessary to protect a child. *Id.*

b. It was an abuse of the court's discretion to suspend visitation. In this case, Ms. Roberts's twice weekly visitation with D.R. and A.R. were suspended in September of 2004, due to foster parents' complaints that the children were more defiant following visits. RP 94-97. Despite the fact that D.R.'s therapist believed that the child benefited from the visits, and that the visits were productive, this therapist agreed that D.R. felt increased anxiety following visits. RP 210. Based only upon case worker Cheryl Grimm's assessment that suspending visitations would allow both children to better "stabilize" in their foster

---

<sup>13</sup> One study found that reunification is ten times more likely when the family participates in regular visits. Inger P. Davis, et al., Parental Visiting and Foster Care Reunification, 18 Child & Youth Servs. Review 363 (1996); see also David Fanshel & Eugene Shinn, Children in Foster Care: A Longitudinal Investigation 98 (Columbia University Press) (1978) (noting a "striking" and "amply demonstrated" correlation between visitation and reunification).

placements, the court suspended visitation completely. RP 94, 100.

However, the Legislature made clear its intent that maximizing a child's opportunities for visitation is in the child's best interest. RCW 13.34.136(2)(b)(ii). A court may suspend visits only where the record shows the visits pose an actual concrete risk of harm to the child. T.L.G., 139 Wn. App. at 4, 17. Suspending visits merely to prevent a child's anxiety is not necessarily in the child's best interests and is contrary to legislative intent.

The Legislature expressly found consistent and frequent visits are in the child's best interests because they are "crucial for maintaining parent-child relationships and making it possible for parents and children to safely reunify." RCW 13.34.136(2)(b)(ii). To suspend visits is therefore to create a catch-22 -- it further disrupts the parent-child bond and undermines the legislative goal of reunification. T.L.G., 139 Wn. App. at 18.

Not only do parent-child visits help maintain the parent-child bond, children also benefit cognitively, emotionally, and behaviorally. Visitation reassures a child that his parents have not abandoned him and still want to see him. Peg Hess & Kathleen Proch, "Visiting: The Heart of Reunification," in Together Again:

Family Reunification in Foster Care 122 (Barbara A. Pine, et al., eds.) (1993). Visitation also provides a healthy outlet for children to express the painful feelings of separation and anxiety. Id.

Here, according to the same case worker, Ms. Grimm, Ms. Roberts "was very appropriate" at visits, and the children were always "excited to see her." RP 95. There is no evidence that the visits caused harm to either child; indeed, case workers and the children's therapist agreed that the visits went quite well and that the children were benefiting. RP 95, 211, 226. The only negative aspects of the visitation were the claims of anxiety and defiance experienced by the children's foster parents, and conveyed to case workers.

However, foster parents commonly report a temporary worsening of children's behavior following parental visits. E.g., Wendy Haight, et al., "Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research", 48 Social Work 195 (Apr. 2003).<sup>14</sup> Experts agree that

---

<sup>14</sup> Visits may cause the parent and child to repeatedly re-experience difficult emotions associated with reunion and separation. Wendy Haight, et al., "Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research", 48 Social Work 195 (Apr. 2003). "Caseworkers should consider the multiple causes of such behaviors and not necessarily attribute them to problems in the attachment relationship." Id.

even where parental visitation causes a child emotional distress, suspending visits is not necessarily in the child's best interest. Id.

c. By abusing its discretion in suspending visitation, the court improperly interfered with family bonding. When the court inappropriately suspended visitation in September 2004, the court interfered with and prevented the bonding process between Ms. Roberts and her two children.

Where the State removes a child from his or her parents, it has an affirmative obligation to make reasonable efforts to reunify the family; visitation is an essential component of any reunification plan. RCW 13.34.065(5); RCW 13.34.136(2)(b)(ii). Absent legitimate health and safety concerns, consistent and frequent visitation is in a child's best interests and essential to the legislative goal of reunification. RCW 13.34.136(2)(b)(ii). Given that it is common and normal for some children to experience emotional distress surrounding visits, allowing courts to suspend visitation based only on a finding that they distress the child is contrary to legislative intent.

The court's abuse of discretion in suspending visitation must not be held against Ms. Roberts in any determination of whether reunification may take place in the near future. It is draconian and

illogical for the State's witnesses to argue that Ms. Roberts has not seen her children for several years, and that this should prohibit the court from considering reunification. The State itself created those conditions when it improperly suspended visitation.

5. THE COURT ABUSED ITS DISCRETION BY FAILING TO APPOINT COUNSEL FOR D.R., DESPITE TRIAL COUNSEL'S TIMELY REQUEST.

a. There is a right to counsel for adolescents in dependency proceedings. RCW 13.34.100(6) states that in dependency proceedings,

If the [subject] 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). It has long been the law in the paternity context that children have a constitutionally protected interest in the issue of their parentage and a due process right to independent party status. State v. Santos, 104 Wn.2d 142, 147-48, 702 P.2d 1179 (1985). Children also have a due process right in paternity actions to representation of their interests through the appointment of a guardian ad litem (GAL). Id. The Court defined the child's interests in paternity to include more than just the potential financial benefits

of child support. The child also has an interest in the “familial bonds...at stake.” Id.

The Court has also taken note of the child’s need for independent legal representation by counsel, in addition to the appointment of a GAL, as required by Santos. In In re Parentage of LB, the Court recognized the *de facto parent* doctrine. 155 Wn.2d 679, 122 P.3d 161 (2005). Although the child in LB had the benefit of a GAL, as did D.R. in the instant matter, the Court commented on the issue of legal counsel to advocate for the child’s position and advised trial courts as follows:

[W]e strongly urge trial courts in this and similar cases to consider the interests of children in dependency, parentage, visitation, custody, and support proceedings, and whether appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice.

In re LB, at fn. 29.<sup>15</sup>

b. Counsel was requested in a timely manner. Here, trial counsel for Ms. Roberts repeatedly requested that independent counsel be appointed for twelve year-old D.R.

Trial counsel requested that D.R. needed an attorney on the first day of trial, March 20, 2008, as D.R.'s twelfth birthday was two days away. RP 165. Despite the court's repeated requests to the

---

<sup>15</sup> Indeed, Washington is currently out of step with the majority of the nation in its failure to mandate some form of legally trained counsel for every child in dependency proceedings. See, Ala. Code §26-14-11 (mandatory appointment of attorney GAL); AS 47.17.030 (mandatory appointment of attorney GAL); Ariz.Rev.Stat. §8-221(A),(I) (mandatory appointment of both attorney and GAL); Ark. Code Ann. § 9-27-316(f) (mandatory appointment of best interests attorney); Conn. Gen. Stat. Ann. §46b-129a(2) (mandatory attorney for the child); D.C. Code § 16-2304(mandatory attorney for the child); Ga. Code Ann. §15-11-98(a) (mandatory attorney for the child in termination proceedings); HI. Rev. Stat. §587-34 (mandatory appointment of GAL and court required to consider appointing counsel if child and GAL disagree); Kan. Stat. Ann. § 38-1505(a) (mandatory attorney GAL, discretionary attorney); Kentucky Rev. Stat. §620.100(1)(a) (mandatory attorney for the child); LSA-R.S. 9:345(B) (mandatory attorney for child); MD Code Cts. & Judicial Proceedings (CJC) §3-813(d)(1) (mandatory attorney for the child); Mass. G.L.A. 119 §29 (mandatory attorney for the child); Mich. C.L.A. 722.630 (mandatory attorney GAL); Minn. Stat. Ann. §260C.212 Subdiv. 4(c)(4) (mandatory attorney for the child and mandatory GAL); Miss. Code Ann. §43-21-121(1)(e), §43-21-201(1), §43-21-151(1) (must appoint a GAL and must appoint attorney if the GAL is not an attorney); N.H. Rev. Stat. §169-C:15, III (mandatory attorney for child); N.J. Stat. Ann. 9:6-8.23 (mandatory law guardian); N.C. Gen. Stat. Ann. §7B-601 (mandatory GAL and mandatory attorney for child if the GAL is not an attorney); N.D. Civ. Code 14-07.1-05.1 (mandatory attorney GAL); 10 Okl. St. Ann. §7002-1.2(C) (mandatory attorney for the child and mandatory GAL); Or. Rev. Stat. §§ 419A.170, 419B.195 (mandatory CASA/best interests and mandatory attorney for the child); S.C. Code 1976 §20-7-110(1) (mandatory attorney for the child and mandatory GAL); S.D. C.L. §§ 26-8A-9; 26-8A-18; 26-8A-20 (mandatory attorney for the child, discretionary GAL/CASA); Utah Code Ann. §78-3a-314(5) (mandatory attorney GAL in termination proceedings); Va. Code Ann. §16.1-266(A), (D) (mandatory attorney GAL, discretionary attorney for the child); Wis. Stat. Ann. 48.23(3m) (mandatory attorney for child if child is 12 or older, mandatory attorney or GAL if child is younger than 12); Wyoming Stat. 1977 §14-3-211 (mandatory attorney for child and mandatory GAL).

GAL, Lu Haynes, to discuss this matter with D.R., the GAL failed to do so. Id.

Trial counsel repeated her request on the next trial date, April 8, 2008, stating that D.R. was already twelve years old and in need of counsel. RP 410. The court's response to this second request was to again ask that the GAL discuss the issue of counsel with D.R. and with her therapist. RP 411.

Trial counsel renewed her request a third time, on the next trial date, April 16, 2008. RP 417. The GAL admitted that she had never discussed the matter of independent counsel with D.R., despite the court's many requests. Based upon the anxiety that the GAL was concerned such a discussion might evoke from her client, she had simply decided not to comply with the court's request. RP 419.

Despite the repeated and timely requests for the appointment of counsel, the court found that appointing an attorney at such a "late date" would cause confusion. RP 426. In its decision, the court noted that although this denial of counsel would raise an appellate issue, and although D.R. had repeatedly indicated her desire for a relationship with her mother, that it was

simply "too late in the game" to bring another lawyer up to speed on the case. RP 427.

c. Since it was clear that D.R.'s goals in the proceeding differed from those of the GAL, it was an abuse of discretion when the court failed to provide D.R. a voice in the courtroom. In deciding the motion for counsel, brought during trial by counsel for the parents, the court stated that this decision was within the court's discretion. RP 426.

Where a decision or order of a trial court is a matter of discretion, it will not be disturbed on review except upon a clear showing of abuse of discretion -- that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).<sup>16</sup> Here, the court exercised its discretion on untenable grounds and for untenable reasons.

---

<sup>16</sup> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other. Ex rel Carroll, 79 Wn.2d at 26.

The court here decided, despite three timely requests that the adolescent D.R. be appointed counsel, that the mid-trial appointment of counsel would simply be inconvenient, causing delay in the proceedings. RP 426. The court reached this conclusion, even while acknowledging that D.R. had told her GAL, as well as anyone else who would listen, that she opposed the termination of her mother's rights, and wanted to continue her relationship with Ms. Roberts. RP 426-27.

The court even stated that its decision would likely raise an appellate issue, noting:

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.

In response, the State's attorney suggested, given the circumstances, that D.R. be contacted about her desire for counsel, or spoken with by her own counselor. RP 423-24.

Despite the State's own apparent consent to such an inquiry, the court abruptly denied the motion for counsel. To deny

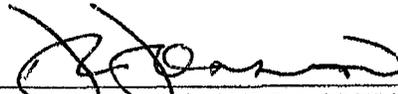
such a motion merely in the name of expediency, can only be seen as a flagrant abuse of discretion.

F. CONCLUSION.

For the reasons stated above, Ms. Roberts respectfully asks this Court to reverse its termination of her parental rights, as it was not supported by the evidence.

DATED this 24th day of February, 2009.

Respectfully submitted,



---

DAVID DONNAN (WSBA 19271)  
Washington Appellate Project (91052)  
Attorney for Appellant

