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No. 27394-6, III

COURT OF APPEALS  
STATE OF WASHINGTON

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. WHERE THE STATE FAILED TO MEET ITS BURDEN AT TRIAL, THE TRIAL COURT'S DECISION TO TERMINATE MS. ROBERTS'S RIGHTS MUST BE REVERSED.

- a. The State was on notice that Ms. Roberts required services tailored to the specific needs of her children; the State's refusal to give Ms. Roberts the services necessary for addressing her identified parental deficiencies was error requiring reversal.

When this dependency matter was initiated, Ms. Roberts's original identified parenting deficiencies arose from her history of depression and PTSD caused by domestic violence. RP 383-84.

Once Ms. Roberts had successfully complied with the services ordered by the court, she took the initiative and sought out additional training in order to better prepare herself for the challenges presented by her high-needs children. RP 598, 650-53.

At this point, she began to hit roadblocks imposed by the State itself. The serious behavioral problems presented by her children were, by this time, well-documented, as were their many placements within the foster care system. RP 38, 53, 56, 67-69, 180, 196-99, 321-28. Despite the fact that Ms. Roberts had taken it upon herself to begin studying the handbooks used by therapeutic

foster parents, she was not permitted to receive credit for her coursework, or offered additional training in working with special needs children, such as her own. RP 650-53.

The Department had actual notice that Ms. Roberts was motivated, interested, and engaged in preparing to reunify with her children – now teenagers, who, as the State has conceded, are hard-to-place, and who are unlikely ever to be adopted. Resp. Brief at 28. The State seems to acknowledge that it was on notice that Ms. Roberts sought additional services tailored to meet the needs of her children. Resp. Brief at 21. However, the State seems to suggest that because the process of taking the therapeutic foster parenting coursework would take some time, that Ms. Roberts would still not be ready within the “near future.” Resp. Brief at 21-22.

First, the State’s reliance on In re P.D. is misplaced. 58 Wn. App. 18, 792 P.2d 159, rev. denied, 115 Wn.2d 1019 (1990); Resp. Brief at 20, 21. Although the Department is not required to provide services that will not correct parental deficiencies in the near future, the instant case is so distinguishable from P.D. as to make the citation inapposite. The child in P.D. was actually born at Western State Hospital, where the mother was involuntarily committed. 58

Wn. App. at 20. Severely schizophrenic and unable to feed, clothe, or find shelter for herself, the mother in P.D. had taken anti-psychotic medication during her pregnancy, resulting in significant delays or even retardation for her child. Id. The parents in P.D. had also had their rights to a previous child terminated. Id.

Likewise, the State's reliance on In re Ramquist, another case involving a schizophrenic mother, is improper. 52 Wn. App. 854, 765 P.2d 30 (1988); Resp. Brief at 20. The child in Ramquist, like the child in P.D., had never lived with the biological mother (the child in Ramquist had been abandoned as an infant), and there was no actual relationship between mother and child in either case.

It is cynical and misleading for the State to rely on cases such as P.D. and Ramquist to argue that the State need not provide Ms. Roberts with tailored services because they are somehow too time-consuming. Unlike the mothers in P.D. and Ramquist, Ms. Roberts raised both of her own children, D.R. and A.R. Ms. Roberts was never hospitalized, institutionalized, or incarcerated, and even her mental health issues were never more severe than a diagnosis of depression and PTSD caused by

domestic violence.<sup>1</sup> RP 86, 380-82; ex. 22. At trial, the psychologist appointed by the court itself to administer Ms. Roberts's mental health evaluations in both 2004 and 2008 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. Case worker Cheryl Grimm testified at trial that at visits, Ms. Roberts "was very appropriate" with the children, who were always "excited to see her." RP 95. There was ample testimony that the children, particularly D.R., very much wanted visits resumed with her mother, and perhaps even wanted to live with her. RP 237-39, 245-50, 423.

The facts of the instant case suggest that Ms. Roberts's situation is quite different from those of the schizophrenic mothers cited for support by the State. Likewise, the State argues, pursuant to Ramquist, that a parent's unwillingness or inability to make use of the provided services excuses the Department from offering extra services that might have been helpful. 52 Wn. App. at 861; Resp. Brief at 20. The record lacks any foundation for this

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<sup>1</sup> A previous diagnosis of depression, or even previous suicide attempts, does not show proof of present parental unfitness. Krause v. Catholic Comm'ty Serv., 47 Wn.App. 734, 742-43, 737 P.2d 280, rev. denied, 108 Wn.2d 1035 (1987); see In re H.J.P., 114 Wn.2d 522, 530, 789 P.2d 96 (1990).

assertion, as Ms. Roberts completed chemical dependency assessments, provided clean UA's, completed two psychological assessments, and completed parenting assessments and classes, among other requirements. RP 85-86, 88, 380-82; ex. 22.

Lastly, the State's reliance on In re Ferguson is inapt. 32 Wn. App. 865, 650 P.2d 1118 (1982), reversed on other grounds, 98 Wn.2d 589, 656 P.2d 503 (1983); Resp. Brief at 20-21. First, this case involved an incarcerated father who had seriously beaten one child and sexually abused the other. Ferguson, 32 Wn. App. at 866-67. The State cites Ferguson regarding the futility of offering services where a parent "has little hope of establishing a relationship with the child despite the services," and finding that in such circumstances, "the trial court may find that the Department has offered all reasonable services." Id. at 869-70; Resp. Brief at 20-21. Ms. Roberts's situation is clearly distinguishable from that in Ferguson, which discusses the doctrine of futility in cases where children do not even know their parents, after extended absences due to incarceration or abandonment. Ferguson, 869-70.<sup>2</sup>

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<sup>2</sup> The Ferguson Court confined its discussion of futility to similar cases of incarceration and physical separation from ones children. See also In re Clark, 26 Wn. App. 832, 611 P.2d 1343 (1980).

Unlike the father in Ferguson, Ms. Roberts has not abandoned her children, and is striving to maintain the ties that connect her to the teenagers she has raised for the majority of their lives. There was also abundant testimony at trial about the connection that D.R. seems to still feel to her mother, which she has expressed in vain to anyone who would listen during the past several years of these proceedings. RP 237-39, 245-50, 423.

Where Ms. Roberts showed compliance with the services ordered by the trial court and, indeed, sought out more demanding services in order to better serve the needs of her children, the State's refusal to assist her in obtaining appropriate services requires reversal. See In re Dependency of H.W., 92 Wn. App. 420, 426, 961 P.2d 963 (1998).

b. Where it was clear from Ms. Roberts's dramatic improvement that conditions could have been remedied in the near future, it was reversible error for the trial court to find little likelihood that the children could be returned to Ms. Roberts in the near future. By the time of trial, Ms. Roberts had, through her own hard work and self-discipline, overcome many of the obstacles that had previously overwhelmed her, and become, in her words, "a whole person." RP 639-40. She had continued to be promoted in her

customer service position at Sears,<sup>3</sup> and to live and support herself independently. RP 640-41, 672-73. Ms. Roberts has her own home, and has completely abstained from alcohol for six years.<sup>4</sup> As discussed above, Dr. Wert, the psychologist appointed by the court to administer Ms. Roberts's mental health evaluations in both 2004 and 2008, called Ms. Roberts's progress "really quite striking," and noted that she had completely overcome her depression by 2008, due to the hard work she had done in therapy. RP 384.

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., for example, the Court found that the State had failed to meet its burden to show that "little likelihood" existed that the mother would not improve within a one-year time frame.<sup>5</sup>

Here, however, the State suggests something quite different.

The State argues that despite Ms. Roberts's demonstrable

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<sup>3</sup> At the time of trial, Ms. Roberts had already been working at Sears for a year and a half full-time, and for four years part-time, and testified that she had earned several customer service awards and promotions. She was also concentrating on paying off her debts. RP 642, 672-73.

<sup>4</sup> At the time of trial, Ms. Roberts testified that she had been sober for four and a half to five years. RP 649.

<sup>5</sup> Although what constitutes the "near future" varies from case to case, depending on the ages of the children, it is generally viewed as approximately six months to one year. In re Dependency of T.L.G. I, 126 Wn.App. 181, 205, 108 P.3d 156 (2005).

improvement, that due to the fact that she may not be immediately ready to parent both children, that her rights should be terminated in the name of “stability and permanence.” Resp. Brief at 24. The cases cited by the State -- such as In re T.R., 108 Wn. App. 149, 163, 29 P.3d 1275 (2001), In re Hall, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983), and In re P.D., 58 Wn. App. 18 – all have something in common. Each of these cases is distinguishable from the instant case, in that each involved very young children who had never resided with their parent, and for whom there was no actual relationship to terminate.

For example, in T.R., the child was seven years old and was removed from the mother from birth, upon testing positive in the hospital for cocaine. 108 Wn. App. at 153. In re Hall involved a four year-old child who had never lived with his father, and whose father, at the time of trial, resided in a work-release facility with a release date eight months in the future. 99 Wn.2d 850. And In re P.D., as discussed above, involved a chronically schizophrenic mother, whose child was born at a psychiatric institution where she had been involuntarily committed. 58 Wn. App. at 20.

The “near future” and need for permanence for young children in these circumstances – children who have never known

their parents -- are quite different from the circumstances affecting the children in the instant case. Since the "foreseeable future" depends on the ages of the children and the circumstances of the placement, it is clear that Ms. Roberts faces no impediment to reunifying with her children in the foreseeable future. T.L.G., 126 Wn.App. at 205.

D.R. and A.R. are no longer young children. D.R. is now thirteen years old, and A.R. is twelve; as the State has acknowledged, since neither is likely ever to be adopted, this termination case has effectively orphaned them. Resp. Brief at 28. There will be no permanence and stability for these children without their mother.

2. THE COURT ABUSED ITS DISCRETION IN SUSPENDING VISITATION, A DECISION WHICH UNDULY IMPACTED MS. ROBERTS'S EFFORTS TO REUNIFY WITH HER CHILDREN.

The trial court's suspension of visitation in this case was error, and manifestly unreasonable. See In re Dependency of Tyler L., \_\_\_ Wn. App. \_\_\_ (No. 27033-5-III, June 11, 2009), at 5-6.

Ms. Roberts's twice weekly visits with D.R. and A.R. were suspended in September of 2004, due to the 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 same therapist agreed that D.R. felt increased anxiety following visits. RP 210. Based only upon case worker Cheryl Grimm's assessment that suspending visitation would allow both children to better "stabilize" in their foster placements, the court suspended visitation completely. RP 94, 100.

Although the State suggests that A.R.'s so-called sexualized behavior during one visit, and D.R.'s behavior during another were sufficient to terminate visitation, Resp. Brief at 31, this is clearly legally insufficient. The burden is on the agency to prove that visitation poses a current concrete risk to the children. Tyler L., supra, at 4 (citing In re Dependency of T.L.G. II, 139 Wn. App. 1, 18, 156 P.3d 222 (2007)). "Something more than opinions based on a single incident is necessary to support a finding of risk of harm." Id. (citing T.L.G., 139 Wn. App. at 18).

Likewise, the State's reliance upon the children's behavior in their foster homes to support the visitation suspension is misplaced. Resp. Brief at 31-32. It is well known among child development experts that "fear, anxiety and/or sadness of separation that stems

from both anticipating and leaving a visit, may cause a child to act out,” both before and after a visit to a parent. Tyler L., supra, at 2. The Tyler L. Court found that without attempting other methods, such as therapeutic visitation, and because visitation is crucial to the reunification of families, the dependency court erred in suspending visitation. Id. at 5.

Here, the trial court summarily suspended Ms. Roberts’s visitation with D.R. and A.R., never attempting any less restrictive measures, other than briefly separating the children’s visitation times so that Ms. Roberts could concentrate on A.R.’s behavior. RP 97. The court then quickly discontinued visitation completely, without any process, despite testimony from the case worker Ms. Grimm that Ms. Roberts was “very appropriate” at visits, and that the children were always “excited to see her.” RP 95. The trial record is also replete with testimony supporting visitation, such as D.R.’s therapist, Dr. Estelle, who stated that D.R. “seemed to benefit from the visits.” RP 211. Dr. Estelle also stated testified that future visitation with Ms. Roberts could be positive for both children. RP 245. There was 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 both benefiting from the contact with their mother. RP 95, 211, 226.

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. For the State's witnesses to argue that Ms. Roberts is not sufficiently bonded with her children to reunify with them is circular reasoning. RP 558. The State itself created those conditions when it improperly suspended visitation.<sup>6</sup>

3. THE DENIAL OF COUNSEL TO THE CHILDREN AT TRIAL WAS STRUCTURAL ERROR, REQUIRING REVERSAL AS A MATTER OF LAW.

a. Ms. Roberts timely requested counsel for her daughter, who was entitled to counsel as a dependent child. RCW 13.34.100(6) states that in dependency proceedings,

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<sup>6</sup> The current review of the Colville DSHS Office by the Office of the Family and Children's Ombudsman has brought to light the "environment of mistrust" between DSHS and "partners in the professional community," as well as the Colville community itself. This report is currently available online: Children's Administration Releases Corrective Action Plans for Colville Office, <http://www.dshs.wa.gov/mediareleases/2009/pr09087.shtml>. (last accessed June 25, 2009).

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). Despite Ms. Roberts's repeated and timely requests for the appointment of counsel for D.R. during the termination trial, the court found that appointing an attorney at such a "late date" would cause confusion to the child. 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. 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 a 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.

b. The denial of the right to counsel in a termination case is structural error that is harmful per se, requiring reversal. Denial of counsel for the entire length of a trial 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) (regarding criminal proceedings). “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)).<sup>7</sup>

The State suggests only that the trial court’s decision would only be an abuse of discretion if “no reasonable man would take the view adopted by the trial court.” Resp. Brief at 35. This argument fails to address the statutory standard or the case law.

The trial court’s failure to appoint counsel for D.R. was an abuse of discretion -- that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State

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<sup>7</sup> In the interest of judicial economy, Ms. Roberts adopts the arguments contained within the children D.R. and A.R.’s Opening Briefs concerning the constitutional right to counsel, and incorporates them by reference.

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). This abuse of discretion created a structural  
error, requiring reversal. See, e.g., Cronin, 466 U.S. at 658; State  
v. Frost, 160 Wn.2d at 779.

B. CONCLUSION.

For the foregoing reasons and those discussed in  
Appellant's Opening Brief, Tonya Roberts respectfully requests this  
Court reverse its termination of her parental rights, as it was not  
supported by the evidence, and because structural error at trial  
requires automatic reversal.

DATED this 25th day of June, 2009.

Respectfully submitted,



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