

NO. 76675-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Dependency of B.W.K., a Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

A.K.,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

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A. ASSIGNMENT OF ERROR

The trial judge violated appellant's due process right to a fair tribunal, the separation of powers doctrine, and the appearance of fairness doctrine when she crossed the line from impartiality to advocacy in favor of the State and against appellant.

Issue Pertaining to Assignment of Error

The record shows the trial judge asked hundreds of questions during trial and often took over the examination of witnesses. She repeatedly intervened with comments and questions that often were designed to illicit or belabor evidence that was unfavorable to appellant. The trial judge impeached appellant and aggressively cross-examined defense witnesses. At times, she asked questions that were speculative and argumentative. She made sua sponte objections to defense counsel's questions on hearsay grounds. The trial judge helped the State and CASA in procuring facts weighing against appellant. She went so far as to answer a question for a witness. Finally, during the State's closing argument, the trial judge advocated for the State to adopt certain theories to support termination. Was appellant denied a fair tribunal in violation of due process, the appearance of fairness doctrine, and the separation of powers doctrine?

B. STATEMENT OF THE CASE

Appellant A.K. is the mother of B.W.K., who was born on November 26, 2014. At the time, Ms. A.K. was residing in a motel located in the city of Fife with Lonnie Jackson, her former boyfriend.¹ Ex. 6.

Nine days after birth, B.W.K. suffered a severe head injury due to being dropped. Ms. A.K. had left B.W.K. with Mr. Jackson while she went out to buy cigarettes. Mr. Jackson nodded off to sleep and dropped [B.W.K.]. Ex. 6.

Ms. A.K. took B.W.K. to Mary Bridge Hospital for treatment and the Tacoma Police Department became involved. When questioned about what happened, Ms. A.K. said B.W.K. fell off the bed. However, she later admitted that Mr. Jackson had dropped the baby. B.W.K. was placed in protective custody. Ms. A.K. was arrested for making a false statement to a public servant. Ex. 6.

A dependency order was entered on March 11, 2015. Ex. 6. Ms. A.K.'s primary parental deficiency was drug addiction. Ex. 6. The trial court ordered a drug and alcohol evaluation and

¹ Mr. Jackson is not B.W.K.'s father. The biological father's rights were terminated by a default dependency order entered on August 18, 2016. CP 67, 71-74.

recommended treatment. Ex. 6. Ms. A.K. complied. RP 117. She successfully engaged in a methadone maintenance program and lowered her dosage from 61 to 18 mg. RP 98. Ms. A.K. was in compliance at the time of the termination hearing in February 2017. RP 117.

The primary parental deficiency alleged in support of termination was Ms. A.K.'s lack of knowledge about her child's special needs due to not fully engaging with his medical providers and attending appointments. RP 321, 430, 514. B.W.K. has numerous medical and developmental problems that require ongoing therapy and services. RP 223-36, 330,573-77.

Unfortunately, during much of the dependency, Ms. A.K. did not have stable housing, reliable transportation, or a local support system.² RP 53, 57, 266, 371, 374, 427, 452-53, 461. She also struggled with organizational skills. RP 839. As a result of these hurdles, Ms. A.K. missed some medical appointments, which were

² Ms. A.K.'s primary support system was in largely located in the Kentucky and Tennessee border area where she had extended family, employment resources, and available housing. RP 29, 31-32, 68-69, 167. She believed that she could successfully parent B.W.K if the trial court permitted her to take him back home. RP 133.

scheduled based on the convenience of the foster mom's schedule, and some visits. RP 73, 143-45, 242, 246, 269, 853.

Ms. A.K. attended some medical therapy appointments and had many good quality visits, but also missed some. RP 242, 839, 204. During therapy sessions, she was found to be cooperative, teachable, and appropriately interacting with her son. RP 354-56. Visits also revealed a positive relationship between Ms. A.K. and B.W.K. RP 154, 159, 162, 164, 839, 841. These were happy visits between mother and son. RP 839. B.W.K. ran to her, smiled, and they laughed a lot. RP 841. B.W.K. was affectionate toward his mother, giving her kisses and hugs. RP 164. He calls her "Mom." RP 161. Ms. A.K. was attentive to B.W.K.'s needs. RP 159. Ms. A.K. did all the caretaking – changing diapers, feeding B.W.K., and playing with him. RP 162, 154. There were no problems in her interactions with her son. RP 154. There is no question Ms. A.K. loves her son and there is a mother-son bond. RP 162, 948.

Fortunately, in December 2016, Ms. A.K. secured housing with a supportive family. RP 131, 795. This family offered her a stable home where she could stay indefinitely, helped with transportation, and provided a local support system for her in her efforts to reunify. RP 799, 803, 812, 899.

A termination trial was held between February 28 and March 8, 2017. On March 22, 2017, the trial court entered a termination order. CP 267-78. Ms. A.K. timely appealed. CP 285.

The remaining relevant facts are best addressed in the argument below.

C. ARGUMENT

APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIBUNAL.

A fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). It is an extremely rare case in which a trial judge crosses the line from impartiality to advocacy, thus violating due process, the appearance of fairness doctrine, and the separation of powers doctrine. Appellant reluctantly and respectfully submits, that review of the cumulative record here demonstrates this is such a case.

1. Parents Are Afforded Strict Due Process in Termination Cases.

Parental rights are a fundamental liberty interest protected by the constitution. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 27, 969

P.2d 21 (1998); aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). “It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent.” In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005) (quoting State v. Rasch, 24 Wash. 332, 335, 64 P. 531 (1901)).

The Constitution guarantees a parent her right to a fair fact-finding hearing. Santosky, 455 U.S. AT 753; In re Dependency of A.M.M., 182 Wn. App. 776, 790–91, 332 P.3d 500 (2014). Accordingly, parental termination proceedings are afforded strict due process protections. In re Darrow, 32 Wn. App. 803, 806, 649 P.2d 858 (1982). Due to the dire remedy sought by the State in termination trials, parents are afforded greater due process rights than in dependency proceedings or other proceedings to determine the custody or placement of children. In re Welfare of R.H., 176 Wn. App. 419, 425, 309 P.3d 620 (2013).

Due process protections afforded parents in a termination hearing include notice, open testimony, time to prepare and respond to charges, and a meaningful hearing before an impartial tribunal. In re Dependency of H.W., 70 Wn. App. 552, 555 n. 1, 854 P.2d 1100

(1993); In re Moseley, 34 Wn. App. 179, 184, 660 P.2d 315 (1983).

Unfortunately, the record in this case shows that there was not strict adherence to due process principles, with Ms. A.K. being denied the impartial tribunal guaranteed her under the Constitution.

2. Constitutional Due Process Requires That a Tribunal Be Fair and Objectively Appear Fair.

“The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts. State ex. rel. Barnard v. Bd. of Educ., 19 Wn. 8, 17, 52 P. 317 (1898)). “There can be no question but that the common law and the Federal and our state constitutions guarantee to a defendant a trial before an impartial tribunal, be it judge or jury.” State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 548, 202 P.2d 927 (1949). The “administration of justice is dependent upon the impartiality, disinterestedness and fairness on the part of the judge” regardless of whether it is a bench trial or a trial in front of a jury. Id. at 549. The constitutional right to a fair tribunal is so fundamental to our justice system, that denial of this right is considered a structural error that requires reversal. Williams v. Pennsylvania, ___ U.S. ___, 136 S.Ct. 1899, 1909–10, 195 L.Ed.2d 132 (2016).

The United States Supreme Court has concluded that fundamental fairness as embodied in constitutional due process endeavors to prevent

even the “possibility” of unfairness. Murchison, 349 U.S. at 136; Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. A tribunal must satisfy “the appearance of justice” in all matters before it. Murchison, 349 U.S. at 136. Hence, due process under the Fourteenth Amendment requires both fairness and the appearance of fairness in the tribunal. E.g., Wersal v. Sexton, 674 F.3d 1010, 1024 (8th Cir. 2012); Siefert v. Alexander, 608 F.3d 974, 985–86 (7th Cir. 2010); Tyars v. Finner, 709 F.2d 1274, 1285 (9th Cir. 1983).

Under the appearance of fairness doctrine, the law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial. Where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. Tatham, 170 Wn. App. at 95 (quoting Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995)). Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised. State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406, 407–08 (1983) (citing State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)).

A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person

would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995); State v. Ra, 144 Wn. App. 688, 704–05, 175 P.3d 609, 616 (2008). Unfortunately, that did not happen here.

3. Appellant May Raise an Appearance of Fairness Challenge for The First Time on Appeal.

For reasons explained above, Ms. A.K. may raise a challenge on the appearance of fairness doctrine for the first time on appeal under the Fourteenth Amendment. Should this Court disagree, she asks that it review the merits of this issues under RAP 1.2(c) or via its own discretionary power as recognized under State v. Blazina, 182 Wn. 2d 827, 835, 344 P.3d 680, 683 (2015).

Appellant is aware Washington's due process clause has been interpreted such that the appearance of fairness doctrine is not considered constitutional in nature. E.g., City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978) (explaining "Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based.") Thus, under Washington law, a parent may raise a due process claim showing an impartial tribunal for the first time on appeal, but that party may be found to have waived any appearance of fairness challenge if it was not raised at

trial. In re Marriage of Wallace, 111 Wn. App. 697, 705, 45 P.3d 1131 (2002) (explaining that Washington appellate courts will not review an appearance of fairness issue raised for first time on appeal because it is not constitutional in nature).

As explained above, however, under United States Supreme Court precedence, federal due process requires there be not only actual fairness but also an appearance of fairness in the tribunal. Murchison, 349 U.S. at 136; Tumey, 273 U.S. at 532. Thus, under federal law, the appearance of fairness doctrine is constitutional in nature. E.g., Siefert 608 F.3d at 985–86. Hence, it may be raised for the first time on appeal. RAP 2.5(a)(3).

Should this Court disagree, appellant asks it to accept review of appellant's appearance of fairness claim under RAP 1.2(c) or via its own discretionary power as recognized under Blazina, 182 Wn. 2d at 835. It was a serious injustice to both Ms. A.K. and her son to have something as serious a termination decision determined in a tribunal that did not maintain the appearance of fairness. Moreover, the significant judicial overreach that occurred in this trial shakes public confidence in the judicial system and, thus, is deserving of full appellate review under the appearance of fairness.³

³ Should this Court decide not to review the appearance of fairness issue, appellate review of Ms. A.K.'s due process and separation of powers

4. Due Process and The Appearance of Fairness Doctrine Are Violated When a Judge Crosses from Impartiality to Advocacy.

A determination of whether a party has been provided a fair tribunal is based on a view of the record of the proceeding as a whole. Burtch, In re Disciplinary Proceeding Against, 162 Wn. 2d 873, 888, 175 P.3d 1070, 1076 (2008). Due process and the appearance of fairness is violated if the record shows the judge donned “executive and judicial hats at the same time.” State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). While a judge may ask clarifying questions of a witness within the bounds of fundamental fairness, due process is called into question when it appears the trial court is acting as both judge and advocate for the State, undertaking such functions as “objecting to defense counsel’s questions, cross-examining defense witnesses, and impeaching a witness testifying favorably to the defense.” Id. at 511.

Due process is also violated if the record shows judicial intervention in the trial process occurring to such an extent that it indicates partiality, or the appearance of partiality. E.g., Ra, 144.Wn. App. at 696, 699, 705. Partiality and judicial overreach may be deduced from the tenor, frequency, or persistence of the trial judge’s intervening comments and questions or from its insertion of itself into the adversarial process in a

challenges is still appropriate.

manner that appears to favor one side over the other. See, Id. (finding judicial overreach where judge made statements that disparaged the defendant and proposed theories to the State on how to get certain evidence admitted); State v. Steele, 23 N.C. App. 524, 525-26, 209 S.E.2d 372 (1974) (finding judicial overreach where the trial court asked over one hundred questions in the course of examination, entered and ruled on his own objections to the defense, and was disparaging); People v. Cofield, 9 Ill. App. 3d. 1048, 1051, 293 N.E.2d 692 (1973) (finding judicial overreach where the trial judge stepped too far into role of advocate against the defendant). Such intervention may come when a trial judge helps develop the State's case by direct or redirect examination, undermines the defense through cross-examination of the defendant, impeaches witnesses favorable to the defense, sua sponte makes objections to defense counsel's questions, or influences the testimony or theories against the defendant. See, Moreno, 147 Wn.2d at 511 (reviewing case law showing examples of judicial overreach).

Under due process, when judicial overreach is at issue, the question for an appellate court is whether the record – when viewed in its entirety and from an objective standpoint – demonstrates that the trial judge took on too great a role and moved (or appeared to move) from a neutral fact-finder to an advocate. As explained below, the records show

this to be the case here.

5. Separation of Powers is Violated When a Judge Takes on the Role of the State's Advocate.

If a trial judge steps too far into the advocacy role reserved to an agency of the executive branch, this offends constitutional separation of powers concepts. The separation of powers doctrine is “one of the cardinal and fundamental principles of the American constitutional system” and forms the basis of our state government. State v. Rice, 174 Wn.2d 884, 900, 279 P.3d 849 (2012). Washington, through its constitution, divides the mechanics and powers of government into three separate but coordinate branches. Each branch of government wields only the power it is given. Moreno, 147 Wn.2d at 505.

The separation of powers doctrine ensures that the fundamental functions of each branch remain inviolate. State v. Gresham, 173 Wn. 2d 405, 428, 269 P.3d 207, 217 (2012). The constitutional division of governmental power is “for the protection of individuals” against centralized authority and abuses of power. Rice, 174 Wn.2d at 901. Hence, an individual may raise separation of powers claims.⁴

⁴ Recently, in an unpublished opinion, Division III concluded that individuals do not have standing to bring a separation of powers challenge. State v. Brown, 2017 WL 3267539 at *5. This is incorrect. The United States Supreme Court expressly recognized individuals have standing to raise a separation of powers claim

The test for determining whether separation of powers is violated has been stated as follows:

“The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.”

Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). The independence and integrity of the judiciary is threatened when it is either “assigned [or] allowed ‘tasks that are more properly accomplished by [other] branches.’” Moreno, 147 Wn. 2d at 506 (citing Morrison v. Olson, 487 U.S. 654, 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)). Hence, from a separation of powers perspective, the question here is whether the trial court invaded the functions of the executive branch and assumed a task more properly accomplished by that branch.

In terms of separation of powers, the Assistant Attorney General’s (AAG) role in termination cases is tantamount to that of the prosecutor in a criminal case. The AAG undertakes investigations and prosecution of the

while explaining that, “the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.” Bond v. United States, 564 U.S. 211, 222, 131 S. Ct. 2355, 2365, 180 L. Ed. 2d 269 (2011). Washington courts rely on federal principles regarding the separation of powers doctrine in interpreting and applying the state’s separation of

State's case in an effort to enforce RCW 13.34.180 and terminate parental rights. As such, its power rests within the executive branch. City of Seattle v. McKenna, 172 Wn. 2d 551, 556, 259 P.3d 1087, 1090 (2011).

As opposed to the prosecutorial-like role of the AAG, the primary function of the judicial branch is to fairly and impartially settle disputes according to the law. Hence, it is the judge's duty to ensure a neutral tribunal and a fundamentally fair process for rendering a determination of the termination matter. A trial court should not enter the "fray of combat" or assume the role of counsel. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980). As shown below, the trial court did not do so here.

6. When the Record Is Reviewed Objectively, It Reveals Judicial Overreach Resulted in Ms. A.K. being Denied a Fair and Impartial Tribunal.

Ms. A.K. was denied a fair tribunal. The record is replete with actions by the trial court indicating a lack of neutrality, judicial overreach, and an appearance of unfairness toward Ms. A.K. The trial judge persisted in crossing over into the role of an advocate, asking hundreds of questions of witnesses throughout the trial.⁵ She did not just ask clarifying

powers doctrine. State v. Wadsworth, 139 Wn. 2d 724, 735, 991 P.2d 80, 87 (2000).

questions; she was procuring evidence. As shown below, she repeatedly stepped into the role reserved for the AAG and took actions to undercut Ms. A.K.'s defense. Ultimately, the judicial overreach was so great that it violated due process, the appearance of fairness doctrine, and the separation of powers doctrine.

First, the trial court spent an extraordinary amount of time aggressively questioning Ms. A.K. and other witnesses, with an emphasis on obtaining facts negative to Ms. A.K.⁶ RP 54-56, 67-72, 89-92, 143-46, 246-47, 480-91, 494-96, 505 -508; 650-54, 747, 803-811, 815-18. The trial judge frequently took over questioning witnesses in an effort to impeach Ms. A.K.' testimony. RP 122-26; 130; 136; 634-36, 640-42, 708-09, 724, 811-12, 877-80, 895, 905-07. The trial judge often used leading

⁵ After reading Steele (which emphasized the fact that the trial judge asked more than hundred questions at trial), appellate counsel began the daunting task of counting the number of questions asked by the trial judge. After reaching 300 hundred questions, she stopped counting. Counsel was less than half way through the transcript when she had reached this number.

⁶ In this brief, appellate counsel attempts to convey the breadth of judicial overreach that is present in this record through some meaningful examples. However, given the remarkable degree of intrusion and the limited space in briefing, appellant asks this Court to review the record as a whole. Similarly, counsel understands that large block quotes from the transcripts are not preferable, but counsel has found it necessary here in order to give this Court meaningful examples of the length and tone of the trial judge's extensive questioning.

questions to shape the direction of the testimony in a way that was negative to Ms. A.K. RP 404, 459, 480-91, 644-45, 650-54.

The judge's pointed questions directed at defense witnesses were so pervasive that they not only resulted in judicial overreach, but they also created an appearance of unfairness. For example, when Ms. A.K.'s mother took the stand, defense counsel asked whether she knew Mr. Jackson. RP 780. The witness said she knew him but had not had any recent contact. RP 780. Before defense counsel could follow up, the trial court intervened and grilled Ms. A.K.'s mother as to the extent of her knowledge regarding her daughter's relationships and Mr. Jackson.

THE COURT: Who is Lonnie Jackson?

THE WITNESS: Who is Lonnie Jackson?

THE COURT: Yep.

THE WITNESS: That's someone Ashley used to date.

THE COURT: How do you know that?

THE WITNESS: From he – because he went to school with my son. And they dated when they were younger.

THE COURT: In Tennessee?

THE WITNESS: Yes. No, Kentucky, actually. Kentucky.

THE COURT: Did their relationship end after Kentucky?

THE WITNESS: I don't know when their relationship ended.

THE COURT: You don't. You don't know who your daughter dates?

THE WITNESS: No, ma'am. My daughter has been out west, a whole country away, for two years. I don't know who she is talking to or what she is doing, who she is seeing. I don't know when they split up. I don't know.

THE COURT: Do you know about Mr. Mr. Jackson or Lonnie Mr. Jackson's relationship with her here?

THE WITNESS: I am aware that she went out there – when she initially went out there, that's who – his family was out there.

THE COURT: And?

THE WITNESS: She has no one out there. It was his people that was out there.

THE COURT: Was their relationship still going on at that point?

THE WITNESS: Yeah, I would assume at that point. If she is going out to Washington, I would assume they were going to date –

THE COURT: Do you have any idea –

THE WITNESS: -- again or -- you know.

THE COURT: Do you have any idea what happened after that?

THE WITNESS: No. I mean, I know about the accident with the baby, but that's about it. I don't know, you know, anything else, other than, you know, the accident, him falling asleep with the baby, and her taking him to the hospital, and then all this happened.

THE COURT: You understand that Mr. –

THE WITNESS: And that's it.

THE COURT: Your understanding is that Lonnie fell asleep with the baby?

THE WITNESS: Yes. That's what I understand that had happened.

THE COURT: And then what?

THE WITNESS: Then she took him to the hospital –

THE COURT: And then what happened?

THE WITNESS: Then the next thing I know, CPS was involved.

THE COURT: And what happened to Mr. Jackson?

THE WITNESS: I have no idea. I think he went to jail. I think he might have been in jail when I was there, but I'm not sure. I don't know.

THE COURT: And what happened –

THE WITNESS: Needless –

THE COURT: -- to Lonnie Jackson –

THE WITNESS – to say, I didn't even want to talk or speak or know anything about Lonnie Jackson after this episode.

THE COURT: You –

The WITNESS: -- because, of course, I was upset.

THE COURT: You didn't want to know anything more about him after that?

THE WITNESS: No, I didn't. I didn't care where he was or nothing. My concern was my children – my grandchildren and my child. I didn't have any concern for Lonnie Jackson at the time.

THE COURT: To your knowledge –

THE WITNESS: Once my children were in CPS custody, I was worried about my chil—my grandchildren and my child.

THE COURT: To your knowledge is he still in jail?

THE WITNESS: I don't know. I have no idea where Lonnie is at –

THE COURT: You're not interested –

THE WITNESS: -- or what he is doing.

THE COURT: You're not interested in knowing where this man is?

THE WITNESS: No.

THE COURT: You're not –

THE WITNESS: I'm interested in getting my grandchildren home.

THE COURT: And you're not interested anymore in knowing who your daughter is dating?

THE WITNESS: Well, I'm sure if my daughter wants to share who she is dating, she will tell me.

THE COURT: But you don't ask her?

THE WITNESS: I do not.

RP 780-84.

This was strong questioning by the trial judge that was not neutral. These questions were not designed to clarify testimony that had been brought out by the parties. It occurred before defense counsel could fully explore the topic and before the AAG even had a chance to conduct the State's cross. The trial judge never gave the State a chance to prosecute its own case here. Moreover, these questions appeared to have been aimed at ferreting out evidence to undermine Ms. A.K.'s claim that she was not in a relationship with Mr. Jackson. At times, they were argumentative. This type of examination coming from the bench is not indicative of an impartial tribunal.

The trial judge's examination of Bonnie Kosanovich – the woman who opened her house to Ms. A.K. – demonstrates a similar hostility toward defense witnesses and the trial judge's overreach into the role of an advocate. Defense counsel had just begun to discuss the stable housing arrangement Ms. Kosanovich had with Ms. A.K. when the trial court took over the examination.

THE COURT: When are you expecting [Ms. A.K.] to move back to Tennessee?

THE WITNESS: Well, hopefully, she really wants her son back, and then stay here as long as she needs to –

THE COURT: Mm-humm. When –

THE WITNESS: -- until things are ready

THE COURT: -- but when are you expecting her to leave, or are you?

THE WITNESS: We have no expectations at the moment.

THE COURT: Okay. Do you expect her to leave next year or two years or five years from now?

THE WITNESS: Just when she is ready, when she is able to.

THE COURT: Okay. Explain what that means to me.

THE WITNESS: When she is ready to -- I mean, just until she gets on her feet.

THE COURT: And what does that mean?

THE WITNESS: When you have a job, money, another place to go to.

THE COURT: When she has a job, that's when she is going to go back to another state?

THE WITNESS: No. Well, I'm sure she will have help from her mom to go back there, but just when -- she wants her child back and we will have her just, you know, until the Court says it's okay for her to move out of state.

THE COURT: Okay. So we have a termination trial underway right now, right?

THE WITNESS: Yes.

THE COURT: And you know that's why you're testifying?

THE WITNESS: Yes.

THE COURT: So when do you expect her to leave?

THE WITNESS: There is no expectation. No expectation on it.

She could stay as long as she wants.

THE COURT: Okay. So you just want her to stay indefinitely?

THE WITNESS: Just until she is ready to leave.

THE COURT: Have you talked to your husband about this?

THE WITNESS: He is okay with it.

THE COURT: No, I got that, but the two of you haven't discussed her termination date in your home?

THE WITNESS: Well, if that happens, if it's terminated then she could go back to Tennessee whenever she wants.

THE COURT: So if this trial ends in termination, then she will return to Tennessee? And if it doesn't end in termination, then you're going to keep her in the home until when?

[DEFENSE COUNSEL]: That calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yeah.

THE COURT: It's her home.

[DEFENSE COUNSEL]: Thank you.

THE WITNESS: Well, it's okay with me that she stays as long as she can.

THE COURT: Okay. So if the trial doesn't end in termination, she can stay indefinitely?

THE WITNESS: Yes.

THE COURT: And if the trial does end in termination, she can stay indefinitely?

THE WITNESS: Yes.

THE COURT: Okay.

RP 797-99.

This exchange went beyond just asking clarifying questions. The trial judge never waited for defense counsel or the AAG to independently develop Ms. Kosanovich's testimony regarding the stability of this housing situation. Instead, the trial judge stepped into the AAG's role and drilled the witness.

The trial judge asked argumentative, speculative, and unnecessarily repetitive questions. After the trial judge's third question, Ms. Kosanovich stated she had no expectations as to when Ms. A.K. would leave her home. Yet, she essentially had to repeat this several times and in several ways as the trial judge tried to shake out a different answer. The trial judge continued harping on this issue and trying to pin this witness down. From an objective standpoint, the trial court seemed dissatisfied with the witness's answer and was pushing for her to formulate a different one that was less favorable to Ms. A.K. This was improper overreach and showed a lack of impartiality.

Another example of judicial overreach was when the trial judge offered up negative information about the mother to the social worker so that she could affirm it while on the stand. RP 432, 437-38. This is highly

irregular and demonstrates a lack of fairness.

The trial judge also went to great lengths to assist the CASA, Janet Belles, in making a case against Ms. A.K. One issue at trial was whether Ms. A.K. had allowed Mr. Jackson to attend a monitored visit when he was prohibited from doing so. The CASA found a picture posted on Facebook of Mr. Jackson and B.W.K., which she assumed was taken during a monitored visit at the mall. RP 706. Ms. A.K. denied that Mr. Jackson was at any monitored visits, and she told social workers the posted picture was taken at a time when Mr. Jackson was still permitted to visit the child. RP 486. To rebut this with the photo, the CASA needed to establish the picture was taken during a monitored mall visit at a time when Mr. Jackson had already been excluded from visits.

In an attempt to pin down a date, the judge took over the direct examination and led Ms. Belles through much of her testimony. RP 644-46, 650-54, 708, 708-14. At one point, Belles testified that she believed the picture was taken in the mall where monitored visits occurred because of the chairs in the background of the photo. RP 650-52. When CASA's counsel circled back to get more information, the trial court brushed aside counsel and took the reins.

[CASA's COUNSEL]: Earlier you testified that you could tell that [the photograph was taken] in a mall, and you gave an example of the chair –

THE COURT: No, she said specifically she knew it was in this mall...where the mother had arranged for these test visits. Okay, she mentioned chairs. Is there anything else in this photograph that tells you where this was?

THE WITNESS: The overhead lights, the tile floors. There is a store head above here and there's, like, signs. It's a mall.

THE COURT: The mall or a mall?

THE WITNESS: It's the Tacoma Mall... So, I would say it is a – in the Tacoma Mall where the visits had been happening.

THE COURT: Okay. So what is it about [B.W.K.]'s clothing you mentioned and B.W.K.'s appearance? Just didn't get – first of all, you said that you could tell that [B.W.K.] was toddler age. What was it you could tell about his age by looking at this photo?

THE WITNESS: This photo isn't as clear as the one that I did see ... He had a, like, a sweatshirt that had a train on it.

THE COURT: Okay. Slow down. Is this the photograph that you saw, a terrible reproduction of it?

THE WITNESS: Yes.

THE COURT: Okay. Then looking at this photograph, which is a terrible reproduction of the photograph you saw, is it accurate even though it's not a good reproduction.

THE WITNESS: Yes.

THE COURT: Okay. Looking at this photograph that accurately reproduces what you saw, tell me what it is, first of all, about [B.W.K.] himself that indicates the timing of this.

THE WITNESS: His age... He looks like he's about 11 months there or a year.

THE COURT: Okay. And what about his clothing?

THE WITNESS: I'm not understanding what you're asking.

THE COURT: You said before that there was something about what [B.W.K.] was wearing—

THE WITNESS: Yes.

THE COURT: -- okay, that was important? What is it about what he's wearing that's important?

THE WITNESS: It was the same shirt that I had a picture of.

THE COURT: Do you remember if that showed up in any other photos he took or just on this one visit you took it when you were there?

THE WITNESS: Just -- I didn't take this picture.

THE COURT: I know.

THE WITNESS: Oh, sorry. Say it again?

THE COURT: Well, from what you said, if I understand you right, Ms. Belles, this photograph shows [B.W.K.] wearing a shirt yes?

THE WITNESS: Yes.

THE COURT: And you also had taken a picture of the shirt that he's wearing here at some point, right?

THE WITNESS: Oh yes, yes, yes.

THE COURT: Okay. Do you know whether -- when it was that you took the picture of the shirt that he's wearing

here?

THE WITNESS: It's in my CASA October report. I think it's the October report... I am thinking it is now.

THE COURT: Would looking at an October report help refresh your memory as to if that's the report?

[CASA's ATTORNEY]: Your Honor, may I hand the witness an October report to help refresh her memory?

THE COURT: Yeah...

[The CASA exhibit was handed to the clerk, marked as Exhibit 153, and shown to the witness]

[The WITNESS]: It looks like the hearing date was on 11/2/15.

THE COURT: What is hearing date? ... So here's the question ... Can you – can you date the photograph? Your photograph, can you date it.

THE WITNESS: I – I could if I had my computer where all my pictures are kept, but I put it into this report, so it's always the recent picture that I always put into my CASA report. I'm not answering your question, am I?

RP 708-14.

The trial judge took direct examination of the CASA right out of the hands of the attorney. The judge drilled down for facts it wanted produced. However, she did not leave it at this.

The trial judge went on to tell the AAG and CASA's counsel exactly what evidence they needed to produce so that the Facebook post could be used against Ms. A.K.

So a reminder, folks, here's what I'm interested in. I don't know the date of this Facebook post, okay? Is everybody listening? I don't know the date this Facebook post was visible, but I do have, so far, from [a social worker]'s testimony is that the mall visits to check whether Mother could take care of [B.W.K.] independently were scheduled for December 2015. That's what I have.

RP 715-16.

After this, the trial judge continued to influence the presentation of evidence against Ms. A.K. by telling the CASA and State what facts they needed to establish to give the Facebook post relevance and weight. RP 719-20. She even told this witness, who was struggling to remember dates: "Okay. Well, the thing is, Ms. Belles, I don't – I can't really put any weight on anything that you saw involving the mother being with Lonnie unless it's at some time pertinent to this case." RP 726.

The trial judge continued to push Ms. Belles to establish the date of a visit. She even went so far as to push the facts past what this witness was comfortable testifying to under oath.

THE COURT: Does it help you figure out if [the monitored mall visit] was in the Spring of 2016 or the summer or the fall? Can you put a season on it?

THE WITNESS: I want to lean towards winter, but I'm not 100 percent sure, especially under oath, I can't say.

THE COURT: This past winter or last winter?

THE WITNESS: It would have been 2006 winter.

THE COURT: 2016?

THE WITNESS: I think so, yes.

THE COURT: Okay.

RP 742 (emphasis added). The judge's second question was argumentative given that the witness said she could not testify under oath that the visits occurred in winter.

The trial court continued to cross into the line of advocate, shaping the evidence against Ms. A.K. during the defense cross-examination of this witness. When defense counsel was asking Belles about Exhibit 152 – the photo from the mall, the judge became argumentative.

[Defense Counsel]: Okay. I believe you've testified that you recognize that photo because of the chairs that you recognized. Where are the chairs in the that photo?

[The Witness]: I stated [in prior testimony] that I was mistaken by my memory.

[Defense Counsel]: What were you mistaken about?

[THE WITNESS]: That there were chairs. There were no chairs.

[Defense Counsel]: Okay.

THE COURT: What is that chair to the left in the photograph? Aren't those chairs?

THE WITNESS: I think they're signs.

THE COURT: No, to the left. Behind the ...

THE WITNESS: Let me see it again.

...

THE COURT: Just behind Mr. Jackson's right ear sitting on the floor there, aren't those chairs?

THE WITNESS: They could be, yes.

THE COURT: Okay.

RP 746.⁷ This is yet another example of judicial overreach. A trial judge should never be trying to influence a witness' testimony on any fact.

That was not the end of the intrusion into defense counsel's examination. Shortly afterward, defense counsel posed a question to the witness and the trial court actually answered it.

[DEFENSE COUNSEL]: Why couldn't it be a picture of [Mr. Jackson] with [B.W.K.] in a different mall that's not a supervised visit?

[TRIAL COURT]: Because how would the mother get access to the child, Counsel?

THE WITNESS: She answered it.

THE COURT: Yeah, I mean –

[DEFENSE COUNSEL]: Judge answered it?

THE WITNESS: Yes.

THE COURT: Yeah.

⁷ A similar exchange took place later with the trial court again intruding on the question of this witness regarding whether she saw chairs in the picture. RP 928-29.

RP 747. The trial judge should never have put words in this witness' mouth.

There were several other instances where the trial judge interfered with counsel's efforts to present facts favorable to Ms. A.K.'s defense. For instance, during her direct examination, social worker Alison Piwtorak testified about what role the agency supervising visits (A Place Called Hope) might have played in facilitating Ms. A.K.'s access to B.W.K.'s feeding therapy. RP 459-60. The testimony was a bit convoluted. Id. On cross, defense counsel sought to clarify whether it was possible to arrange a feeding therapy in a private home (such as the one Ms. A.K. was living in). The trial court jumped in and prevented defense counsel from fully exploring this area.

[DEFENSE COUNSEL]: You said it would be very difficult for A Place Called Hope to arrange feedings at someone's home, correct?

THE COURT: No. You misheard. She said that she could arrange feeding therapy at A Place Called Hope. She did arrange feeding therapy at A Place Called Hope. Mom wasn't there for three feeding therapy sessions in a row, so it moved back to the foster mother's home.

[DEFENSE COUNSEL]. Okay. So my question is –

The Court: She said it would be difficult –

[DEFENSE COUNSEL]: -- it possible –

THE COURT: -- to arrange a supervised visit in a place like the foster mother's home, which is not a neutral location, but that's a different question from the availability of A Place Called Hope, which she said was available.

[DEFENSE COUNSEL]: Okay. So is it possible to arrange therapy at a private home?

THE COURT: No, Mr. Hokendorf. One more time she said a supervised visit needs a neutral location. She said that's why feeding therapy was arranged at A Place Called Hope until mother didn't appear for these successive therapy sessions. That's what she said. Anything else you want to ask her?

[Defense Counsel]: Okay, Well I wanted to ask that question, but that's fine.

The Court: Well she's answered that one. Okay?

RP 463-64.

This was judicial overreach. It was entirely unnecessary for the trial judge to intervene and speak for this witness. Her prior testimony had left open the possibility that, while difficult, it might be possible to arrange for feeding therapy at a private home. RP 459-60. This witness was capable of clarifying what she meant by her previous testimony -- much more so than the trial court. The trial judge not only took the witness' prior testimony and rephrased it in her own words, she prevented a line of cross examination. Moreover, the trial judge also took the opportunity to twice unnecessarily emphasize negative evidence against Ms. A.K. (i.e. the fact that she did not attend therapies).

The trial judge often disrupted counsel's flow when establishing facts favorable to Ms. A.K. by asking questions that diverted the focus to negative facts. For instance, defense counsel called Ms. Kosanovich to establish Ms. A.K.'s current housing was stable and that she had a reliable support system. The trial court was particularly aggressive during this testimony, spending an extraordinary amount of time cross-examining the witness in an effort to show otherwise. RP 794-814.

Defense counsel asked Ms. Kosanovich a total of 50 questions on direct examination. The trial judge intervened and asked this witness 82 questions. At one point, defense counsel was establishing the fact that Ms. Kosanovich's house was an appropriate home to support the reunification of Ms. A.K. and B.W.K. when the trial judge interrupted and asked a series of completely unrelated questions designed to impeach Ms. A.K.'s former testimony regarding her smoking habits. RP 811-12.

At a different point, defense counsel was eliciting testimony to establish the house was drug free. RP 808. The trial judge again interrupted and changed the topic with a lengthy grilling over what the witness knew about Mr. Jackson and whether Ms. A.K. had a current boyfriend. RP 808-10.

The trial judge also appeared to engage in a game of one-upmanship with defense counsel. For example, counsel asked Ms.

Kosanovich about the food Ms. A.K. prepared for visits, which resulted in positive testimony for the mother. RP 813. In response, the Court interrupted by asking whether the witness knew why Ms. A.K. forgot to bring diapers on a couple of occasions. RP 813. This was uncalled for and off point. The trial court's question came from left field, was only marginally relevant, and disrupted the flow of defense counsel's attempt to present the defense.

The trial judge also improperly pulled the laboring oar in the cross-examination of Ms. Kosanovich. She ended up asking more questions of this witness than the AAG. The focus of the questioning was to test Ms. A.K.'s assertion she was not seeing Mr. Jackson. RP 814-819. The trial judge was improperly acting as an advocate.

The judge's intrusion into the examination of Ms. Kosanovich went beyond merely asking clarifying questions. The sheer volume and timing of the questions suggests the judge was taking on the role of an advocate who was procuring evidence. The tenor of the questions suggested partiality against Ms. A.K. This judicial overreach also disrupted defense counsel's ability to fully put forth the facts of his case.

Another factor showing the lack of impartiality is the trial judge's badgering of Ms. A.K. when she was on the stand. For example, when the AAG was cross-examining Ms. A.K. about an online statement to the

effect that she was “going above and beyond” in complying with services, the trial court jumped on her, asking: “Did it mean anything to you at all that people were telling you that your child had about a zillion special needs and you had to be there for him?”⁸ RP 872. This kind of hyperbole about B.W.K.’s special needs and confrontational nature of this question would have been objectionable if made by a party – but it was particularly egregious coming from a trial judge who is supposed to appear impartial.

Additionally, the trial court voiced its disbelief of Ms. A.K.’s testimony early in the trial. While she was on the stand, the judge told Ms. A.K. that it believed she was lying. RP 126. This came in response to the trial court’s cutting questioning of Ms. A.K. about her belief that her former attorney forged her name on a document. RP 122-26. Shortly afterward, the judge said that it had undertaken the examination with the intent of determining whether it had to report the incident to the bar association. RP 138. The judge stated that she found no merit in the claim. RP 138. Having reached this determination, this should have put the issue to rest. However, the trial court continued to bring up the topic with other witnesses. RP 519-37. This additional negative testimony was unnecessary and cumulative and seemed to be an attempt by the trial

⁸ After this, the court went on to grill Ms. A.K. about whether she attended medical appointments. RP 872.

judge to rub salt in the wound.

The trial judge also stepped into the role of an advocate by raising sua sponte hearsay objections to defense questions. RP 160; 205-07, 803. Making matters worse, the judge was unnecessarily hostile to defense counsel's objections. It characterized one objection as "nuts." RP 260. The judge told defense counsel that his hearsay objections were "annoying." RP 530. And, finally it ordered defense counsel to stop interrupting with hearsay objections. RP 723. This effort to chill defense counsel's objections – while at the same time making sua sponte objections to defense counsel's questions – raises yet another question about the impartiality of this tribunal.

The trial judge also overruled legitimate defense objections to its questions. For example, the trial judge was questioning the foster mother as to how well Ms. A.K. understood B.W.K.'s needs. RP 242. The foster mom answered that she did not know what Ms. A.K. did or did not understand. RP 242. Defense counsel objected to further questions to press this witness as speculative given the witness had said she did not know. RP 242-43. The trial court overruled the objection and invited the witness to continue with her answer, which was speculative. RP 244. Again, this shows how judicial overreach infected this trial.

Finally, another significant factor evidencing the tribunal's lack of impartiality is the fact the trial judge offered the AAG theories to use against Ms. A.K. during the State's closing argument. For instance, the judge drew the AAG's attention to the issue of whether Ms. A.K. was still in a relationship with Mr. Jackson. RP 960. The State said that it was not relying on that fact to support termination because the record didn't prove that. RP 961. The trial court then tried to convince the AAG that the evidence was sufficient to establish a current relationship. RP 691. The AAG explained the limitations of the evidence. RP 962. The trial court responded by saying that the evidence suggested there was an ongoing relationship and supported a theory that Ms. A.K. did not understand her child's needs. RP 961-62.

Another example of the trial court offering the AAG theories to support termination came when the AAG was addressing whether there was any likelihood that conditions would be remedied so the child could be returned in the near future. The trial court interrupted and suggested the State could make an argument based on the facts of this case that supported a rebuttable presumption. RP 968-69. In the end, the AAG declined, but the

fact that this was suggested by the judge showed improper advocacy against Ms. A.K.

The trial judge also went on to tell the AAG that Ms. A.K.'s stated intent to take B.W.K. to Tennessee if they were reunited supported a theory that she did not understand her child's needs. RP 973-74. All that was left for the AAG to do was to agree to the judge's argument, which it did. RP 974. These examples of the trial judge feeding theories or arguments to the AAG in support of termination demonstrate once again that the trial judge was unable to maintain a line between sitting on the bench and advocating for the State.

In sum, this record – when looked at objectively and in its entirety – amply demonstrates that the judge engaged in judicial overreach that rose to the level of violating due process, the appearance of fairness doctrine, and the separation of powers doctrine. The frequency, tenor, and intrusiveness of the trial judge's questions went beyond proper judicial restraint. The trial judge asked hundreds of questions. The bulk of the trial judge's questions emphasized facts that reflected negatively upon Ms. A.K. As explained above, these questions often were not designed to clarify existing evidence, but actually placed the trial court in the role of establishing evidence for the State or cross-examining defense witnesses.

Ultimately, this record reveals that Ms. A.K. was denied her right to a fair tribunal due to judicial overreach. Hence, the termination order should be reversed and the case remanded for trial in front of a new judge.

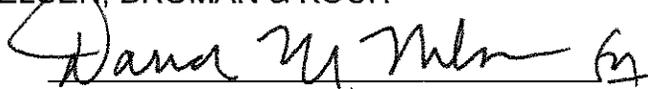
D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to reverse the termination order and remand for a new trial in front of a different judge.

Dated this 31st day of August, 2017.

Respectfully submitted

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August 31, 2017 - 12:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 76675-9
Appellate Court Case Title: In re the Dependency of B.W.K., Ashley Knuckles, Appellant v. DSHS,
Respondent
Superior Court Case Number: 16-7-01406-1

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