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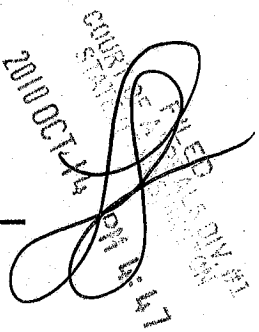
NO. 64736-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DEPENDENCY OF M.S.R. (DOB 10/10/00) AND T.S.R.

(DOB 10/10/00)



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

The Honorable James Doerty

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....3

C. STATEMENT OF THE CASE.....4

1. Background.....4

2. The First Removal.....5

3. Ms. Luak's Early Participation in Services.....6

4. Three More Removals.....11

5. Dr. Washington-Harvey's Recommendation for Cognitive Behavioral Therapy.....13

6. No One Discussed the Purpose and Importance of Cognitive Behavioral Therapy with Ms. Luak.....14

7. Ms. Luak Never Directed Anger Toward her Children.....17

8. The Juvenile Court Terminated the Parent-Child Relationship Without Allowing M.S.R and T.S.R. a Voice in the Proceedings.....18

E. ARGUMENT.....19

1. THE STATE FAILED TO SATISFY ITS BURDEN UNDER RCW 13.34.180(1)(D) AND (E) BECAUSE IT DID NOT TIMELY OR UNDERSTANDABLY PROVIDE SERVICES NECESSARY TO REMEDY MS. LUAK'S DIFFICULTY CONTROLLING HER ANGER.....19

a. DSHS had a duty to understandably provide services capable of correcting Ms. Luak's deficiencies within the foreseeable future.....19

b. DSHS failed to understandably offer or provide services capable of remedying Ms. Luak's difficulty controlling her anger.....22

c. The rebuttable presumption under RCW 13.34.180(1)(e) did not apply because the State failed to provide services necessary to remedy Ms. Luak's deficiencies, and she likely would have improved through CBT if DSHS had timely and understandably provided it.....27

d. The termination orders must be reversed.....29

2. M.S.R. AND T.S.R. WERE DENIED THEIR CONSTITUTIONAL RIGHT TO COUNSEL.....29

F. CONCLUSION.....44

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Braam v. State, 150 Wn.2d 689, 81 P.3d 851 (2003) 33, 41, 42

In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006) 34

In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998) 19

In Re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007) 34

In re Dependency of K.R., 128 Wn.2d 129, 904 P.2d 1132 (1995) 20

In re Hudson, 13 Wn.2d 673, 126 P.2d 765 (1942) 19

In Re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005) 31, 32

In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010) 20

In re Welfare of Hall, 99 Wn.2d 842, 664 P.2d 1245 (1983) 22

In re Welfare of Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974) 29

Moore v. Burdman, 84 Wn.2d 408, 526 P.2d 893 (1974) 34, 41

Washington Court of Appeals Cases

Bellevue School District v. E.S., 148 Wn. App. 215, 199 P.3d 1010 (2009) 32, 34, 37

Krause v. Catholic Com'ty Servs., 47 Wn.App. 734, 737 P.2d 280, rev. denied, 108 Wn.2d 1035 (1987). 21

In re Churape, 43 Wn.App. 634, 719 P.2d 127 (1986) 21

In re Dependency of A.G., 93 Wn. App. 268, 968 P.2d 424 (1998) 30

In re Dependency of P.D., 58 Wn. App. 18, 792 P.2d 159, rev. denied, 115 Wn.2d 1019 (1990) 22

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Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893,
47 L.Ed.2d 18 (1976) 32, 36, 39-42

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388,
71 L.Ed.2d 599 (1982) 29, 30, 36

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054,
147 L. Ed. 49 (2000) 19

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Kenny A. ex rel Winn v. Perdue, 356 F.Supp.2d 1353
(N.D. Ga 2005) 30-33, 35-37, 39, 41

Constitutional Provisions

Const. art. 1, § 3 29

U.S. Const. amend. 14 29

Statutes

RCW 13.34.020 19

RCW 13.34.030 37

RCW 13.34.130 ..... 21, 40

RCW 13.34.136 ..... 22, 40

RCW 13.34.180 ..... 3, 4, 19-21, 27-29

RCW 13.34.190 ..... 20, 21

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Rules

RPC 1.1 40

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred by concluding that the State expressly and understandably offered or provided all necessary services capable of correcting Ms. Luak's parental deficiencies within the foreseeable future. CP 427; Finding of Fact 1.26.

2. The juvenile court erred by concluding that there was little likelihood that conditions would be remedied so that the children could be returned to their mother's care in the near future. CP 427; Finding of Fact 1.27.

3. In the absence of substantial evidence in the record, the juvenile court erred in entering the portion of Finding of Fact 1.24 that provides,

> There may in fact be an as-yet-unidentified specific CBT program available, but Ms. Luak's unwillingness to make use of the services already offered over the years relieves the Department from searching further.

4. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.28.

5. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.47.

6. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.51.

7. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.53.

8. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.55.

9. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.56.

10. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.58.

11. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.59.

12. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.60.

13. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.65.

14. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.66.

15. In the absence of substantial evidence in the record, the juvenile court erred in entering Finding of Fact 1.74.

16. Constitutional due process was violated when the children were denied their right to counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Pursuant to RCW 13.34.180(1)(d), before the court may terminate a parent's relationship with her child, the State must prove by clear, cogent, and convincing evidence that it expressly and understandably offered or provided all necessary services capable of correcting the parent's deficiencies within the foreseeable future. Here, DSHS failed to provide collateral information to Ms. Luak's anger management and mental health counselor, causing that provider to erroneously conclude in April 2007 that Ms. Luak did not require further treatment. Despite Ms. Luak's continued problems with controlling her anger, and despite Ms. Luak's significant experiences with trauma in the past, DSHS did not offer any further services to address her anger until October 2008. Then, DSHS failed to explain the purpose and importance of the newly recommended treatment. Did DSHS fail to understandably offer or provide services necessary to correct Ms. Luak's anger issues?

2. Pursuant to RCW 13.34.180(1)(e), before the court may terminate a parent-child relationship, the State must prove by clear, cogent, and convincing evidence there is little likelihood the parent can remedy conditions such that her children may be returned in the near future. Where

DSHS failed to provide services capable of remedying Ms. Luak's anger control issues, and there was evidence that Ms. Luak would have improved through continued treatment if such services had been provided, did the juvenile court err when it concluded that the presumption under RCW 13.34.180(1)(e) applied?

3. Does a child have a constitutional right to representation in a termination proceeding?

C. STATEMENT OF THE CASE

1. Background. Nyakat Luak is the mother of T.S.R. and M.S.R., twin boys who were nine years old at the time of the termination trial. CP 422, Finding of Fact (hereinafter "FF") 1.1. Ms. Luak is also the mother of S.M., a girl who was seven years old at the time of the termination trial and who was placed with her father, as well as M.M., an infant who was not part of this dependency case. 4RP 405, 7A-RP 950-51.[1]

Ms. Luak grew up in the war-torn nation of Sudan, and entered the United States as a refugee in 1998, when she was a teenager. FF 1.8. She was physically abused and raped in a refugee camp. 2A-RP 272. When

[1] There are two sets of consecutively paginated transcripts, comprising eleven total volumes, which are referenced as follows: 1RP (7/7/09, 7/8/09), 2RP (9/29/09), 3RP (9/30/09), 4RP (10/1/09), 1A-RP (10/5/09), 2A-RP (10/6/09), 3A-RP (10/7/09), 4A-RP (10/12/09), 5A-RP (10/12/09), 6A-RP (10/14/09), and 7A-RP (10/15/09, 10/20/09, 12/4/09).

she first came to the United States, Ms. Luak lived in a foster home, but one of her brothers beat her and forced her to leave the house. 3RP 298. She was eighteen years old when she gave birth to the twin boys on October 10, 2000. CP 422; FF 1.1; Ex. 45.

After immigrating to the United States, Ms. Luak immediately attempted to adapt to life in the United States by learning to speak and understand English through several English language programs, and obtained employment. FF 1.9; 3RP 291-93; 3A-RP 435. However, her African heritage remained highly important to her. She maintained frequent contact with her extended family, and lived with several family members. 3RP 289-90. She often relied on family members to supervise her children while she was at work, as it was a common practice for an African mother to count on the entire village to help raise her children. 3A-RP 452; 7A-RP 1045. Ms. Luak also prepared African food for her children, and took them to African restaurants so they could learn about their culture. 3A-RP 327, 6A-RP 936.

2. The First Removal. On December 8, 2004, Ms. Luak left M.S.R, T.S.R, and S.M. in the care of her sister. CP 422, FF 1.3. Unbeknownst to Ms. Luak, her sister left the children alone, and a mattress

in the apartment caught on fire. 1RP 22. The authorities removed the children from the apartment and brought them to a hospital to examine them for smoke inhalation. 1RP 22. The children were not injured, and appeared otherwise well-cared-for. 1RP 23.

Ms. Luak arrived at the hospital to find social worker Mary Marrs putting the children into social worker Larry Nelson's car. 1RP 25. Ms. Luak yelled, "Those are my babies!" and approached the driver's side of the car to see the children. 1RP 25. Marrs ran into the hospital to call for help from the hospital security officers. 1RP 25. Ms. Luak told Nelson that she wanted to say goodbye to the children, and reached into the car to talk to the children and give them a hug. 1RP 43. The children were upset, and Ms. Luak attempted to comfort them. 1RP 43. When Marrs returned, she repeatedly tapped on Ms. Luak's back while ordering her to back away from the car so they could take away the children. 1RP 26. Ms. Luak turned around and hit Marrs in the face and kicked her in the leg. 1RP 26. Hospital security pulled Ms. Luak away from Marrs, and Nelson drove away with the children. 1RP 43. Nelson brought the children to a foster home in Enumclaw. 1RP 45.

3. Ms. Luak's Early Participation in Services. By March 15, 2005, Ms. Luak agreed to a finding of dependency. FF 1.2. In July 2005, she

participated in a psychosocial evaluation with Dr. Carmela Washington-Harvey. Ex. 45. Dr. Washington-Harvey labeled Ms. Luak with a preliminary diagnosis of Conduct Disorder and an acculturation problem, based on Ms. Luak's admissions that she was arrested for harassing the boys' father at his job, that she pushed a social worker, and that she screamed over the phone at a social worker. 2A-RP 192-94.

Dr. Washington-Harvey recommended anger management, parenting classes, mental health counseling, and family preservation services. Ex. 45. She believed the mental health counseling would address the underlying reasons behind Ms. Luak's behaviors and recommend further services. 5A-RP 766. Dr. Washington-Harvey advised that the service providers be "individuals who are knowledgeable or at the very least sensitive to Sudanese parenting and societal expectations," and use positive reinforcement with Ms. Luak. Ex. 45.

At trial, Dr. Washington-Harvey explained that the cultural sensitivity aspect of the treatment was very important because she did not believe Ms. Luak truly understood that DSHS could terminate her parental rights if she did not satisfy expectations regarding services and visitation. 2A-RP 200-02. Social worker Cara Moore agreed that Ms. Luak did not comprehend the concept that the State could terminate her parental rights.

3A-RP 437. CASA Brenda Burke also observed that Ms. Luak did not understand DSHS's insistence that all of her family members pass background checks in order to be around her children. 7A-RP 1043-45.

By July 2006, Ms. Luak was participating in one-on-one parenting classes with Maralee Leland, who is a child and family therapist. 5A-RP 627-29, 642. Leland provided six one-hour sessions, during which she and Ms. Luak discussed various parenting skills as well as appropriate responses to hypothetical situations. 5A-RP 629-31. Leland observed that Ms. Luak actively participated in the classes and demonstrated an understanding and application of the material. 5A-RP 632-33.

By March 13, 2007, Ms. Luak completed a series of six sessions of anger management with Leland. 5A-RP 634. During the sessions, Leland taught Ms. Luak to be more mindful of her responses to anxious situations, and to calm herself by breathing deeply or by walking away from a situation. 5A-RP 634-35. After those six sessions, Ms. Luak participated in four sessions of mental health counseling with Leland. 5A-RP 642.

Leland observed that Ms. Luak's anger is triggered by a fear of losing her children and a feeling of being misunderstood. 5A-RP 635-36. Leland saw Ms. Luak as a calm and pleasant person when she was not discussing her feelings of being threatened, hurt or misunderstood. 5A-RP

645. Leland testified that Ms. Luak showed improvement, and believed that Dr. Washington-Harvey's diagnosis of Conduct Disorder was incorrect. 5A-RP 638, 648. Leland opined that Ms. Luak's experience in the refugee camps of Sudan and Ethiopia – where she suffered through violence, starvation, and other threats – caused Ms. Luak to develop certain behaviors necessary for her survival, such as "lashing out" when threatened. 5A-RP 648-51. Leland addressed the psychological effect of Ms. Luak's traumatic experiences by discussing her problematic behavior with her while attempting to change her mode of thinking. 5A-RP 652. Ms. Luak actively participated in these discussions and was open with Leland. 5A-RP 653.

Ms. Luak testified that she learned from Leland how to control her anger by squeezing something, by taking a deep breath, or by removing herself from a situation until she is calm. 4A-RP 602-03. Ms. Luak implemented these techniques with the social workers by hanging up the phone when she became angry with them, and then calling them back when she was calm. 4A-RP 603-04. If her children were around when a person made her angry, she would ignore the person. 4A-RP 604. In her work at a retirement home with elderly people experiencing dementia, Ms. Luak demonstrated patience even when her clients swore at her, pushed

her, and even spit at her. 4A-RP 604-05. She explained that she does not take it seriously because her clients with dementia are like children in that they do not understand their actions, and it is Ms. Luak's job to help them. 4A-RP 605.

On April 17, 2007, once Ms. Luak had finished the six sessions of anger management and four sessions of mental health counseling, Leland informed the social worker that Ms. Luak did not need additional treatment at that time. 5A-RP 643-44, 654. However, Leland believed Ms. Luak would need more therapy if she continued to experience anger and assaultive behavior. 5A-RP 671-72. Leland testified that, had the social worker provided her evidence that confirmed the diagnosis of Conduct Disorder, she would have provided Ms. Luak with more intense therapy for a longer period of time. 5A-RP 676-77. However, the social worker never sent Leland any collateral information about Ms. Luak. 5A-RP 668.

A month later, in May 2007, Ms. Luak approached her daughter while S.M. was visiting her father and stepmother, and Ms. Luak threatened the stepmother. CP 428-29; FF 1.34. S.M.'s stepmother petitioned for a protection order against Ms. Luak. Id. Despite this incident, and although Ms. Luak continued to express anger toward the

social workers and CASA Mikie Helman, DSHS did not renew the referral for anger management. 3A-RP 370-72; 5A-RP 656.

Throughout June and August of 2007, Ms. Luak participated in family preservation services with Lisa Barreto, twice a week. 5A-RP 684, 687, 696. Barreto talked to Ms. Luak about the necessity of employing a proper caregiver to supervise the children while Ms. Luak is at work. 5A-RP 690-91. Ms. Luak worked on a list of appropriate caregivers with Barreto, and was able to recognize that several of her family members did not belong on that list. 5A-RP 691. Barreto observed that the children were well behaved, happy, and ready to be reunified with their mother. RP 712-13. Barreto observed that Ms. Luak actively participated in services, but that it became difficult to arrange meetings with Ms. Luak as a result of her work schedule. 5A-RP 729-30. Barreto discontinued the services after Ms. Luak told her that she did not believe the services were useful, especially when she was so busy with her two jobs. 5A-RP 694-97.

Although Barreto recommended that Ms. Luak continue family preservation services with another provider, social worker Johnna Lehr did not renew the referral. 1RP 103. Lehr reasoned that, even though Ms. Luak was willing to meet with the new provider, Lehr did not believe she would be cooperative with that service. 1RP 101.

4. Three More Removals. Meanwhile, the juvenile court returned the children to Ms. Luak's care on January 29, 2006. CP 422, 428; FF 1.3, FF 1.31. In August 2006, Ms. Luak's relative, Goc Ring, took the boys without Ms. Luak's permission and drove while intoxicated. CP 422; FF 1.32. Ms. Luak contacted the police, and later agreed to prohibit Ring from having any contact with the boys. FF 1.32. However, in October 2006, Ring and another relative drove Ms. Luak home after a medical procedure. 4A-RP 573-75. Ms. Luak was still medicated from the procedure and went to sleep, while Ring and several other relatives stayed at her home with the children. 4A-RP 573-75. The boys reported that Ring hit M.S.R. that night, and DSHS removed the children on October 9, 2006. CP 422, 428; FF 1.3, FF 1.33.

On June 22, 2007, the children were returned to Ms. Luak's care. CP 422, 429; FF 1.3, FF 1.35. However, on October 3, 2007, when Ms. Luak was arrested for driving a vehicle that one of her relatives allegedly stole, the children were removed again. CP 422, 429; FF 1.3, 1.36. They were returned on November 1, 2007 to Ms. Luak's care. CP 422-23, 429; FF 1.3, FF 1.37. At the time, the children had been placed with Ms. Luak's brother, and she wished for them to finish the school year at the same school, so she allowed them to stay in that home. 3A-RP 445. On

December 3, 2007, the juvenile court removed the children from Ms. Luak's care due to an allegation that S.M. had taken one of Ms. Luak's allergy pills. 3A-RP 447-48, 479-80. The court ordered a second psychological evaluation. CP 423; FF 1.3.

After the final removal, Ms. Luak and her attorney repeatedly contacted social worker Cara Moore in order to participate in more services. 3A-RP 464-65. Moore told Ms. Luak that she did not know what services to order, and did not give Ms. Luak a referral for the second psychosocial evaluation until April 2008. 3A-RP 464-66. By April 2008, Ms. Luak was confined to bed rest as a result of her pregnancy, and Moore transferred the case to social worker Tuong Pham. 3A-RP 465.

5. Dr. Washington-Harvey's Recommendation for Cognitive Behavioral Therapy. In June and July 2008, Ms. Luak participated in the second psychosocial evaluation with Dr. Washington-Harvey. Ex. 46. Before Dr. Washington-Harvey could issue her report, on August 5, 2008, social worker Tuong Pham filed the petition for termination. CP 1-9.

Dr. Washington-Harvey issued her recommendations on September 3, 2008. Ex. 46. She amended Ms. Luak's diagnosis of Conduct Disorder to an "Adjustment Disorder with Disturbance of Conduct." Ex. 46. Dr. Washington-Harvey observed that Ms. Luak had not made progress

through prior services because she was using denial as a defense mechanism instead of attempting to address mistakes she made in the past. Ex. 46. Dr. Washington-Harvey recommended that Ms. Luak participate in Cognitive Behavioral Therapy (CBT) in order to change her mode of thinking. Ex. 46. This therapy requires at least sixteen weeks of two sessions per week. 2A-RP 214-16. Dr. Washington-Harvey added that no further services would be effective until Ms. Luak participated in CBT. Ex. 46. Dr. Washington-Harvey specified that the CBT therapist should be culturally sensitive to Ms. Luak's background, but did not suggest any specific providers. Ex. 46; 5A-RP 757.

Dr. Washington-Harvey believed Ms. Luak would have benefitted more from her anger management and parenting classes if she had participated in CBT first, and could not explain why she did not recommend CBT in 2005. 6A-RP 884-85. At trial, Dr. Washington-Harvey also suggested that a person who lived through a violent civil war like that in Sudan would benefit from treatment for Post-Traumatic Stress Disorder (PTSD). 6A-RP 885. She explained that CBT helps people with PTSD to recognize their triggers and develop appropriate responses to those triggers. 6A-RP 885.

6. No One Discussed the Purpose and Importance of Cognitive Behavioral Therapy with Ms. Luak. Dr. Washington-Harvey did not explain the new recommendation of CBT to Ms. Luak, and instead discussed it with social worker Tuong Pham. 2A-RP 214. On October 31, 2008, Pham sent a letter to Ms. Luak explaining that he was transferring the case to social worker Gina Torres, and gave Ms. Luak the name and contact information of a specific CBT provider. Ex. 56. Rather than explaining the purpose of CBT, or addressing the inconsistency posed by Maralee Leland's earlier conclusion that Ms. Luak did not need further mental health counseling, Pham merely instructed, "participate cognitive behavior." Ex. 56.

Ms. Luak's previous mental health provider, Maralee Leland, agreed that Ms. Luak would benefit from CBT. 5A-RP 656-57. Despite the fact that Leland had been trained in CBT and had developed a good rapport with Ms. Luak, the social workers did not refer Ms. Luak to Leland for CBT. 5A-RP 656. The social workers did not even ask Leland to contact Ms. Luak in order to explain why CBT was necessary.

Ms. Luak contacted the provider suggested by Pham, and informed Pham that the provider would not accept medical coupons. 3RP 398; 4RP 410. Pham, rather than search for a provider willing to accept medical

coupons or sliding scale fees, or even provide Ms. Luak with an alternative list of providers, told Ms. Luak to bring a motion to force DSHS to pay for CBT. 3RP 411, 438. Pham also informed all of the parties that CBT was not available and too expensive. 3RP 438, 443. However, Pham never contacted Dr. Washington-Harvey to help him find an appropriate provider, and never discussed funding options with his supervisors at DSHS or with the Attorney General. 3RP 442-44; 5A-RP 757.

Once social worker Gina Torres took over the case, she located several low-cost providers of dialectical behavioral therapy, and sent Ms. Luak a list of those providers on March 2, 2009. Ex. 57. Torres did not discuss with Dr. Washington-Harvey whether *dialectical* behavioral therapy would satisfy her recommendation for *cognitive* behavioral therapy. 5A-RP 757. Ms. Luak contacted one of the suggested providers in order to set up an intake interview, but that provider would not accept Ms. Luak due to the provider's policy against accepting clients under a court order to complete treatment. 3A-RP 420; 6A-RP 806. On April 22, 2009, Torres sent a letter instructing Ms. Luak how to enroll in CBT with another provider. Ex. 60. Again, Torres did not discuss this provider with Dr. Washington-Harvey to determine whether it offered the recommended therapy. 5A-RP 757.

In Torres's discussions with Ms. Luak, Torres repeatedly told her that she was court-ordered to do CBT, but never explained the purpose of CBT or why Ms. Luak needed it. 1A-RP 148-49. Torres assumed Ms. Luak understood why CBT was necessary because she never asked any questions about it. 1RP 150. Ms. Luak told Torres that she could not do CBT because she was too busy doing things to get her kids back. 1RP 151. Torres did not interpret that statement as an indication that Ms. Luak did not understand that her failure to participate in CBT could lead to termination of her parental rights. 1RP 151-52.

In June 2009, Ms. Luak went to the DSHS office to ask for help finding a CBT provider, and they referred her to the Refugee Women's Alliance (ReWA). 3RP 398-99. During a recess in the termination trial, Ms. Luak participated in the intake interview at ReWA, and attended three counseling sessions. 3RP 400.

7. Ms. Luak Never Directed Anger Toward her Children.

Although Ms. Luak experienced significant anger control problems with authority figures involved in this case and with the fathers of her children, she never expressed anger toward her children. CP 423; FF 1.5, 1.34, 1.39, 1.40, 1.41, 1.42, 1.44; 1RP 131-32. Dr. Washington-Harvey observed that Ms. Luak is not angry in general, but rather becomes angry

in response to stimuli related to the State removing her children. 5A-RP 772-73. Dr. Washington-Harvey explained that Ms. Luak was unlikely to direct that anger toward her children. 5A-RP 773.

Ms. Luak recognized the problem with fighting in front of her children, and testified that if she needs to talk to a visit supervisor or social worker, she always goes to a room away from the children. 4A-RP 537-38. Witnesses observed she was patient, kind, attentive, and affectionate to all her children. CP 423; FF 1.5; 3A-RP 323-26. The boys enjoyed visits with her. 3A-RP 326; 7A-RP 1034.

CASA Brenda Burke believed it would be a "travesty" to sever the boys' relationships with their mother and extended family, and that Ms. Luak deserved a chance to obtain the treatment she needed. 7A-RP 1046-47. Burke believed that, with mentoring and services sensitive to Ms. Luak's African heritage, Ms. Luak would do a fantastic job parenting the boys. 7A-RP 1043-45.

8. The Juvenile Court Terminated the Parent-Child Relationship Without Allowing M.S.R and T.S.R. a Voice in the Proceedings. On two occasions during the trial, Ms. Luak's trial counsel requested an opportunity for M.S.R. and T.S.R. to express their wishes to the court. 1RP 1-7; 7A-RP 987. The State and the attorney for the CASA workers

argued it would be too traumatic for the boys to testify, even if they were to do so in the privacy of the court's chambers. 7A-RP 988-90. The CASA workers stipulated that the boys do not want to lose their relationship with their mother. 7A-RP 988. The juvenile court denied M.S.R. and T.S.R. the opportunity to testify, reasoning that there was no need for them to come to the unhappy setting of the courthouse. 7A-RP 991.

The juvenile court terminated Ms. Luak's relationships with M.S.R. and T.S.R. CP 421-38.

D. ARGUMENT

1. THE STATE FAILED TO SATISFY ITS BURDEN UNDER RCW 13.34.180(1)(D) AND (E) BECAUSE IT DID NOT TIMELY OR UNDERSTANDABLY PROVIDE SERVICES NECESSARY TO REMEDY MS. LUAK'S DIFFICULTY CONTROLLING HER ANGER

a. DSHS had a duty to understandably provide services capable of correcting Ms. Luak's deficiencies within the foreseeable future.

Parents have a fundamental right to raise and care for their children. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), aff'd sub nom., Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 49 (2000); In re Welfare of C.B., 134 Wn. App. 942, 951, 143 P.3d 846 (2006). Washington courts have described this right as "sacred," In re Hudson, 13 Wn.2d 673, 685, 126 P.2d 765 (1942), and "more precious to many people than the right to life itself." In re J.D., 42 Wn. App. 345, 347, 711 P.2d 368 (1985) (quoting In re Welfare of Gibson, 4 Wn. App. 372, 379, 483 P.2d 131 (1971)). Thus, the State's goal in dependency matters is to nurture the family unit and do all it can to see the unit remains intact "unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020; In re Dependency of Ramquist, 52 Wn. App. 854, 861-62, 765 P.2d 30 (1988).

A juvenile court may not terminate a parent's relationship with her children absent clear, cogent, and convincing evidence of current parental unfitness. In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010). The State satisfies its burden to prove current parental unfitness when it proves the six statutory factors under RCW 13.34.180(1) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a); In re Dependency of

K.R., 128 Wn.2d 129, 140-41, 904 P.2d 1132 (1995). Among the six elements, the State must prove:

> (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; and
>
> (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.

RCW 13.34.180(1).[2] Clear, cogent, and convincing evidence exists when the ultimate fact at issue is "highly probable." K.R., 128 Wn.2d at 141.

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[2] RCW 13.34.180(1)(e) provides the following rebuttable presumption:

> A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:
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> . . . .
>
> (ii) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future.

If the six statutory elements are established, the trial court must then consider whether termination of parental rights is in the child's best interest. RCW 13.34.190(4); In re Churape, 43 Wn.App. 634, 636, 719 P.2d 127 (1986). The State must prove the best interests element by a preponderance of the evidence. A.B., 168 Wn.2d at 912.

The primary purpose of a dependency adjudication is to allow courts to order remedial measures to preserve family ties and alleviate the problems which prompted the initial State intervention. Krause v. Catholic Com'ty Servs., 47 Wn.App. 734, 744, 737 P.2d 280, rev. denied, 108 Wn.2d 1035 (1987). Thus, the State has an affirmative duty to "expressly and understandably" offer or provide "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d); RCW 13.34.130(3)(b), (5)(b); RCW 13.34.180(4); RCW 13.34.231(4).

This encompasses "all reasonable services that are available within the agency, or within the community, or those services which the department has existing contracts to purchase," in order to enable a parent "to resume custody." RCW 13.34.136(1)(b)(iv); RCW 13.34.136(1)(b)(i); In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005). By addressing parental deficiencies, such services facilitate the legislative

goal of reunification. In re Welfare of S.V.B., 75 Wn. App. 762, 769, 880 P.2d 80 (1994); In re Dependency of P.D., 58 Wn. App. 18, 29, 792 P.2d 159, rev. denied, 115 Wn.2d 1019 (1990).

The State does not satisfy its duty to offer or provide services by merely informing the parent what he or she needs to correct. In re Welfare of Hall, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983). The services offered must be tailored to the specific needs of the individual parent, with the ultimate goal of preserving the family unit. RCW 13.34.020; S.V.B., 75 Wn. App. at 769. "Obviously, the necessary services will vary from individual parent to individual parent, ... [and] the services offered must be tailored to the individual." P.D., 58 Wn. App. at 29.

b. DSHS failed to understandably offer or provide services capable of remedying Ms. Luak's difficulty controlling her anger. Nyakat Luak came to this country in 1998 as a teenage refugee from the war-torn country of Sudan. FF 1.8. At that time, Sudan was embroiled in a civil war that lasted from 1983 to 2005.[3] As a result of war, famine, political oppression, and the systematic rape and slaughter of entire villages of people, enormous numbers of Sudanese people have immigrated to

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[3] See Douglas H. Johnson, The Root Causes of Sudan's Civil Wars (2003).

countries like the United States, which provides refuge to those seeking asylum from warfare and/or religious persecution.[4]

Ms. Luak experienced significant trauma while living in refugee camps in Africa and at the foster home where she was first placed in the United States. 3RP 298; 2A-RP 272. Her therapist, Maralee Leland, believed this trauma caused Ms. Luak to "lash out" when she felt threatened. 5A-RP 640-41. Leland explained that people who experience significant trauma often develop the deviant or violent behaviors usually associated with Conduct Disorder because it is necessary for their survival. 5A-RP 651.

Considering Ms. Luak's past trauma as well as her recurring problem with controlling her anger when she felt threatened or misunderstood, the juvenile court was correct when it found "beyond doubt" that CBT was essential for Ms. Luak. FF 1.18. CBT would have challenged Ms. Luak to change her thinking, to recognize her triggers for angry reactions, and to develop appropriate responses to traumatic situations. 6A-RP 884-85. It also would have addressed her use of denial

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[4] Kathleen A. Ward-Lambert, The Refugee Experience: A Legal Examination of the Immigrant Experiences of the Sudanese Population, 33 Nova L. Rev. 661, 670-73 (2009).

as a defense mechanism, which – according to Dr. Washington-Harvey – prevented her from accepting and learning from her past mistakes. Ex. 46.

However, the juvenile court erred when it concluded that DSHS understandably offered this service to Ms. Luak. FF 1.18, 1.26. This vital service was only offered to Ms. Luak four years into the dependency case, months after DSHS had filed the termination petition, and over a year after Ms. Luak's prior mental health counselor had concluded that she no longer needed therapy. Further, DSHS passed this case through seven social workers in less than five years, and several of those social workers caused substantial delays in providing Ms. Luak with the services she needed.

In the beginning of the case, DSHS followed Dr. Washington-Harvey's recommendation and provided Ms. Luak with anger management classes and mental health counseling. 5A-RP 627-29, 642. Ms. Luak actively participated in those services, and made significant progress. 5A-RP 632-33. Her counselor, Maralee Leland, found Ms. Luak to be calm and pleasant when not discussing things that threatened her ability to parent her children. 5A-RP 645. The problem, however, was that the social worker never provided Leland with collateral information about the case, so Leland was unaware of much of the information on which Dr. Washington-Harvey based her diagnosis of Conduct Disorder. 5A-RP

668, 676-77. As a result, in April 2007, Leland dismissed that diagnosis, and determined that Ms. Luak no longer needed therapy after only six sessions of anger management and four sessions of mental health counseling. 5A-RP 643-44, 654. Leland testified that, had she known the extent of Ms. Luak's assaultive behavior, she would have provided Ms. Luak with more intensive therapy for a longer period of time. 5A-RP 676-77.

Despite the fact that Ms. Luak was accused of threatening her daughter's stepmother only a month after Leland ended therapy, DSHS did not renew the referral for anger management with Leland or any other provider. FF 1.34; 5A-RP 656. Despite multiple allegations that Ms. Luak was inappropriately expressing her anger toward authority figures and others involved in the case, DSHS did not offer or provide any treatment to address Ms. Luak's anger issues until October 31, 2008, when social worker Tuong Pham sent her a letter directing her to "participate cognitive behavior," and instructing her to contact the new social worker with any questions. Ex. 56; 3A-RP 370-72; 5A-RP 656. Prior to that, social worker Cara Moore had no idea what services to offer Ms. Luak. 3A-RP 464-66.

Once DSHS finally figured out that Ms. Luak needed further mental health treatment, the social workers failed to adequately communicate to Ms. Luak the importance of the recommended therapy. When Dr. Washington-Harvey recommended CBT, she did not explain the purpose of the treatment to Ms. Luak or how it differed from the previous mental health treatment Ms. Luak had already completed. 2A-RP 214. Dr. Washington-Harvey did, however, explain CBT to Tuong Pham because she believed it was very important for Ms. Luak to begin the therapy as soon as possible. 2A-RP 214. But, Pham and the social worker to whom Pham immediately passed the case (Gina Torres), failed to communicate either the importance or the purpose of the CBT to Ms. Luak. Ex. 56; 1A-RP 148-49. They merely reiterated that it was court-ordered, and left Ms. Luak with the impression that it was just another court-ordered service she did not need. Ex. 56; 1RP 151; 1A-RP 148-49. Even when Ms. Luak informed Torres that she had not completed CBT because she was too busy doing things to get her kids back, Torres did not inform Ms. Luak that CBT was the most important thing she could do to get her kids back. 1RP 151-52.

Because it was essential for Ms. Luak to begin CBT before she could benefit from any further services, Torres had a duty to do more than

merely inform Ms. Luak that the juvenile court had ordered the service. Torres could have asked Dr. Washington-Harvey to explain the purpose of CBT to Ms. Luak. Torres could have asked Maralee Leland – who had developed a strong rapport with Ms. Luak – to explain the discrepancy between the new recommendation for CBT and Leland's earlier conclusion that Ms. Luak did not require further therapy. At the very least, Torres should have made efforts to warn Ms. Luak that there would be severe consequences if she did not participate in this particular service. Had Torres done this, Ms. Luak would have participated in CBT earlier. Indeed, once the termination trial began, Ms. Luak finally grasped the importance of CBT, enrolled in treatment with the Refugee Women's Alliance, and began therapy on September 3, 2009. 3RP 400.

In sum, the social workers in this case caused substantial delays in providing Ms. Luak with the services she needed to remedy her difficulty controlling her anger. As a result, DSHS deprived Ms. Luak of the right to a meaningful opportunity to remedy her parental deficiency, and failed to satisfy its duty under RCW 13.34.180(1)(d).

c. The rebuttable presumption under RCW 13.34.180(1)(e) did not apply because the State failed to provide services necessary to remedy Ms. Luak's deficiencies, and she likely would have improved

through CBT if DSHS had timely and understandably provided it. The juvenile court in this case concluded that the presumption under RCW 13.34.180(1)(e) applied and that the State proved sub-factor (ii) by clear, cogent, and convincing evidence. FF 1.53. However, the statutory presumption does not apply if the State failed to clearly offer or provide all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future. RCW 13.34.180(1)(e). As discussed above, DSHS failed to offer or provide services capable of correcting Ms. Luak's anger issues, so the presumption did not apply.

Further, there was not clear, cogent, and convincing evidence of a "documented unwillingness of the parent to receive and complete treatment," under sub-section (ii) because Ms. Luak did willingly participate in anger management classes and mental health counseling, and demonstrated improvement. RCW 13.34.180(1)(e)(ii); 4A-RP 602-03; 5A-RP 653, 632-33; 7A-RP 996. Her improvement through that therapy, as well as the patience she demonstrated through her work with her mentally ill clients at the retirement home, indicate that if DSHS had explained the importance and purpose of CBT, Ms. Luak would have participated and benefitted from it. 4A-RP 604-05; 7A-RP 1034.

Moreover, there was not clear, cogent, and convincing evidence that Ms. Luak's anger issues posed a "psychological incapacity or mental deficiency. . . so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child," under sub-section (ii) because there was no evidence that Ms. Luak's anger issues posed an imminent threat to the children or affected her ability to care for the children. The social workers could only speculate that Ms. Luak might direct her anger toward the children as they became older and more oppositional – a hypothesis Dr. Washington-Harvey rejected. FF 1.51; 5A-RP 773. Indeed, Ms. Luak posed no threat to her baby, her aunt's eight children who lived with Ms. Luak, or the elderly people in Ms. Luak's care at her job. FF 1.5; 3RP 289; 4A-RP 604-05.

Therefore, the statutory presumption did not apply, and the State failed to satisfy its burden under RCW 13.34.180(1)(e).

d. The termination orders must be reversed. Because the State failed to satisfy its statutory burden, this Court must reverse the termination orders and remand this case so Ms. Luak can finally have a meaningful opportunity to reunite with her children.

2. M.S.R. AND T.S.R. WERE DENIED THEIR CONSTITUTIONAL RIGHT TO COUNSEL

Parents have a fundamental liberty interest in the care and custody of their children. U.S. Const. amend. 14; Const. art. 1, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Welfare of Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974). Children also have fundamental liberty interests at stake in deprivation proceedings, including an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. Kenny A. ex rel Winn v. Perdue, 356 F.Supp.2d 1353, 1360 (N.D. Ga 2005). Those rights cannot be abridged without due process of law. See, e.g., Santosky, 455 U.S. at 754; In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding that minors have due process right to counsel in delinquency proceedings).

Failing to appoint counsel to M.S.R. and T.S.R. violated their procedural and substantive due process rights as enumerated by federal and state courts. U.S. Const. amend. 14; Const. art. 1, § 3. A parent has standing to challenge an order where such an appointment has not been properly made. See In re Dependency of A.G., 93 Wn. App. 268, 280-81, 968 P.2d 424 (1998) (permitting parent to challenge the trial court's failure to appoint a G.A.L.).

Although there is currently no decision directly on point in Washington that addresses whether dependent children have a constitutional right to counsel, recent rulings illuminate why a dependent child is entitled to have an attorney at all stages of a dependency in order to protect that child's liberty interests.[5]

The United States District Court for the Northern District of Georgia is the only court to directly address this issue in a published decision. That court ruled in 2005 that foster children have a constitutional due process right to counsel and effective legal representation at every stage of their dependency proceeding. Kenny A. ex rel Winn v. Perdue, 356 F.Supp.2d 1353 (N.D. Ga 2005).[6]

While the Washington State Supreme Court, in In Re Parentage of L.B., 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005), declined to consider whether counsel for children was constitutionally required in a parentage action, it noted the ruling in Kenny A. and "strongly urge[d]" courts to consider appointing counsel for children in family law-type

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[5] This issue also was recently accepted for review by the Washington Supreme Court. In re Termination of Roberts, No. 84132-2. Oral argument has not yet been scheduled in the case.

[6] In Kenny A., unlike the present case, dependent children in Georgia were appointed attorneys, but excessive caseloads made effective legal representation impossible. The situation here is much worse. No attorney, regardless of caseload, was

proceedings, including dependencies, where G.A.L.s were already appointed. Id. "When adjudicating the 'best interests of the child,' we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless." Id.

Beyond the note in L.B., perhaps the most instructive case in Washington is Bellevue School District v. E.S., 148 Wn. App. 215, 199 P.3d 1010 (2009). While not directly addressing the issue raised here, this Court in E.S. applied well-established principles of due process and concluded that children in truancy proceedings have a constitutional right to counsel at the first hearing. While the context may be different, the constitutional principles and interests at issue in E.S. are very similar to those raised here.

Both Kenny A. and E.S. relied on the procedural due process balancing test enumerated in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under the Mathews test, courts must balance: (1) the private interest at stake; (2) the risk of error involved under the current procedures and the probable benefits of additional

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appointed, and no one advocated for the boys' desire to maintain a relationship with their mother.

procedural protections; and (3) the government's interest in the proceeding, including fiscal and administrative burdens. Id.

The Kenny A. and E.S. courts found that, when applied to children in dependency or truancy proceedings respectively, this test indicates that the failure to provide children with legal counsel violates the Due Process Clause of the Fourteenth Amendment.[7]

Turning first to the private liberty interest that will be affected, Kenny A. held dependent children have:

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

356 F. Supp. 2d at 1360.

Dependent children's fundamental interests in safety, health, and well being have been recognized by a unanimous Washington State Supreme Court, which found that foster children have a substantive due process right "to be free from unreasonable risks of harm and a right to

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[7]See also, Jacob Ethan Smiles, A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings, 37 Fam. L.Q. 485 (2003) (arguing that when applied to children in dependency proceedings, the Mathews test indicates that the failure to provide children with legal counsel violates the Due Process Clause of the Fourteenth Amendment).

reasonable safety." Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003). Additionally, the Washington State Supreme Court has discussed children's interests in family integrity, with one Justice noting that the "child has a constitutionally protected interest in whatever relationships comprise his or her family unit." In re Custody of Shields, 157 Wn.2d 126, 130, 136 P.3d 117 (2006) (Bridge, J., concurring); see also Moore v. Burdman, 84 Wn.2d 408, 411-12, 526 P.2d 893 (1974) (recognizing that at issue in termination proceedings are not only parental rights but also the child's right and psychological need to maintain ties with his biological parent).

The child also has a liberty interest at stake, given that he or she must act in conformity with the dependency court's orders even though the child has generally been denied an opportunity to actually participate in the legal proceedings that lead to those orders. Just as in the truancy context, a dependent child is subject to contempt and possible detention for any violation (e.g., running from a placement) of the court's order. The dependency orders that restrain the child's behavior, just like the truancy orders, are "a necessary and direct predicate to a later finding of contempt and imposition of detention and sanction." E.S., 199 P.3d at 1014. Just as a truancy court has the authority to hold a child in contempt, so does a

dependency court -- either through RCW 13.34.165 or the court's inherent powers. See In Re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007).

While there are many similarities between the liberty interests at issue in a truancy matter and those at issue in a dependency, a dependency action has much more powerful effect on the life of a child than does a truancy action. DSHS and dependency courts make decisions that affect a child's life that can far exceed those of truancy petitions. A dependency proceeding can determine who the child's family will be, and the court can require the child to comply with orders concerning all aspects of the child's life, including but not limited to education, placement and visitation with family. Ultimately, DSHS can change the living and educational placement of a child without a court reviewing the decision.

The child's personal liberty interest is also affected by the chance that a dependent child will be placed in an institutional setting, never to find a stable or permanent home. As the Kenny A. court noted, "foster children ... are subject to placement in a wide array ... of foster care placements, including institutional facilities where their physical liberty is greatly restricted." 356 F.Supp.2d at 1360-61. In addition, the Kenny A. court found that a child's liberty interest may also be affected by the often

arbitrary placement process resulting from the lack of suitable foster homes.[8] Id.

Looking at the next prong of the Mathews balancing test, there is the possibility for substantial loss as a result of an erroneous deprivation in these type of proceedings. As noted above, the stakes are very high in dependency proceedings, especially at termination trials. As the Kenny A. court found, "an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships." 356 F.Supp.2d at 1360.

Without legal representation throughout the course of a dependency case, from the removal of the child through the termination of parental rights, "there is a significant risk that erroneous decisions will be made." Id. at 1361. The risk of error caused by the failure to appoint counsel for the child is exacerbated by the fact that courts are granted wide discretion in making determinations in dependency proceedings. See Id.

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[8] See Erik Pitchal, 2006 Edward v. Sparer Symposium: Civil Gideon: Creating a Constitutional Right to Counsel in Dependency Cases, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 682 (2006) ("Children may be moved from placement to placement for reasons having nothing to do with what is best for that child, but because beds need to be freed for an incoming sibling group, or because the foster parent is retiring and moving out of state, or because the foster parent was late for court and the judge ordered the agency to move the child. Liberty includes peace of mind, and freedom means having some measure of stability in the world around you. ...Children in foster care have a physical liberty interest at stake in ongoing dependency proceedings because these very questions about their lives are constantly at issue.")

(quoting Santosky, 455 U.S. at 762). "Such 'imprecise substantive standards that leave determinations unusually open to the subjective values of the judge' serve 'to magnify the risk of erroneous fact-finding.'" Id.

Washington's current procedural safeguards in dependency are insufficient to protect children from erroneous decisions. The assumption that a G.A.L., a parent, or the court mitigates the high risk of error has been rejected by both the Kenny A. and E.S. courts. The G.A.L -- who is defined simply as a "person" under RCW 13.34.030(8) and generally has no legal training -- is insufficient to protect the child's due process rights. The Kenny A. court acknowledged this when it stated that "CASAs are . . . volunteers who do not provide legal representation to a child." 356 F.Supp.2d at 1361.[9]

Additionally, the E.S. court noted that a child and a parent may have opposing interests in a truancy proceeding and, thus, the parent's presence may not mitigate the risk of erroneous decisions. 199 P.3d at 1014. Likewise, the G.A.L., who is appointed to report the child's best interest to the dependency court, may have opposing interests with respect to the child – as was the case here in that CASA Mikie Helman advocated

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[9] In this case, neither of the two CASA volunteers had any legal training beyond what the CASA program offered. 3A-RP 343-44 (Mikie Helman), 7A-RP 996-97 (Brenda Burke).

for termination despite the fact that the boys wanted to maintain a relationship with their mother and siblings. 3A-RP 379-80, 7A-RP 988. Under these circumstances, the G.A.L.'s role in dependency and the parent's role in truancy are analogous, and the child's interest may go unheard or insufficiently heard.

Like the G.A.L.'s, the parent's presence in a dependency also fails to mitigate the risk of erroneous decisions. While the interests of parents and children may converge, the viewpoints and situations of each are almost always unique. In many instances, parents and children may not agree on reunification, and ultimately, the court's orders have wholly different effects on a parent than on a child. A parent faces the loss of his or her child, but a child faces the possibility of being moved from placement to placement, being separated from siblings, schools, and foster parents. A parent's presence cannot mitigate the risk of errors in dependency that will directly affect the child.[10]

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[10] It is also necessary to note here that the statute providing for notice for truancy requires that parents and children both receive notice of the hearing, have the right to present evidence, and have the right to be advised of the "option and rights available under Chapter 13.32A RCW." RCW 28A.225.035(8). That the parents and the child are treated distinctly by law suggests that the parent does not have a duty to guide the child – subject to truancy – as to his legal rights and responsibilities. As a result, both the child in truancy and the child in dependency potentially are left unguided, despite being directly impacted by the outcome of the proceedings. While the law may presume that a parent is capable of understanding the proceedings, there is no provision that the parent in truancy cases must share that understanding with the child.

In looking at the risk-of-error prong of the Mathews test, the Kenny A. court found that "juvenile court judges, court appointed special advocates (CASAs), and citizen review panels do not adequately mitigate the risk of such errors." 356 F.Supp.2d at 1361. Clearly, neither the G.A.L., the parent, the caseworker, nor the Attorney General's office, which represents DSHS – all of whose interests may conflict with those of a foster child—can adequately mitigate the risk of such errors. Given the risk of error and the effect such error(s) would have on the child's life, a child cannot be free from unreasonable risk of danger, harm, or pain unless her voice and legal rights are adequately protected. The child's special relationship with the State "gives rise to a host of substantive rights that can best and in most cases only be protected with vigilant advocacy."[11]

With legal representation in this dependency case, M.S.R. and T.S.R. could have asserted their right to live with and/or visit siblings,

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[11] Pitchal, supra note 4, at 679-80. ("The right to caseworkers who are adequately trained and supervised and who have a manageable caseload, the right to live in foster homes and other placements that have been adequately screened...,the right to live in a placement where the caretakers have been provided relevant information about the child's medical history and who is well matched to the child's needs (as opposed to random placements); the right to live with adult relatives as opposed to strangers, and the right to be placed with siblings; the right to services to support the foster placement and avoid disruptions and multiple moves among different placements; the right to timely and appropriate permanency planning; the right to appropriate and necessary mental health, medical, and education services; and, for teenage mothers in foster care, the right to be placed with her own children, absent a finding of unfitness against the minor parent.")

could have challenged the termination of their mother's parental rights, or could have advocated for an open adoption plan that would have allowed them to maintain a relationship with their siblings, mother, and large extended family. RCW 13.34.130(3), RCW 13.34.025(1) (regarding coordination of services to children in dependency, including sibling contact and visitation); RCW 13.34.136 (regarding permanency plan of care). "Only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." Kenny A., 356 F.Supp.2d at 1361.

In addition, attorneys are bound by Rules of Professional Conduct and have a duty to act in a professional manner towards their clients. In contrast to a G.A.L., a child's attorney in dependency is required to advocate for the child's expressed wishes and exhibit competence in the law. RPC 1.2; RPC 1.1. Only attorneys for children have confidential and privileged relationships with the children -- which allows for open disclosure of issues (like an intent to run away) or privileged legal advice – on issues directly relating to the dependency or on issues that overlap with it, such as immigration, education, or mental health.

Finally, in addressing the final prong of the Mathews balancing test, there is no overriding countervailing State interest here, especially since most states already appoint attorneys for all children in dependencies without any evidence of detrimental effect on the children or the process.

The National Report on a Child's Right to Counsel in 2006 found that 36 states and the District of Columbia require that a lawyer be appointed to a child in dependency proceedings.[12] In addition, at least two counties in Washington State routinely appoint counsel to children.[13]

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

As the Washington Supreme Court has noted, a child's welfare interests are the only interest the State represents in dependency hearings. Moore, 84 Wn.2d at 413 ("While the state, through its Department of Social and Health Services, is a party, its interest is limited to a concern

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[12] First Star, Nat'l Report Card on Legal Representation for Children 5 (2007).

for the welfare of the child."). Thus, as the Kenny A. court explains, the State and child's interest in having appointed counsel for the child are actually one in the same:

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

356 F. Supp. 2d at 1361 (internal citations omitted). Once the constitutional issues of liberty and due process are established, the State cannot argue that it has insufficient funds to provide legal counsel to children in dependency. No countervailing government interest overrides the liberty interests of foster children.

Given the reasons explained above, under the three prongs of the Mathews test, procedural due process demands that children in dependency cases be appointed counsel.

Additionally as noted above, children also have a substantive due process right, as enumerated by the Washington State Supreme Court in Braam v. State, "to be free from unreasonable risks of harm and a right to reasonable safety." 150 Wn.2d at 699. The Court went on to note that

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[13] King County for children aged twelve and older. Benton-Franklin Counties for

"[t]o be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." Id. at 700. Dependency courts must, just like DSHS, ensure that the judicial process protects those substantive due process rights.

Removing a child and placing him in foster care may have drastic health and safety consequences, as the child may be abused or neglected at the hands of her caretakers.[14] Even if placed in a suitable foster home, a child will likely experience physical and mental health problems and an increased possibility of poor performance in school, failure to graduate, and even homelessness.[15]

In sum, due process demands that all parties are given an opportunity to be heard. A child cannot be heard without representation, especially in cases like this, where the juvenile court's attempt to shelter the children from the termination trial prevented the children from having

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children aged eight and older.

[14] See Pitchal, supra note 4, at 677.

a voice in the proceedings. 7A-RP 990. Because M.S.R. and T.S.R. were denied their right to counsel, due process was not served and the termination should be reversed so that M.S.R. and T.S.R. may be fully and fairly represented in the legal proceedings that so significantly impact the course of their lives.

E. CONCLUSION.

For the foregoing reasons, Ms. Luak respectfully requests this Court to reverse the termination orders.

DATED this 14th day of October 2010.

Respectfully submitted,

Maureen M. Cyr (28724) for

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Washington Appellate Project
Attorneys for Appellant

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[15] See Joseph Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 Am. Econ. Rev. 1583 (2007), *available at* http://www.mit.edu/~jjdoyle/doyle_fosterlt_march07_aer.pdf; Mason Burley & Mina Halpern, Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care, Washington State Institute for Public Policy (2001), *available at* http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf. *See also* Mason Burley, Educational Attainment of Foster Children: 2006 Results, Washington State Institute for Public Policy (2008), *available at* http://www.wsipp.wa.gov/rptfiles/08-03-3901.pdf.

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

IN RE M.S.R. MINOR CHILD	)	
LUAK NYAKAT,	)	NO. 64736-9-I
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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