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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 REPLY BRIEF

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A. ARGUMENT

1. THE STATE FAILED TO TIMELY OR UNDERSTANDABLY PROVIDE SERVICES NECESSARY TO REMEDY MS. LUAK'S DIFFICULTY CONTROLLING HER ANGER

In her opening brief, Nyakat Luak argued that the Department of Social and Health Services (DSHS) failed to understandably offer or provide services capable of remedying Ms. Luak's difficulty controlling her anger. App. Op. Br. at 19-27. In sum, Ms. Luak is a Sudanese refugee who experienced significant trauma before and after she immigrated to 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. As a result of Ms. Luak's anger problems, the juvenile court found "beyond doubt" that cognitive behavioral therapy (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 as a

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

But DSHS did not offer CBT until late in the case, after Ms. Luak had already completed mental health counseling and anger management treatment, and over a year after Ms. Luak's mental health counselor informed her that she no longer needed treatment. 5A-RP 632-33, 645. The treatment provided by Leland failed to fully address Ms. Luak's anger problems because the social workers never provided Leland with collateral information that corroborated Dr. Washington-Harvey's early diagnosis of Conduct Disorder. 5A-RP 668, 676-77. As a result, in April 2007, Leland dismissed that diagnosis, never provided treatment to address Conduct Disorder, and determined ended Ms. Luak's treatment after only six sessions of anger management and four sessions of mental health counseling. 5A-RP 643-44, 654. Had Leland 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. Thus, DSHS's failure to inform Leland about the extent of Ms. Luak's anger problems prevented Ms. Luak from fully benefitting from Leland's therapy.

Further, once Dr. Washington-Harvey recommended CBT, the social workers failed to adequately communicate to Ms. Luak the

importance of the recommended therapy by explaining 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.

The State responds: "From the start, Dr. Washington-Harvey identified the mother's reactive behaviors as her greatest obstacle to parenting appropriately [... and] recommended the mother participate in anger management treatment, mental health counseling, Family Preservation Services (FPS) and a culturally relevant parenting class," and, although Ms. Luak participated in these services, she continued to exhibit the same anger problems. Resp. Br. at 13. The State asserts it was "clear that that she was not benefitting from these services and further recommendations needed to be made." Resp. Br. at 13. But, when confronted in May 2007 with the fact that its initial service plan had failed, DSHS did not change strategies for over a year.

Ms. Luak completed the provided anger management classes and mental health counseling in April 2007. 5A-RP 643-44, 654. A month later, Ms. Luak threatened her daughter's stepmother, who, in turn, petitioned for a protection order against Ms. Luak. CP 428-29; FF 1.34. But DSHS did not inform Leland that Ms. Luak needed additional anger management treatment. 5A-RP 676-77. The social workers never provided Leland with any collateral information about Ms. Luak's

assaultive behaviors before, during, or after her treatment. 5A-RP 676-77. DSHS did not provide any relevant services until June 2008, when it provided a second evaluation with Dr. Washington-Harvey. Ex. 46.

Even after Dr. Washington-Harvey made her recommendations in August 2008, DSHS failed to understandably and timely provide the service Ms. Luak needed. Dr. Washington-Harvey did not explain CBT to Ms. Luak. 2A-RP 214. Social worker Tuong Pham merely told her, in a letter informing her that he would no longer be her social worker, to "participate cognitive behavior." Ex. 56. Although Ms. Luak's prior counselor, Leland, was trained in CBT and had developed a good rapport with Ms. Luak, the social workers did not refer Ms. Luak to Leland for CBT or even ask Leland to explain to Ms. Luak the purpose of CBT or how it was different from the therapy she already completed. 5A-RP 656. When Ms. Luak contacted the provider suggested by Pham and informed him that the provider would not accept medical coupons, Pham did not inform her about other providers. 3RP 411, 438. It was not until March 2009 that the new social worker, Gina Torres, provided Ms. Luak with a new list of low-cost providers. Ex. 57.

The State argues that Torres's letters were sufficient to communicate the importance of CBT to Ms. Luak because the letters informed her that placement of her children with Ms. Luak was

conditioned on her participation in CBT. Resp. Br. at 16. But this is simply too little too late. Torres never resolved for Ms. Luak the contradiction between her completion of the prior treatment and the new court order. 1A-RP 148-49. Moreover, when Ms. Luak told Torres that she could not do 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. Therefore, DSHS did not satisfy its duty to understandably provide this necessary service.

The State further argues that it is speculative to assume that Ms. Luak would have benefitted from CBT if DSHS had provided it earlier because Ms. Luak believed she did not need further counseling. Resp. Br. at 16. This contradicts the trial court's finding "beyond doubt" that CBT was necessary for Ms. Luak to correct her parental deficiency and the State's own expert's opinion that CBT would have addressed Ms. Luak's use of denial and would have challenged Ms. Luak to change her thinking, to recognize her triggers for angry reactions, and to develop appropriate responses to traumatic situations. FF 1.18; 6A-RP 884-85. Indeed, Dr. Washington-Harvey believed this service was so vital that it should be provided before DSHS provided any other service. It is also important to note that, due the fact that Leland told Ms. Luak that she had completed

therapy and did not need further treatment, Ms. Luak's belief that she did not need further counseling was reasonable. Essentially, the State seeks to be excused from providing a service that would have addressed Ms. Luak's use of denial because her use of denial might have rendered that service futile. This argument is circular and should be rejected.

Therefore, DSHS's duty to understandably offer or provide services under RCW 13.34.180(1)(d) required the social workers to explain to Ms. Luak why her previously completed therapy was not sufficient and why CBT was necessary to address her parental deficiency. Because DSHS failed to do this, the termination orders must be reversed.

2. THE STATE FAILED TO PROVE THERE WAS LITTLE LIKELIHOOD THAT MS. LUAK WOULD CORRECT HER PARENTAL DEFICIENCY WITHIN THE NEAR FUTURE

Ms. Luak also argued that DSHS failed to satisfy its burden under RCW 13.34.180(1)(e) because (1) 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 (2) she likely would have improved through CBT if DSHS had timely and understandably provided it. The State responds that the statutory presumption applies because, once DSHS determined that CBT was necessary, it offered it numerous times. Resp. Br. at 18.

However, the presumption cannot apply because DSHS did not offer CBT within the first year of the case. The presumption under RCW 13.34.180(1)(e) penalizes a parent for not making improvements within the first twelve months of a dependency case. During the first year of this case, Ms. Luak actively participated in and completed all services provided to address her anger problems. Although Ms. Luak continued to present anger problems, DSHS did not offer further treatment until August 2008. Ms. Luak, therefore, cannot be faulted for her lack of improvement during the first year. And this Court should not reward DSHS for its failure to offer or provide appropriate services during the first year of the case. The presumption does not apply.

The State goes on to argue that even if the presumption did not apply, it satisfied the little likelihood prong because Ms. Luak refused to participate in CBT and, according to the social worker, was not yet receptive to CBT after her first three sessions. Resp. Br. at 18-19 (citing social worker's testimony at 2RP 226). However, the fact that Ms. Luak did engage in CBT once she learned of its importance shows that she was willing to participate in it. Further, Dr. Washington-Harvey believed Ms. Luak would benefit from CBT by changing her mode of thinking, by addressing her use of denial as a defense mechanism, and by making it more likely for her to benefit from other services such as anger

management and parenting classes. Ex. 46; 6A-RP 884-85. Dr. Washington-Harvey testified that CBT lasts for at least sixteen weeks, so despite DSHS's delays in understandably providing CBT, Ms. Luak still had a good chance of showing improvement in the near future. The social worker's opinion, which was not based on any observation of Ms. Luak in therapy or any consultation with her CBT counselors, did not establish clear, cogent, and convincing evidence that there was little likelihood that she would address her deficiency in the near future. Therefore, DSHS failed to satisfy its burden under RCW 13.34.180(1)(e) and the termination orders must be reversed.

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

Ms. Luak argues that her sons M.S.R. and T.S.R., who were nine years old at the time of the termination trial, were deprived of their constitutional right to representation in the termination proceedings. App. Op. Br. at 29-44.

a. Review is warranted under RAP 2.5(a)(3). First, the State responds that Ms. Luak cannot raise this issue for the first time on appeal under RAP 2.5(a)(3) because there is no evidence that the absence of counsel for the boys led to an erroneous termination of the parent-child relationship. Resp. Br. at 21-22. But Ms. Luak need not show that the failure to appoint

counsel would have changed the outcome of the case in order to make the "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). To determine whether there has been actual prejudice, the court must determine whether the error is so obvious on the record that the error warrants appellate review. Id. (citing City of Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Here, the juvenile court denied Ms. Luak's children a voice in the termination trial, which deprived the boys of due process in proceedings leading to complete deprivation of their fundamental liberty interest in maintaining their relationship with their mother. The juvenile court refused to hear testimony from the boys about their wishes to return to their mother. 1RP 1-7; 7A-RP 987; 7A-RP 991. The only person who expressed the boys' wishes was the CASA, who provided a stipulation that the boys wished to return to their mother, but still argued for termination. 7A-RP 988; 7A-RP 1103, 1111. Thus, no one advocated for the boys' wishes during the termination trial or throughout the dependency case. This error is so obvious that it warrants appellate review.

Further, appointment of counsel for the boys could have changed the outcome of the trial. Had the court provided the boys with legal representation, the boys could have advocated throughout the dependency case for more appropriate services to address Ms. Luak's anger problems, could have presented evidence that termination was not in their best interests, could have asserted their right to live with and/or visit siblings, 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).

b. The juvenile court's discretion to appoint counsel to children under twelve under RCW 13.34.100(6) does not satisfy due process for a child for whom the court does not appoint legal representation. The State argues that RCW 13.34.100(6) satisfies due process because it provides the court with the discretion to appoint counsel for a child under age twelve "if the guardian ad litem or the court determines that the child needs to be independently represented by counsel." Resp. Br. at 23. Ms. Luak addresses this argument in detail in her opening brief. App. Op. Br. at 37-44.

Further, RCW 13.34.100(6) requires the child – who is by law and in fact incapable of effectively protecting his or her own legal interests without counsel – to know of this right and to have the composure and wherewithal to request counsel in court. This statute creates an almost insurmountable barrier for a youth to request counsel, especially when the CASA volunteer or court does not inform the youth of that right or allow him to come to court. The assumption that a CASA/GAL, a parent, or the court mitigates the high risk of error has been rejected by both the Kenny A. and E.S. courts. Bellevue School District v. E.S., 148 Wn. App. 215, 199 P.3d 1010 (2009); Kenny A. ex rel Winn v. Perdue, 356 F.Supp.2d 1353 (N.D. Ga 2005). The CASA/GAL – 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.

In this case, the juvenile court did not allow M.S.R. and T.S.R. to express their wishes in court because the courthouse is an "unhappy place." 7A-RP 991. Also, 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). Thus, it was unlikely that M.S.R. and T.S.R. were aware of their right to request representation.

c. A child's fundamental liberty interest in maintaining the integrity of his family unit is not so limited as to diminish his right to representation in termination proceedings. The State argues that children in dependency cases do not have a right to representation in all cases because children have limited constitutional rights. The State relies on Bellotti v. Baird, 443 U.S. 622, 633, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), for the proposition that a child's constitutional rights are less than those of adults because "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; and because the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Resp. Br. at 26 (quoting Bellotti, 443 U.S. at 635-37).

But Bellotti addressed the constitutionality of a statute that required a minor to obtain permission from her parents before obtaining an abortion, which implicated far different interests of the child than those involved in parental termination proceedings. In Bellotti, the Court concluded,

> Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, . . . sympathy, and . . . paternal attention."

443 U.S. at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971)). Accordingly, the Bellotti Court found that the statutory requirement for a minor to obtain her parent's permission before obtaining an abortion

> furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Id. at 640-41. Thus, the limitation on a child's rights in that case was established in order to provide guidance to a child before she makes an important decision. The State argues for just the opposite in this case – to deprive a child in a dependency case of guidance and of the power to contribute to a decision that will drastically and irreversibly affect his life. Unlike the scenario addressed in Bellotti, in a dependency case, the child has been removed from the "guiding role" of his parents and is torn between the interests of the State and his parents. With no one to represent the child's wishes, he is powerless and voiceless.

Further, contrary to the State's assertion, children have a special interest in the preservation of the parent-child relationship. See, e.g., Santosky v. Kramer, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("the child and his parents share a vital interest in preventing

erroneous termination of their natural relationship"); Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974) (recognizing child's interest in "the affection and care of his parents"). "It is no slight thing to deprive 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). Children 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., 356 F.Supp.2d at 1360. 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." Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003).

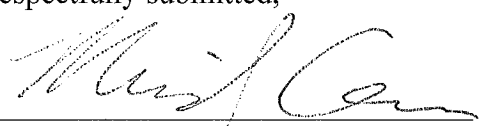
For reasons more fully explained in Ms. Luak's opening brief, this court should hold that M.S.R. and T.S.R. were denied their constitutional right to counsel during the termination proceedings and remand for new proceedings. App. Op. Br. at 27-44.

B. CONCLUSION.

For the reasons outlined above and in appellant's opening brief, Ms. Luak respectfully requests this Court to reverse the termination orders.

DATED this 21st day of December 2010.

Respectfully submitted,



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

IN RE M.S.R. AND T.S.R. MINOR CHILDREN	)	
N.L.,	)	NO. 64736-9-I
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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