

FILED
Court of Appeals
Division I
State of Washington
11/30/2017 2:10 PM

NO. 76675-9-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In Re the Dependency of B.K., Minor,

STATE OF WASHINGTON,
Department of Social and Health Services,

Respondent,

v.

A.K.

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

KELLY TAYLOR
Assistant Attorney General
WSBA #20073
Office Identification #91016
Office of the Attorney General
800 Fifth Avenue #2000
Seattle, WA 98104
(206) 389-3919

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF ISSUES.....	2
III.	COUNTERSTATEMENT OF FACTS.....	2
IV.	ARGUMENT	9
	A. The Appearance Of Fairness Doctrine Should Not Be Heard For The First Time On Appeal.....	9
	B. Pursuant To RAP 2.5(a)(3), Review Of The Due Process Claim Should Not Be Granted Because There Has Been No Showing Of Actual Prejudice	10
	C. If Ms. K.'s Due Process Argument Is Considered For The First Time On Appeal, Her Argument Should Be Denied Because Ms. K. Has Not Met Her Burden Of Demonstrating Specific Evidence Of Bias	11
	D. Ms. K. Separation Of Powers Argument Lacks Merit.....	20
V.	CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>City of Bellevue v. King County Boundary Review Bd.</i> , 90 Wn.2d 856, 586 P.2d 470 (1978).....	9
<i>In re Borchert</i> , 57 Wn.2d 719, 359 P.2d 789 (1961).....	12
<i>In re Burtt's Welfare</i> , 12 Wn. App. 564, 530 P.2d 709 (1975).....	15
<i>In re Dependency of A.W.</i> 53 Wn. App. 22, 765 P.2d 307 (1988).....	10
<i>In re Interest of Mahaney</i> , 146 Wn.2d 878, 51 P.3d 776 (2002).....	11
<i>In re Marriage of Davison</i> , 112 Wn. App. 251, 48 P.3d 358 (2002).....	12
<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	12
<i>In re Welfare of Sego</i> , 82 Wn.2d 736, 513 P.2d 831 (1973).....	13
<i>State v. Chamberlin</i> , 161 Wn.2d 30, 162 P.3d 389 (2007).....	12
<i>State v. Morgensen</i> , 148 Wn. App. 81, 197 P.3d 715 (2008).....	10
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	10
<i>State v. Ra</i> , 144 Wn. App. 688, 175 P.3d 609 (2008).....	19

<i>State v. Steele</i> , 23 N.C. 524, 209 S.E.2d 372 (1974).....	15
<i>State v. Tolia</i> s, 135 Wn.2d 133, 954 P.2d 907 (1998).....	9
<i>Wolfkill Feed & Fertilizer Corp. v. Martin</i> , 103 Wn. App. 836, 14 P.3d 877 (2000).....	11

Statutes

RCW 13.34.180(1).....	9
-----------------------	---

Rules

ER 404(b).....	19, 20
RAP 2.5(a)	9, 10
RAP 2.5(a)(3).....	2, 10, 11

I. INTRODUCTION

The subject of this appeal is B.K., a developmentally delayed boy born on November 26, 2014. Ms. K. is B.K.'s biological mother, and she appeals the order terminating her parental rights to B.K. When B.K. was ten days old, his skull was fractured while in the care of Ms. K's boyfriend. B.K. requires a responsible caregiver who can make sure B.K. attends his ongoing appointments, such as medical appointments, occupational therapy, physical therapy, speech therapy, and educational services. Over the course of two years, Ms. K. failed to consistently attend B.K.'s therapeutic appointments, and she did not attend any of his medical appointments. Ms. K. also failed to consistently visit B.K. Following a five day termination trial, the trial court terminated parental rights.

For the first time on appeal, Ms. K. claims she was denied her right to an unbiased judge. However, Ms. K. made no motion for a mistrial before the trial court. As a result, she failed to preserve her claim regarding the appearance of fairness doctrine, as it was not raised below and the doctrine does not implicate Constitutional rights. If the argument is considered, the application of an objective test by a reasonable person who knows all the relevant facts demonstrates that the judge's impartiality was not reasonably questioned. For these reasons, the termination of parental rights order should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Ms. K. did not move for a mistrial in the court below. Did Ms. K. fail to preserve her claim regarding the appearance of fairness doctrine?

2. Manifest error in RAP 2.5(a)(3) requires a showing of actual prejudice. Ms. K. has not assigned error to any of the fifty findings made by the trial court. Without a showing of actual prejudice, is Ms. K's due process claim properly before this Court?

3. The trial court asked questions of all sixteen witnesses who testified at trial. Ms. K. points to no specific evidence of actual or potential bias. When an objective test is applied to the trial court's behaviors, was the judge's impartiality reasonably questioned?

4. Ms. K. provides no case law to support her separation of powers argument, and the record does not support her claim that the trial court advocated for the State. Does her separation of powers argument lack merit?

III. COUNTERSTATEMENT OF FACTS

B.K. is a developmentally delayed boy born on November 26, 2014. Ex. 6, Ex. 74. The mother of B.K. is A.K., and the father of B.K. is J.B.¹ On

¹ The parental rights of the father J.B. were terminated by default, and he is not involved in this appeal.

December 5, 2014, B.K. was taken to Mary Bridge Children's hospital by Ms. K. after he sustained a blunt force injury to his head causing his skull to fracture. Ex. 6 at 2; Ex. 74 at 1. According to Ms. K., when B.K.'s injury occurred, she had left the motel to buy cigarettes, leaving her children in the care of her boyfriend, Lonnie Jackson. Ex. 6 at 2. Ms. K. initially reported that B.K. was injured when another child pulled a blanket from under him. *Id.* Ms. K. later reported that Mr. Jackson was holding B.K., nodded off, and dropped him. *Id.* Ms. K. was convicted for making false statements to a public servant regarding this incident. Ex. 29, Ex. 30. Mr. Jackson was arrested for reckless endangerment. Ex. 6 at 3.

B.K. was placed in protective custody, and child protective services were contacted. Ex. 6 at 2-3. Ms. K. admitted that she is addicted to opiates and that she participates in methadone treatment. *Id.* at 3. In December of 2014, Ms. K. was out of compliance with her methadone treatment program. Ex. 6 at 3. Ms. K had been buying methadone off the street and smoking marijuana daily. *Id.* A dependency petition was filed on January 5, 2015, and B.K. was placed in licensed foster care. Ex. 3 at 6.

Ms. K. agreed that B.K. was a dependent child on March 11, 2015. Ex. 6 at 1. Ms. K.'s dispositional order required her to complete a drug/alcohol evaluation and follow treatment recommendations, participate in random urinalysis as required by her drug treatment program, and to

cooperate with establishing paternity for B.K. Ex. 6 at 9. Once reunification was determined to be imminent, she was to participate in and complete Project Safe Care. *Id.* Ms. K. was permitted supervised visitation twice per week. *Id.* at 10.

Initially, Lonnie Jackson was permitted supervised visits with B.K, because Mr. Jackson was possibly B.K.'s father. RP 643. Mr. Jackson was dismissed as a party from the dependency proceeding in April of 2015, after genetic testing excluded him as a possible father. FF 2.13, CP 270. He was not permitted to have contact with B.K. after being excluded as a possible father. RP 643. Early on in the dependency, Ms. K. lived with Lonnie Jackson's mother, and, at times, she would acknowledge that Lonnie Jackson also lived there. RP 539. Mr. Jackson dosed at the same methadone clinic as Ms. K. RP 539. The Department social worker was concerned that Ms. K. was still associating with Lonnie Jackson. RP 540.

Ms. K. obtained a drug/alcohol evaluation and was assessed as chemically dependent on opiates. Ex. 31. She engaged in medication-assisted treatment at the methadone program. Ex. 31. At the time of the termination trial, Ms. K. was compliant with her treatment, which included behavioral therapy, monthly meetings, methadone testing and urinalysis testing. FF 2.11, CP 269. Her treatment provider noted, however, that aspects of Ms. K.'s life lacked stability, such as her housing and

employment. RP 101.

B.K. has developmental delays. RP 577. He has asthma, anemia, hypotonia, temperamental intensity, hyperdysplasia in his right eye, and sensory processing difficulties. RP 67 at 3, Ex. 74 at 1. B.K. requires a stable, safe and nurturing home environment. Ex. 74 at 4. B.K.'s pediatrician, Dr. David Joosten, noted a connection between B.K.'s asthma attacks and B.K.'s visits with his mother. RP 590. On multiple occasions, the Department social workers Clarissa Blackmer and Alison Piwtorak raised their concern with Ms. K. that she was exposing B.K. to smoke during visits. FF 2.15, CP 270.

Department social worker Blackmer offered Ms. K. services which included additional urinalysis testing, a new drug/alcohol evaluation, and a mental health assessment. Ex. 40C, FF 2.18, CP 271. Ms. K. did not agree to participate in a mental health assessment, which was offered to rule out any potential mental health issues. RP 540-42; FF 2.18, CP 271. At the permanency planning hearing on November 2, 2015, the juvenile court found that Ms. K. was in compliance with her court ordered services, but lacked stable housing and employment. Ex. 13 at 6. Ms. K. was visiting B.K. on a regular basis, and the court ordered a meeting to discuss expanding Ms. K.'s visits and possible return home to Ms. K. Ex. 13 at 12.

A shared planning meeting took place on November 2015. RP 473.

Ms. K. reported that Mr. Jackson was “completely out of her life.” RP 481. Ms. K. stated she would be present at as many of B.K.’s therapy sessions as possible. FF 2.35, CP 274. At the end of December 2015, Ms. K.’s visits were scheduled to move to monitored (instead of supervised) if Ms. K. visited appropriately at three consecutive visits with B.K. RP 474. However, visitation supervisors raised concerns that Ms. K. was not fully supervising B.K. during visits. RP 486. For example, B.K. had fallen out of a stroller after Ms. K. failed to properly buckle him into the stroller. RP 841. It was also reported that B.K. was left with strangers while Ms. K. went to the restroom. RP 486. Sometime between October 2015 and January 2016, Ms. K. allowed Lonnie Jackson to have unauthorized contact with B.K. FF 2.13, CP 270. During this time period, the visitation supervisor had mistakenly permitted a monitored instead of a supervised visit. RP 551. During the monitored visit, Ms. K. took a picture of B.K. and Lonnie Jackson together at the Tacoma Mall, and she posted this photo on Facebook. FF 2.13, CP 270; RP 480.

From March 2016 through May 2016, Ms. K. did not visit with B.K. at all. RP 494. At the dependency review hearing on April 4, 2016, Ms. K. was found to be repeatedly missing visits, and she had not responded to the efforts of the Department social worker to meet with her. *Id.* at 7. The juvenile court changed the primary permanency plan from return home to

mother to adoption, and ordered the Department to file a termination petition. *Id.* at 3, 12. The termination petition was filed on May 26, 2016. CP 1.

Ms. K. reestablished contact with the Department in May of 2016. RP 494. Her visits with B.K. resumed, but from June 2015 through February 2017, the visitation contract was suspended three times due to Ms. K. repeatedly missing visits. RP 147. At the permanency planning hearing on September 26, 2016, the juvenile court found that the mother was in compliance with services (attending treatment and providing clean UAs) but she remained inconsistent in her communication with the Department social worker and inconsistent in visiting B.K. Ex. 21 at 6-7.

Shortly after being placed in foster care, B.K. began occupational therapy, and it was determined that he has a sensory processing problem that creates delays and challenges with self-care, play skills, emotional regulation/behavior, communication, fine motor skills and gross motor skills that are impacting his ability to participate successfully in daily life activities. Ex 76. B.K.'s pediatrician, Dr. Joosten, testified that B.K. requires a caregiver with a "proven track record" of making sure appointments are kept to prevent B.K. from lagging further behind developmentally. RP 597-98. Department social worker Piwtorak told Ms. K. to be sure she attended all of her visits and therapy sessions. Ex. 49. Ms.

K. failed to consistently attend B.K.'s therapeutic appointments, and she did not attend any of his medical appointments. RP 540, FF 2.29, 2.30, CP 272-23. Ms. K. visited B.K. only on an inconsistent basis. FF 2.31, 2.32, 2.33, CP 273.

A five-day termination trial took place in February and March of 2017. FF 2.29, CP 272. The trial court heard testimony from sixteen witnesses. Each of these witnesses were questioned directly from the court. RP 27-91, 870-907(questioning Ms. K.), RP 94-117 (questioning chemical dependency professional Jared Spyhalski), RP 143-162 (questioning case aide Donna Woodruff), RP 189-212 (questioning case manager Genora Chappell), RP 223-274 (questioning foster parent A.M.), RP 286-300 (questioning Dr. Glenn Tripp), RP 316-323, 398-460, 930-938 (questioning Department social worker Alison Piwtorak), RP 330-364 (questioning Tailla Stallings-Alailima), RP 391-392 (questioning family resource coordinator Carly Cappelto), RP 480-558 (questioning Department social worker Clarissa Blackmer), RP 572-612 (questioning Dr. David Joosten), RP 626-655,708-765, 918-928 (questioning Court Appointed Special Advocate Janet Belles), RP 662 (questioning special educator Chelsea Siler), RP 678-703 (questioning pediatric speech pathologist Sheryl Jakobsen), RP 776-792 (questioning maternal grandmother Deana Knuckles), RP 796-826 (questioning mother's friend, Bonnie Kosanovich).

Following the trial, the court found that all six of the termination elements set forth in RCW 13.34.180(1) were satisfied, that Ms. K. was currently unfit to parent B.K., and that termination was in B.K.'s best interests. CP 268-277. Ms. K. now appeals from the termination of parental rights order.

IV. ARGUMENT

A. **The Appearance Of Fairness Doctrine Should Not Be Heard For The First Time On Appeal**

This Court should decline to consider for the first time on appeal whether the trial court violated the appearance of fairness doctrine. A party may not raise a claim of error on appeal not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a).

The Washington State Supreme Court has held that the appearance of fairness doctrine does not implicate constitutional rights. *State v. Tolia*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998). The “appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based.” *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978). Consequently, because the claim is not constitutionally based, it cannot be

raised for the first time on appeal. RAP 2.5(a). Ms. K. waived the appearance of fairness claim by failing to raise it with the trial court. *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) (applying the doctrine of waiver to defendant's appearance of fairness claim). It is of “paramount importance that the trial court be apprised of alleged errors so that it can make corrections, if necessary, and thereby avoid an appeal and consequent new proceeding.” *In re Dependency of A.W.* 53 Wn. App. 22, 26, 765 P.2d 307 (1988).

B. Pursuant To RAP 2.5(a)(3), Review Of The Due Process Claim Should Not Be Granted Because There Has Been No Showing Of Actual Prejudice

If it is determined that Ms. K.’s claims involve a constitutional right, the due process claim should not be considered because Ms. K. has not demonstrated manifest error. Manifest error under RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Demonstrating actual prejudice requires a “plausible showing by the [appellant] that the asserted error had practicable and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). As argued below, the trial court questioned all of the witnesses to varying extents, without aligning with counsel for any of the parties. Even if one assumes, for the sake of argument, that there was some error, it was not prejudicial to the outcome of the trial,

because Ms. K. does not assign error to the trial courts findings, and a substantial amount of uncontroverted evidence supported termination of parental rights. The trial court entered fifty findings of fact after hearing evidence over a span of five days. CP 267-277. The findings indicate that the termination elements were satisfied, that Ms. K. was currently unfit to parent B.K., and that termination was in B.K.'s best interests. CP 268-277. Ms. K. assigns error to none of these findings. Br. Appellant at 1. Unchallenged findings are verities on appeal. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002). The numerous uncontested findings demonstrate a lack of prejudice under RAP 2.5(a)(3) and weigh in favor of not considering Ms. K.'s claims regarding unconstitutional bias. The unconstitutional bias claim is not properly before this Court.

C. If Ms. K.'s Due Process Argument Is Considered For The First Time On Appeal, Her Argument Should Be Denied Because Ms. K. Has Not Met Her Burden Of Demonstrating Specific Evidence Of Bias

Due process and the appearance of fairness doctrine require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). The trial court is presumed to perform its functions without bias or prejudice. *Id.* at 841. An "assertion of an unconstitutional risk of bias must overcome a presumption

of honesty and integrity accruing to judges.” *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). To prevail, the claim must be supported with specific evidence to overcome this presumption. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). The reviewing court applies an objective test to determine whether a judge’s impartiality might reasonably be questioned by a reasonable person who knows all the relevant facts. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002)(quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

Applying the objective test to the facts of this case, a reasonable person knowing all of the facts would not question the trial court’s impartiality, because the trial court’s actions provided no indication that the court was biased or prejudiced. “For a judge to be biased or prejudiced against a person’s cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person’s state of mind that affects his opinion or judgment.” *In re Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961). Here, there is no evidence in the record to suggest that the trial court had any preconceived bias against Ms. K. at the outset of the case. None of the trial court’s comments or rulings indicate that the trial court was unwilling to consider Ms. K.’s position. Ms. K. argues the trial court spent an “extraordinary

amount of time” impeaching Ms. K.’s testimony by asking numerous questions. Br. Appellant at 16. The amount of time spent by the trial court questioning Ms. K. demonstrates a persistent willingness by the trial court to consider her testimony, even when her testimony was obviously flawed.

Eventually, the trial court concluded that Ms. K. was “not a reliable reporter and is not credible” and entered a written finding to this effect. FF 2.12, CP 269. The trial court’s questioning of Ms. K. and the trial court’s determination that Ms. K. was not credible does not demonstrate specific evidence of bias. Washington case law establishes that the trial court is capable of resolving questions touching upon credibility. *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Notably, one of the first exhibits admitted by the State to the trial court was Ms. K.’s conviction for false reporting to a public servant. Ex. 29, RP 25. This conviction alone could have created some reluctance by a trier of fact to take Ms. K.’s statements at face value. During her testimony, Ms. K. made numerous dubious claims. Ms. K. testified that she did not read the dependency order she signed. RP 39. She blamed her own attorney, claiming her attorney misrepresented her statements to the juvenile court. RP 88-89. Ms. K. told social worker Blackmer that she had “proof” that the visit supervisors were misrepresenting facts, but then she never showed up for appointments to present her “proof.” FF 2.16, CP 270.

Ms. K.'s testimony also contradicted the testimony of other witnesses. For example, she testified that she had quit smoking. RP 60. Her chemical dependency counselor subsequently testified that Ms. K. was still smoking "one to two cigarettes a day." RP 94. Ms. K. testified that she took a photo of Lonnie Jackson and B.K. together during the time period when Mr. Jackson was permitted to have visits with B.K., in March or April of 2015. RP 882. B.K. was born on November 24, 2014, so he would have been only four or five months old at that time. RP 883. Yet, the photo taken shows an older child; the child in the photo has an ability to hold his head up, he had a number of teeth, and he was wearing a sweatshirt that he was known to wear when he was at a later age. Ex. 152, FF 2.13, CP 270. The trial court's determination regarding Mr. K.'s lack of credibility was reasonably based on Ms. K.'s own testimony, her criminal history, the Facebook photo, and the testimony of other witnesses. Given the totality of evidence presented, the trial court's questions of Ms. K. did not provide evidence of specific bias. Nor did any of the court's comments suggest that termination of parental rights was a foregone conclusion. When a reasonable person knows all of the facts, the court's impartiality is not reasonably questioned.

From the extensive record below, Ms. K. has selected a number of the trial court's comments in an effort to support the trial court's supposed

“significant judicial overreach.” Br. Appellant at 10. Ms. K. argues that the trial court asked “hundreds of questions.” Br. Appellant at 1. The record supports this claim. The trial court, during the course of a six-day trial, did ask hundreds of questions. Trial judges are permitted to ask questions. “That the court has wide discretionary powers in the trial of a cause and is not prohibited from questioning a witness, is beyond controversy.” *In re Burtt’s Welfare*, 12 Wn. App. 564, 577, 530 P.2d 709 (1975) quoting *Dennis v. McArthur*, 23 Wn.2d 33, 38, 158 P.2d 644, 647 (1945). It is only in “trials before a jury” that the questioning by the judge “must be cautiously guarded so as not to constitute a comment on the evidence.” ER 614(b). In this case, because the judge, not the jury, was the trier of fact, the judge’s questioning does not provide evidence of unconstitutional bias and was not prejudicial to the outcome of the trial. The fact that the trial was not before a jury also distinguishes the situation from the case relied upon by Ms. K., *State v. Steele*, 23 N.C. 524, 209 S.E.2d 372 (1974). Br. Appellant at 12, 16. *Steele* granted a new trial because the trial court’s intensive questioning and comments had a “cumulative effect upon the jury” which “seriously prejudiced defendant’s case.” *Steele*. B.K.’s termination trial is further distinguished from the situation in *Steele*, because the trial court in B.K.’s case made no comments to “belittle and humiliate defense counsel,” as occurred in *Steele*. *Id.* at 526.

Ms. K. complains that the trial court asked defense witness Kosanovich 82 questions, suggesting that defense witnesses were questioned more severely than the State's witnesses. Br. Appellant at 34. This claim does not appear to be supported by the record. The trial court asked approximately 83 questions of Department social worker Piwtorak and approximately 96 questions of Department social worker Blackmer. RP 316-323, 398, 930, 938. 480-558. The CASA was asked approximately 160 questions. RP 626-655, 708-765, 918-928. The best indicator of number of questions asked by the trial court appears to be length of time the witness spent testifying.

In addition, most questions asked by the trial court seemed to be of a clarifying nature. Many of the questions involved an attempt by the court to nail down the timing of the various events. The dependency proceeding for B.K. had been going on for two years by the conclusion of the termination trial, so the evidence produced at trial covered a lengthy time-period. Ex. 6; CP 278. Unfortunately, the witnesses did not testify for the court in chronological order, and some of the witnesses admitted their memories regarding dates were less than clear. For example, the CASA testified, "I'm terrible at dates." RP 742. Department social worker Blackmer also struggled recalling some dates. RP 494. The trial court frequently asked questions to figure out what was going on when, asking

questions that began with “when,” “how long,” and “what time,” or “what period.” *See, e.g.*, RP 27, 59, 191, 195, 198, 253, 317, 352, 354, 372, 439, 449, 506, 641, 643, 742, 790, 791, 887, 901, 907, 930. These clarifying questions do not show bias on the part of the trial court.

The trial court’s interrogation of Ms. K. and her witnesses also fails to show bias because the trial court directly questioned each of the sixteen witnesses who testified at the trial. RP 27-91, 870-907(questioning Ms. K.), RP 94-117 (questioning chemical dependency professional Jared Spyhalski), RP 143-162 (questioning case aide Donna Woodruff), RP 189-212 (questioning case manager Genora Chappell), RP 223-274 (questioning foster parent A.M.), RP 286-300 (questioning Dr. Glenn Tripp), RP 316-323, 398-460, 930-938 (questioning Department social worker Alison Piwtorak), RP 330-364 (questioning Tailla Stallings-Alailima²), RP 391-392 (questioning family resource coordinator Carly Cappetto), RP 480-558 (questioning Department social worker Clarissa Blackmer), RP 572-612 (questioning Dr. David Joosten), RP 626-655,708-765, 918-928 (questioning Court Appointed Special Advocate Janet Belles), RP 662 (questioning special educator Chelsea Siler), RP 678-703 (questioning pediatric speech pathologist Sheryl Jakobsen), RP 776-792 (questioning

² The transcript refers to this witness as Tialla Spallings-Alailima. RP 327. The exhibit she authored lists her as Tialla Stallings Alailima. Ex. 69.

maternal grandmother Deana Knuckles), RP 796-826 (questioning mother's friend, Bonnie Kosanovich).

Ms. K. argues that the trial court crossed the line "from impartiality to advocacy" by acting as "an advocate for the State." Br. Appellant at 11. This argument has no merit because Ms. K. fails to reference any specific portion of the record which demonstrates the trial court advocated for the State. At times, the trial court's questions resulted in answers favorable to Ms. K. For example, during Ms. K.'s cross-examination of case manager Genora Chappell, the trial court asked whether she personally had observed a visit, and, if so, how the visit went. RP 209. Ms. Chappell answered in a way favorable to Ms. K., stating, "they love each other" and that B.K. "knows him mom well" and that Ms. K. "was very attentive to him." RP 209. When Ms. K's attorney later raised the question of possible bias on the part of the visitation supervisor, the trial court explored this possibility, asking the witness, "Do you have any personal connection like a friendship with the foster parent?" RP 212. When questioning B.K.'s foster mother, the court elicited testimony about how Ms. K. was "really sweet with [B.K.] and plays with him." RP 243. This record demonstrates that the trial court was not an advocate for the State.

The trial court questioned all of the witnesses to varying extents, without aligning with counsel for any of the parties. And, the court's

critiques and expressions of skepticism were not limited to Ms. K.'s testimony. The court pressed many witnesses on various points, including witnesses presented by the Department. For example, the trial court asked pointed questions of the Department social worker Blackmer about whether all necessary services were provided, asking "Did you ever consider whether something was going on with mom besides noncompliance, like a personality disorder?" RP 489. The court also disagreed with some of the positions taken by the attorney representing the Department. The trial court informed the attorney for the Department, "I'm not much on opinion testimony from the social workers in the case, particularly when it's an effort to get them to testify to the ultimate issues before the Court..." RP 310. The even-handed nature of comments and interrogation undermines Mr. K's claim that the trial court was something other than an independent and impartial trier of fact.

Ms. K. argues that the trial court's actions in her case were akin to those in *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008). Br. Appellant at 9, 11. In *Ra*, the trial court made comments suggesting that the defendant in a murder trial was "some sort of distorted character who breeds and lives violently." *State v. Ra* at 705. The trial court in *Ra* not only made disparaging comments about the defendant, the trial court also "proposed theories for the State to use in admitting improper ER 404(b) evidence." *Id.*

Without deciding whether the appearance of partiality warranted reversal, the appellate court remanded and directed the case be assigned to another judge. *Id.* By contrast, in the case at hand, the trial court neither made disparaging comments about Ms. K. nor suggested that improper evidence be admitted. The trial court told Ms. K.'s attorney, "[I]f I hear hearsay, I'm not going to consider it." RP 531. As noted earlier, the trial court questioned all the witnesses who testified, and had no intention to assist one side or the other.

In summary, the cases cited by Ms. K. are distinguishable, and when an objective test is applied, the judge's impartiality was not to be reasonably questioned. For this reason, Ms. K.'s request for a new trial should be denied.

D. Ms. K. Separation Of Powers Argument Lacks Merit

Ms. K. claims the trial court was an "advocate for the State," and for this reason, she claims the trial court violated separation of powers concepts. Br. Appellant at 13. She provides no case law to support her claim. Certainly, the trial court did not serve as an "advocate for the state" in terms of admitting evidence. At various points throughout the trial, the court referenced its commitment to considering only admissible evidence, stating the court would disregard hearsay testimony, opinion testimony of the Department social worker, and unverified suspicions of the CASA- whether

an objection was made or not. RP 256, 310, 531, 725, 730, 962. And, on numerous occasions, the trial court sustained objections made by Mr. Hoekendorf. RP 160, 250, 319, 345, 423, 430, 435, 436, 491, 538, 640, 650, 654, 822, 890. When the foster parent testified about statements made by the CASA, the Court interrupted the State's witness, stating to the mother's attorney, David Hoekendorf, "If you're objecting, Mr. Hoekendorf, I'm sustaining." RP 256. Considering the entire record, the trial court's questions and rulings demonstrate the trial court was an independent and neutral fact-finder. The lack of supporting case law and lack of factual record to support her claim causes her separation of powers argument to fail.

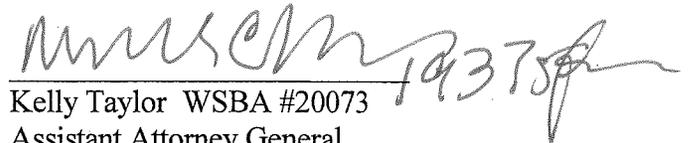
V. CONCLUSION

For the reasons stated above, the court should affirm the trial court's order terminating parental rights.

RESPECTFULLY SUBMITTED this 30th day of November, 2017.

ROBERT W. FERGUSON
Attorney General

By


Kelly Taylor WSBA #20073
Assistant Attorney General
Office Identification #91016

CERTIFICATE OF SERVICE

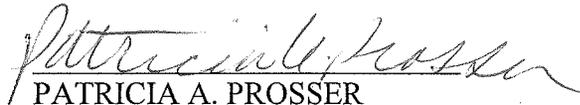
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Court of Appeals, Division One, under Case No. 76675-9-I, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Dana Nelson, Nielsen, Broman & Koch, PLLC, sloanej@nwattorney.net, and nelsond@nwattorney.net; and

2. Kathleen Martin, Dependency CASA Program, casa.group@kingcounty.gov, and kathleen.martin@kingcounty.gov.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of November, 2017, at Seattle, WA.



PATRICIA A. PROSSER
Legal Assistant
Office Identification #91016

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

November 30, 2017 - 2:10 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.
Superior Court Case Number: 16-7-01406-1

The following documents have been uploaded:

- 766759_Briefs_20171130140925D1631552_8263.pdf
This File Contains:
Briefs - Respondents
The Original File Name was BriefBKFfinalPP_113017.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- kathleen.martin@kingcounty.gov
- nelsond@nwattorney.net

Comments:

Sender Name: patricia prosser - Email: patp@atg.wa.gov

Filing on Behalf of: Kelly L. Taylor - Email: kellyt1@atg.wa.gov (Alternate Email: shsseaf@atg.wa.gov)

Address:
800 Fifth Ave., #2000
Seattle, WA, 98104
Phone: (206) 464-7045

Note: The Filing Id is 20171130140925D1631552