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SUPREME COURT NO. 96842-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON/ DSHS,

Petitioner,

v.

A. K.,

Respondent.

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

The Honorable Catherine Shaffer, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES

1. Is it a violation of one's due process right to a fair trial for the judge to depart from the role of a neutral arbiter even in the context of a civil trial decided without a jury? Yes.

2. Did the Court of Appeals correctly conclude the judge's conduct during the trial denied respondent her due process right to a fair trial before an impartial arbiter? Yes.

3. Did the Court of Appeals correctly reverse and remand for a new trial in front of a different judge? Yes.

B. SUPPLEMENTAL STATEMENT OF THE CASE

Appellant A.K. is the mother of B.W.K. A dependency order was entered on March 11, 2015. Ex. 6. A termination trial was held between February 28 and March 8, 2017, resulting in the termination of the parent-child relationship.¹ CP 267-78.

On appeal, Ms. K asserted the trial judge violated her due process right to a fair tribunal, the separation of powers doctrine, and the appearance of fairness doctrine when the judge crossed the line from impartiality to advocacy in favor of the State. Brief of Appellant at 1, 5-40. The Court of Appeals declined to consider whether the trial judge's conduct violated the appearance of fairness doctrine, deeming it a non-

¹ Relevant facts about the trial are cited in the argument below.

constitutional issue that could not be considered for the first time on appeal. Appendix A at, n. 5. It never addressed the separation of powers argument. Appendix A. Instead, it reversed and ordered a new trial before a different judge on the ground the trial judge had violated Ms. K's due process right to a fair trial when it crossed over from a neutral arbiter to advocate. Appendix A at 1, 27-28.

C. ARGUMENT

I. DUE PROCESS IS VIOLATED WHEN THE TRIAL COURT CROSSES FROM NEUTRAL ARBITER TO ADVOCATE REGARDLESS OF WHETHER IT IS IN A CIVIL PROCEEDING DECIDED WITHOUT A JURY.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution protect against the deprivation of a person's liberty without due process of law.² Due process entitles a person to a fair tribunal with a neutral and impartial decision maker. See, e.g., In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 549, 202 P.2d 927, 929 (1949). This applies in both criminal and civil matters.³ As this Court stated: "The principle of

² Parents are afforded a due process right to a fair termination trial. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

³ Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S. 602, 617, 113 S. Ct. 2264, 2277, 124 L. Ed. 2d 539 (1993) (stating

impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts.” State ex. rel. Barnard v. Bd. of Educ., 19 Wn. 8, 17, 52 P. 317 (1898).

A due process violation occurs when a judge crosses over from a neutral arbiter to advocate. State v. Moreno, 147 Wn.2d 500, 509-11, 58 P.3d 265 (2002) (citing persuasive authority to distinguish between permissible judicial conduct and conduct that is partial).⁴ This is so even in cases where there is no jury. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 548, 202 P.2d 927 (1949).⁵ This is because in both the

that in both the “criminal or civil setting” due process requires a neutral and detached judge); Tatham v. Rogers, 170 Wn. App. 76, 90, 283 P.3d 583, 592 (2012) (same).

⁴ See also, e.g., United States v. Hickman, 592 F.2d 931, 934-36 (6th Cir. 1979) (reversing where the judge took on the role of an advocate by conducting redirect for the State, making and sustaining his own objections, cross examining defense witnesses on his own, and making excessive interjections that were unnecessary to clarify factual matters); State v. Ra, 144 Wn. App. 696, 699, 705, 175 P.3d 609 (2008) (disqualifying a judge on remand where he made statements that disparaged the defendant and proposed theories to the State on how to get certain evidence admitted); State v. Steele, 23 N.C. App. 524, 525-26, 209 S.E.2d 372 (1974) (reversing where the trial court asked over one hundred questions in the course of examination, entered and ruled on his own objections, and manifested a hostile tenor toward the defense).

⁵ See also, Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007) (reversing where judge in a non-jury trial engaged in extensive and argumentative questioning and thereby created an atmosphere making it difficult for the defendant to fully advocate his side of the case); Reyes-Melendez v. I.N.S., 342 F.3d 1001, 1007 (9th Cir. 2003) (reversing where judge in a non-jury proceeding commandeered direct examination of the defendant early on and used “snide” and “sarcastic” commentary); Colmenar v. INS, 210 F.3d 967, 971 (9th Cir.2000) (reversing in a non-jury trial because judge’s interjections prevented the applicant from fully presenting his evidence); McFadden v. State 732 So.2d 1180, 1182-84; 24 Fla L. Weekly D1040 (1999) (reversing in a non-jury probation violation hearing where judge steered the government in its case against the defendant and took over cross examination of the defendant); Auger v. Auger, 149 Vt. 559, 546 A.2d 1373 (1988) (reversing in a child custody bench trial where the trial court “took control of the presentation of the evidence” by cutting off direct examination of the defendant and cross examining witnesses); People v. Cofield, 9

criminal and civil realm the presence of an impartial judge is essential to obtaining reliable results and is necessary to achieving the appearance of fairness due process requires.

The failure of judge to remain neutral violates due process in part because it results in a trial process that does not appear fair. The United States Supreme Court has concluded that fundamental fairness as embodied in constitutional due process endeavors to prevent even the “possibility” of unfairness. Murchison, 349 U.S. 136; Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). Hence, due process requires both fairness and the appearance of fairness in the tribunal. Id.

“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” Mistretta v. United States, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Williams v. Pennsylvania, 136 S. Ct. 1899, 1909, 195 L. Ed. 2d 132 (2016). Where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on

Ill. App. 3d. 1048, 1051, 293 N.E.2d 692 (1973) (reversing where the judge in a bench trial conducted examinations directed at eliciting testimony in support of the State's allegations and called witnesses for this same purpose).

the public's confidence in the judicial system can be debilitating. Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). Thus, due process requires a judge's impartiality be such that it cannot "reasonably be questioned by the average person on the street who knows all the facts of a case." Sentis Group, Inc. v. Shell Oil Co, 559 F.3d 88, 904-05 (8th Cir. 2009) (citation omitted).

A judge's failure to remain neutral during a proceeding not only appears unfair, but it produces unreliable results. When a judge fails to remain neutral this creates a fundamental defect in the adversarial trial process. Greenlaw v. United States, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). The United States Supreme Court has explained that the adversarial system rests on the principle of "party presentation," assigning "to the courts the role of neutral arbiter of matters the parties present." As one commentator explained:

The philosophy of adjudication that is expressed in "the adversary system" is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of ... the jury, on the other.

(Stephen Landsman, *The Adversary System: A Description and Defense*, Amer. Enterprise Sys. for Pub. Pol'y & Res., 47 (1984) (citation omitted).

Within the adversarial system of justice, the presence of a neutral decision-maker is considered essential to guard against the risk of an erroneous decision and to seeking the truth:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980).

When a judge crosses the line between neutral arbiter and usurps the role of counsel this results in a breakdown in the adversarial system. Greenlaw, 554 U.S. at 243. Consequently, the outcome of the proceeding is not reliable. See, e.g. Elias, 490 F.3d at 451 (holding judge's failure to function as neutral arbiter created "substantial uncertainty as to whether the record below was fairly and reliably developed" and undermined confidence in the court's adverse credibility finding); see also, McFadden 732 So.2d at 1183-84 (reversing even though there was substantial evidence to support the judge's findings, because of the break in the adversarial system and the appearance of unfairness).

In sum, case law unequivocally establishes that due process entitles a person to a fair tribunal with a neutral, impartial decision maker. Due process is violated when a judge crosses over from neutral arbiter and usurps

the role of counsel. This is so in both civil and criminal proceedings and in both bench and jury trials. As shown below, despite the fact Ms. K.'s trial was a civil, bench trial, the cumulative effect of judge's conduct denied her due process.

II. THE TRIAL JUDGE'S CONDUCT DENIED MS. K HER DUE PROCESS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL ARBITER.

The case law establishes several factors for a reviewing court to consider when determining whether a party has been denied his or her due process right to a fair tribunal before an impartial arbiter. Applying these factors to the totality of circumstances here, the Court of Appeals correctly concluded Ms. K. was denied this due process right.

A key question presented is: what factors should a reviewing court consider in determining when a trial judge's conduct violates a party's due process right to a neutral decision maker? While there are currently no published cases in Washington that concisely answers this question, case law provides numerous examples of relevant factors to be considered.

Synthesizing some of these factors, the Court of Appeals offered the following framework:

In determining whether a court's interjections and questioning violate the due process right to a fair trial, courts consider the proceedings as a whole and examine a number of factors, including the frequency and nature of the court's questions, whether the court waited until after

counsel questioned the witness, whether the court's questions were clarifying or adversarial, whether the court interjected sua sponte in favor of one party, whether the questioning was impassioned or accusatory, and whether the court usurped counsel's role. See Moreno, 147 Wn.2d at 507-12; United States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974); United States v. Saenz, 134 F.3d 697, 702-05 (5th Cir. 1998); United States v. Singer, 710 F.2d 431, 436-37 (8th Cir. 1983); United States v. Van Dyke, 14 F.3d 415, 418-20 (8th Cir. 1994).

Appendix A at 3. This framework lays out a comprehensive yet workable approach to analyzing when a trial court has stepped out of the role of a neutral arbiter via its questioning.⁶

However, improper questioning is not the only way in which a judge may cross over the line between neutral arbiter and partial advocate. A judge also crosses this line when he or she takes an overactive hand in creating a record that is more favorable to one side than the other. Factors to be considered in this regard include whether the judge helps a party cure its evidentiary omissions, whether he or she steers a party in admitting favorable evidence, and whether the judge cuts off one party's ability to fully present his or her case or facilitates objections to

⁶ The State faults the Court of Appeals for not relying on federal cases in which there was no jury. MDR at 9. However, there are numerous federal non-jury cases in which circumstances similar to those cited above were used to determine whether the trial court stepped outside the role of a neutral decision-maker. Supra, n. 5. Thus, the Court of Appeals' framework is not subject to attack merely because it cites to cases in which there were juries. If a case involves a jury, this merely adds another due process element to be considered – whether the judge's questions and interjections encroached on the jury's role to independently determine facts and determine guilt or liability. See, e.g., Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980).

unfavorable evidence. See, e.g., Sentis, 559 F.3d at 904-05; Elias, 490 F.3d at 451; Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 808 (1998); McFadden, 732 So.2d at 1182-83. This type of conduct may or may not involve judicial questioning, but it is still highly partial and must be considered when determining whether a judge has remained neutral.⁷

When all the factors cited above are applied to this case, the record demonstrates the Court of Appeals correctly concluded that trial judge crossed over the line between neutral arbitrator and an advocate, thereby violating Ms. K's due process right to a fair trial.

During six days of trial, the judge interjected over 800 times. Appendix A at 1. She spent an extraordinary amount of time aggressively questioning Ms. K and other witnesses, with an emphasis on obtaining facts negative to Ms. K. RP 54-56, 67-72, 89-92, 143-46, 246-47, 480-91, 494-96, 505-508; 650-54, 747, 803-811, 815-18. She commandeered questioning witnesses in an effort to impeach Ms. K's credibility. RP 122-26; 130; 136; 634-36, 640-42, 708-09, 724, 811-12, 877-80, 895, 905-07. Many questions were advocate-like, with the judge often using leading

⁷ While the Court of Appeals did not expressly refer to these additional factors as such in its framework, it considered them in reaching its decision. Appendix A at 15 ("The court not only elicited detailed factual evidence that the Department had not presented, it assumed the role of advocate for the Department"); Appendix A at 18 ("The court interjected [in defense counsel's examination of the CASA], steered the witness in a different direction, and at one point answered the question for the witness"); Appendix A at 27 (The court...elicited evidence in support of the Department's case...").

questions to shape the direction of the testimony against Ms. K. RP 404, 459, 480-91, 644-45, 650-54.⁸

The judge was argumentative with witnesses, aggressively trying to pin them down on facts negative to the defense. RP 708-14, 742, 746,797-99. Additionally, she helped lay the foundation for State evidence. RP 708-15, 742. Meanwhile, she actively interfered with the defense's effort to put forth its case, steering witnesses in a different direction. RP 463-64, 747, 808-813. The trial judge even offered up negative facts about Ms. K. so the social worker could affirm them while on the stand.⁹ RP 432, 437-38.

The trial judge made sua sponte objections to defense questions, while she was unnecessary hostile to defense counsel's reasonable objections, calling them "nuts," "annoying" and disruptive. RP 160, 205-07, 260, 530, 723, 803. She even overruled defense counsel's legitimate

⁸ The Court of Appeals opinion dedicates 20 pages to quoting extensively from the record to demonstrate some of the most egregious examples of the trial judge's partial conduct. Appendix A at 7-27. Ms. K. dedicated nearly 24 pages of her opening brief for the same purpose, providing specific citations to the record. BOA at 15-39. Given the page limitations here, respondent will not duplicate that effort; however, she attaches that portion of her opening brief as Appendix B for easy reference should the Court seek to review specific examples with citations to the record.

⁹ Attempting to balance the scales, the State points out that the trial court asked over 80 questions to the Department social worker and over 150 questions to the CASA. MDR at 5. What the State fails to acknowledge is that many of these questions were not aimed at eliciting evidence unfavorable to the State but were instead directed at procuring facts disfavorable to Ms. K.

objections to one of her questions that called for a witness to speculate. RP 242-44.

The State points to the few examples where the trial judge asked clarifying questions of a witness, correctly excluded irrelevant or unhelpful legal conclusions that favored the State, rejected speculative evidence, and made a single critical remark. MDR at 14-15 (citing RP 212, 430, 436-37, 553, 772, 725). From this, it makes the bold claim that “the judge’s questions here did not favor the Department or indicate that the court could not fairly judge the case.” MDR at 13-14.

However, these few instances pale in comparison to the many, many examples of the trial judge’s intrusive, aggressive, and repeated questioning of defense witnesses with an overwhelming emphasis on obtaining negative facts for the defense and in a disparaging manner. Appendix A at 7-27 and Appendix B. Moreover, the examples the State points to were, for the most part, merely proper clarifying questions or routine evidence rulings. Compare, Augilar-Solis v. I.N.S., 168 F.3d 565, 569 (1999) (finding no due process violation where judge was active but even-handed in asking clarifying decision and managing the trial), with, Reyes-Melendez, 342 F.3d at 1007-08 (where judge took over examination very early in the proceeding and was aggressive and snide in tenor).

Next, the State faults the Court of Appeals for not importing the “federal standard” used to determine when there is sufficient bias to invoke federal statutes pertaining to judicial recusal. MDR at 7-9 (citing Liteky v. United States, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) and United States v. Modjewski, 783 F.3d 645, 650-51 (7th Cir. 2015). Liteky held, when a party moves to recuse a judge under 28 U.S.C. § 455(a), it must show that the opinions formed by the judge in the course of a proceeding “display a deep-seated favoritism or antagonism that would make fair judgment impossible.” Liteky, 510 U.S. at 555.

Assuming, arguendo, that Liteky’s standard applies to a due process claim, when a reviewing court concludes the trial judge crossed the line from neutral arbiter to an advocate favoring one party, this necessarily establishes that judicial favoritism or antagonism rendered a fair judgment impossible. For, as explained above, a fair judgement in our adversarial system is predicated on the presence of a neutral judge and independent party presentation of the evidence. E.g., Greenlaw, 554 U.S at 243.

Even if this Court were to require express consideration of the cases the State relies on, this would not change the outcome. The facts in this case are far more egregious than in those cases. In Modjewski, the trial judge asked “mostly to the point questions” of a defense expert in sentencing for approximately 11 minutes, and he did not cut off or impeach the witness.

Modjewski, 783 F.3d at 650-51. In Liteky, the Court concluded the complained of conduct consisted merely of “judicial rulings, routine trial administration efforts, and ordinary admonishments to counsel and to witnesses” and some testy remarks. Id. at 542, 556. In those cases, the judge’s conduct never crossed from neutral arbiter to advocate.

The record here is more akin to that in Sentis, 559 F.3d at 904-05. There, the Eighth Circuit considered Liteky’s standard. Id. On facts far less pervasive and egregious as those here, that Court held the cumulative effect of the trial judge’s conduct established the requisite bias to merit recusal. Id.

In sum, applying all relevant factors for determining when a judge violates due process by crossing from impartial arbiter to advocate, this record supports the Court of Appeals’ conclusion that the cumulative effect of the trial judge’s conduct denied Ms. K her right to a fair trial. Appendix A at 27-28; Appendix B.

III. THE COURT OF APPEALS CORRECTLY REVERSED AND REMANDED FOR A NEW TRIAL IN FRONT OF A DIFFERENT JUDGE.

It is not clear whether a traditional harmless error analysis should be (or can be) applied when the trial court has crossed the line between impartial arbiter to advocate. As explained below, however, this error was so prejudicial, the remedy under either standard must be a new trial.

If this were a criminal case, reversal would be automatic. The United States Supreme Court has determined it is a structural defect to the trial framework where the judge fails to remain neutral. Williams, 136 S. Ct. at 1909. However, this Court has determined in a plurality opinion that the doctrine of structural error is strictly limited to criminal trials and does not apply to civil proceedings. In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) (plurality opinion). Petitioner respectfully asks this Court to reconsider that holding as it pertains to a judge's inability to remain neutral in a termination proceeding. In that context, D.F.F.'s refusal to apply structural error in civil matters is harmful and incorrect.

Structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error. Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). An error "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

D.F.F. is incorrect in so far as it holds "structural error analysis has no place in the civil arena." 172 Wn.2d. at 53. A blanket civil /criminal distinction places form over substance. D.F.F. predicates its conclusion on

language in the U.S. Supreme Court's case law that speaks of the structural error doctrine in terms of a criminal proceedings.

According to the United States Supreme Court, structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.'" Neder v. United States, 527 U.S. 1, 8–9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (alteration in original) (quoting Rose v. Clark, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986))

D.F.F., 172 Wn.2d at 37. However, the substance of this language can apply equally to civil termination proceedings: structural errors deprive parents of basic due process protections without which a termination trial cannot reliably serve its function as a vehicle for determination of parental fitness and no outcome may be regarded as fundamentally fair.

The language pointed to in D.F.F. does not mandate a blanket distinction between criminal and civil cases. See, Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 988 (9th Cir. 2012) (indicating the question of whether constitutional error in a civil context may be structural is still an open question). Instead the relevant consideration is whether the effect of the constitutional error can be fairly assessed in the context of other evidence. Trial errors whose effect may "be quantitatively assessed in the context of other evidence" are subject to review for harmlessness, as opposed to structural defects whose

evidentiary impact “def[ies] analysis by harmless-error standards.” Fulminante, 499 U.S. at 307–10.

The denial of a fair trial in front of an impartial judge is unquestionably considered a structural error in the criminal context. There is no reason why the denial of this right should be treated any differently simply because a termination proceeding is a civil proceeding. In both instances, the error effects the framework of the trial in the same way (i.e. creates a fundamental defect in the truth-seeking process that infects the entire process and makes the outcome unreliable). In both cases, the defect is necessarily unquantifiable and indeterminate (i.e. reviewing courts can only speculate what the record and findings would have been had there been a neutral arbiter).¹⁰

The decision in D.F.F. is also harmful. It creates a situation in which a constitutional error that has already been deemed incapable of being reasonably analyzed for harmless error, must be subjected to a harmless error analysis before reversal may be ordered. It is essentially a

¹⁰ Other courts have found a variety of structural errors in parental rights cases. See, e.g., In re S.M.H., 385 Wis. 2d 418, 428-44, 430, 922 N.W.2d 807, 813 (2019) (holding failure to provide parent an opportunity to present evidence was a structural error and providing extensive discussion of why structural error analysis applied in that civil proceeding); In re Adoption of L.B.M., 639 Pa. 428, 446, 161 A.3d 172, 183 (2017) (holding the failure to appoint a separate attorney to represent the child's legal interests as required by statute was structural error); People ex rel. R.D., 277 P.3d 889 (Colo. App. 2012) (treating the denial of counsel in a termination hearing as structural error); In re S.S., 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (same); In re Torrance P., Jr., 298 Wis.2d 1, 724 N.W.2d 623 (Wis. 2006) (same).

classic “catch-22.” This conundrum is particularly harmful if it permits an unreliable decision terminating a parent-child relationship to stand. For these reasons, respondent respectfully asks this Court to revise the plurality decision in D.F.F. as it applies to the type of due process violation at issue here.

Even if this court disagrees that this is a structural defect, it should not apply the ordinary harmless error analysis. Instead, it should adopt the standard used by the Sixth Circuit in Elias, 490 F.3d at 450-51, to determine whether the error was prejudicial. There, the Court concluded the trial judge failed to function as a neutral arbiter and his conduct may have impeded the affected party’s ability to fully advocate for his cause. The Sixth Circuit explained that it “could not conclude the [judge’s] adverse credibility determination was supported by substantial evidence due to the [judge’s] behavior during trial. Id. at 450. It reversed and remanded, “[b]ecause the [judge’s] conduct at the hearing creates substantial uncertainty as to whether the record below was fairly and reliably developed.” Id. at 451.

Just as in Elias, there can be no confidence in the trial court’s adverse credibility finding pertaining to Ms. K. given the trial court’s partial conduct at trial. Indeed, that conduct creates a substantial uncertainty as to whether the record was reliably developed. As such, just as in Elias, reversal and a new termination trial before an impartial arbiter is necessary.

Finally, should this Court decide a traditional harmless error analysis applies, the result must be reversal given the applicable presumption. This Court must presume constitutional errors to be prejudicial, and the State bears the burden of proving such errors to be harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). In determining whether an error is harmless, the appellate court looks only at the untainted evidence to determine if it alone is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

In this case, the State cannot carry its burden to establish harmless error. First, all the relevant findings are tainted by virtue of the fact they are not the product of a healthy adversarial trial with an impartial fact finder. It is impossible to point to evidence that was not tainted given the trial court's pervasive influence in shaping the evidence before it.

Second, the trial court's determination of credibility was tainted by its failure to remain a neutral arbiter. As discussed above, the trial court had a heavy hand in shaping the evidence against Ms. K. especially in regard to her credibility. Then the court used this adverse credibility finding as a basis to discount any of A.K.'s testimony that contradicted the facts relied upon to establish the State met its burden under RCW 13.34.180 and to establish parental unfitness. FoF 2.12. Hence, it

imported into each of those findings its credibility determination against Ms. K. As such, there are no factual findings in the case that are untainted, and the State cannot meet its burden to establish harmless error.

In sum, a neutral decision-maker is an essential due process protection afforded to parents in termination proceedings. When the judge fails to remain impartial, this creates a fundamental trial defect that is structural, and reversal should be automatic. However, even if this Court concludes that prejudice must be shown, reversal is still proper because the judge's partial conduct created substantial uncertainty as to whether the record below was fairly and reliably developed, and its findings are all tainted by the constitutional error.

D. CONCLUSION

For the reasons stated above and those set forth in appellant's prior briefs, MS. K. respectfully asks this Court to affirm the Court of Appeals

Dated this 17th day of May, 2019.

Respectfully submitted

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APPENDIX A

RICHARD D. JOHNSON,
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October 29, 2018

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CASE #: 76675-9-1

In re the Dependency of B.W.K., Ashley Knuckles, Appellant v. DSHS, Respondent
King County, Cause No. 16-7-01406-1 KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We reverse the order terminating the mother's parental rights to B.W.K.
and remand for a new trial before a different judge."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

76675-9-1
Page 2 of 2

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Catherine Shaffer

2018 OCT 29 AM 8:37

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of)	No. 76675-9-I
B.W.K., dob 11/26/2014,)	
)	DIVISION ONE
A minor child.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES,)	UNPUBLISHED OPINION
)	
Respondent,)	
)	
v.)	
)	
ASHLEY KNUCKLES,)	
)	
Appellant.)	FILED: October 29, 2018

SCHINDLER, J. — The trial court interjected more than 800 times during a six-day termination trial, often engaging in lengthy examination of witnesses. While many questions sought clarification and were neutral, many other questions challenged the credibility of the mother and elicited evidence not presented by the parties. Although a court has broad discretion in a bench trial to question witnesses and control the proceedings, the cumulative effect of the court’s interjections and questions in this case constitutes manifest constitutional error and denied the mother the due process right to a fair trial. We reverse the order terminating the mother’s parental rights to B.W.K. and remand for a new trial before a different judge.

FACTS

Ashley Knuckles is the biological mother of B.W.K., born November 26, 2014. Knuckles suffered from an addiction to opiates. When B.W.K. was nine days old, Knuckles' boyfriend "nodded off" and dropped the baby. B.W.K. suffered a severe head injury.

In January 2015, the Department of Social and Health Services (Department) placed B.W.K. in foster care and filed a dependency petition. Following a 16-month dependency, the Department filed a petition to terminate the mother's parental rights to B.W.K. During the 6-day trial, without objection, the court interjected and asked questions over 800 times. The court asked questions of every witness, including over 100 questions of the mother and a comparable number of questions of the social worker and the court-appointed special advocate (CASA). The court found the Department met its burden of proving the statutory elements to terminate the mother's parental rights to B.W.K.¹

¹ The court must find the following statutory elements by clear, cogent, and convincing evidence:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (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;
- (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. . . . [;]
- ; and
- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1), .190(1)(a)(i). If the State satisfies these criteria, the court may terminate parental rights if it finds by a preponderance of the evidence that termination is in the "best interests" of the child. RCW 13.34.190(1)(b).

The court found the mother was not credible. In particular, the court did not believe the mother's testimony that a photograph of B.W.K. and her boyfriend was taken at the Tacoma Mall in March or April of 2015. The court found instead that the "photo was actually taken between October 2015 and January 2016" when the boyfriend was prohibited from having unauthorized contact with B.W.K.

The court found the mother was "in compliance with her treatment, which includes behavioral therapy, monthly meetings, methadone dosing and UA^[2] testing (all results negative)." But the court found the mother demonstrated an insufficient understanding or interest in the special needs of the child and an inability to meet those needs.

The court concluded there was little likelihood that conditions could be remedied so that B.W.K. could be returned to the mother's care in the near future and continuation of the parent-child relationship diminished the prospects for early integration into a stable and permanent home.

The court entered an order terminating the mother's parental rights to B.W.K.

ANALYSIS

The mother contends she is entitled to a new trial because the court violated her right to due process. The mother asserts that in addition to asking an excessive number of questions, the judge "took over the examination of witnesses," impeached and "aggressively cross-examined" her and her witnesses, "made sua sponte objections" to her attorney's questions, and "helped the State and CASA" in eliciting

² Urinalysis.

facts and evidence. Knuckles contends the court “crossed the line from impartiality to advocacy in favor of the State and against appellant.”

RAP 2.5

The State correctly points out the due process claim is raised for the first time on appeal. Under RAP 2.5(a), this court “may refuse to review any claim of error which was not raised in the trial court.” However, “manifest error affecting a constitutional right” may be raised for the first time on appeal. RAP 2.5(a)(3). Under RAP 2.5(a)(3), the mother must show “ ‘actual prejudice.’ ” State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015)³ (quoting State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). Actual prejudice is “ ‘a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.’ ” Kalebaugh, 183 Wn.2d at 584⁴ (quoting O’Hara, 167 Wn.2d at 99). After careful review of the record, we conclude the trial court’s interjections and questioning constitute manifest constitutional error and actual prejudice.⁵

Right to a Fair Trial

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution protect against the deprivation of a

³ Internal quotation marks omitted.

⁴ Internal quotation marks omitted.

⁵ The mother also contends the court violated the appearance of fairness doctrine. Because the appearance of fairness doctrine is not constitutional in nature, we do not consider the argument for the first time on appeal. RAP 2.5(a)(3); In re Guardianship of Cobb, 172 Wn. App. 393, 404, 292 P.3d 772 (2012); State v. Morgensen, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). The federal authorities she cites do not address whether appearance of fairness claims are of sufficient constitutional magnitude to be raised for the first time on appeal. However, our Supreme Court has unequivocally held that the “appearance of fairness doctrine, though related to . . . due process considerations, is not constitutionally based” and may not be raised as a matter of right for the first time on appeal. City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978). We are bound by the decision of our Supreme Court. Buck Mountain Owners’ Ass’n v. Prestwich, 174 Wn. App. 702, 716, 308 P.3d 644 (2013).

person's liberty without due process of law. The right to a fair trial is a "fundamental liberty" protected by the Fourteenth Amendment and article I, section 3. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

In general, a trial court does not violate the due process right to a fair trial by asking questions. Moreno, 147 Wn.2d at 506-12. Courts have the authority to interject and question witnesses and may, for example, interject to prevent undue repetition of testimony or ask a witness to clarify testimony. ER 614(b); In re Welfare of Burttts, 12 Wn. App. 564, 577, 530 P.2d 709 (1975); United States v. Morgan, 376 F.3d 1002, 1008 (9th Cir. 2004).

However, the due process right to a fair trial is implicated where the court crosses the line from neutral arbiter to advocate. See Moreno, 147 Wn.2d at 509-511. Although a judge has broad discretion to question witnesses in a bench trial, the judge cannot "take charge of a party's case or . . . become a clear partisan." 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 614.5, at 618 (6th ed. 2016); Moreno, 147 Wn.2d at 509-511. "A trial court should not enter into the 'fray of combat' or assume the role of counsel." State v. Ryna Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008) (quoting Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980)). The greater the involvement of the court, the higher the likelihood the judge is effectively usurping the role of counsel, which calls for reversal. See United States v. Hickman, 592 F.2d 931, 932, 936 (6th Cir. 1979) (convictions reversed where the trial

court interjected in proceedings more than 250 times, the constant interruptions "frustrated the defense" and infringed right of cross-examination, and the court indicated disbelief in "the defense story").

In determining whether a court's interjections and questioning violate the due process right to a fair trial, courts consider the proceedings as a whole and examine a number of factors, including the frequency and nature of the court's questions, whether the court waited until after counsel questioned the witness, whether the court's questions were clarifying or adversarial, whether the court interjected sua sponte in favor of one party, whether the questioning was impassioned or accusatory, and whether the court usurped counsel's role. See Moreno, 147 Wn.2d at 507-12; United States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974); United States v. Saenz, 134 F.3d 697, 702-05 (5th Cir. 1998); United States v. Singer, 710 F.2d 431, 436-37 (8th Cir. 1983); United States v. Van Dyke, 14 F.3d 415, 418-20 (8th Cir. 1994).

We conclude the trial court's interjections and questioning in this case violated the mother's due process right to a fair trial. The sheer number of questions asked by the court is problematic and usurped the role of counsel. But the timing and nature of the questions show the court crossed the line between neutral arbiter and advocate. Instead of waiting to ask questions until after counsel finished speaking, the court interjected relatively early and often during the examination of witnesses. The court disrupted the presentation of evidence and exhibited a level of involvement more akin to an advocate than a neutral arbiter. As the following excerpts demonstrate, the court too often commandeered witness examinations, engaged in hostile and advocate-like questioning, and elicited evidence favoring the Department.

The Department called Knuckles as its first witness. Shortly after the Department began questioning her, the court interjected:

THE COURT: . . . I want to draw your attention to page 8 [of the agreed order of dependency], okay, and Provision 4.4, are you there? Where it says Placement?

THE WITNESS: Sorry. These pages are stuck together. Yes, I do see that.

THE COURT: And it says, "DSHS^[6] Supervising Agency is authorized to place the child with a relative who is willing, appropriate and available with reasonable — prior reasonable notice to the party subject to review by the Court. DSHS shall initiate a home study of the maternal grandmother's home in her home state [of Tennessee] as well as the sibling [A.Y.]'s paternal grandmother's home in Kentucky. However, the court order shall be entered before [B.W.K.] is placed outside of Washington State."

Did you read that before you signed this order?

THE WITNESS: [My attorney and I] went through it briefly, but —

THE COURT: So you knew that there was no promise from this order that the child was going to be placed with your mother, right?

THE WITNESS: That's just what I thought when I was signing it, honestly.

THE COURT: Contrary to what it says?

THE WITNESS: Just by what me and the social worker talked about, she just mentioned that [the children] would be out of foster care and with my mom if I signed the paper.

THE COURT: Ms. Knuckles, did you read this order?

THE WITNESS: I can't say that I did, no, ma'am.

THE COURT: Okay.

THE WITNESS: We went through it, but it wasn't — you know, it was just very brief. It was only a few minutes of time that we were together.

[(Department's attorney briefly questions witness.)]

THE COURT: There were hearings after [B.W.K.'s placement in foster care] that you attended. Are you saying [your lawyer] was not telling the court what you wanted to say about how promises had been made that weren't reflected in the order?

THE WITNESS: Well, yes, that's true.

THE COURT: I see. When was the first time you complained that there were promises made to you that weren't reflected in the orders?

THE WITNESS: As soon as I had knowledge a little bit about what's happening, you know, I feel like this —

⁶ Department of Social and Health Services.

THE COURT: When was that, Ms. Knuckles, that you actually made a statement to somebody saying, "This isn't what I agreed to?"

THE WITNESS: It — I know I did it at court when we went when I seen [sic] [my lawyer] at court, but I don't recall a specific date it was.

THE COURT: Did you say this to anybody other than [your lawyer]?

THE WITNESS: Everybody that I've been involved with so far, yes.

THE COURT: So you've said it to your social workers and you've said it to the CASA?

THE WITNESS: That — I'm sorry, said what?

THE COURT: That — that this order didn't reflect what you've been promised.

THE WITNESS: Oh, yes, I talked to my first social worker about it, Cynthia, because she was the one that originally told me.

THE COURT: Anybody else you talked to besides Cynthia and [your lawyer]?

THE WITNESS: Not that I recall.

THE COURT: Okay. Back to you, [Counsel].

[(3 pages of questioning by Department's attorney.)]

THE COURT: Did it occur to you to maybe read the orders to see what they wanted you to do?

THE WITNESS: I was not aware of an order.

THE COURT: Really? You weren't reading any of these court orders that said what services you were required to do?

THE WITNESS: Oh, I had — yeah, I had the paper from the Department that said the — with the — established paternity and the random UAs and stuff, but —

THE COURT: Mm-hmm. And nothing in those said that you had to be off methadone, right?

THE WITNESS: Yeah.

THE COURT: Okay.

[(22 pages of extensive questioning by Department's attorney, several interjections by court.)]

THE COURT: I'm going to stop you here and ask [Knuckles] something else.

What are [B.W.K.]'s particular needs as compared to any other child? What are his special needs?

THE WITNESS: He's different because he needs extra attention. He — his balance and stuff is off, so he can't just be left alone like regular kids with other children. He needs attention 24/7⁷, and that makes it different. He's more high risk than any other children with his needs.

THE COURT: Anything else?

THE WITNESS: No.

⁷ Twenty-four hours a day, seven days a week.

THE COURT: That's it? That's all his needs, is extra attention and 24/7 care?

THE WITNESS: I mean —

THE COURT: Anything else a caregiver needs to give him?

THE WITNESS: Of course, he needs his medical stuff advised and —

THE COURT: What medical stuff needs to be advised?

THE WITNESS: All of his, you know, therapies and appointments and all that. They need to, you know, be taken seriously and —

THE COURT: And how often are those?

THE WITNESS: He's got the therapies that I'm allowed to go to. There are three of them and it's twice a week: Physical therapy, occupational therapy, and speech therapy.

THE COURT: If he returns to you, how are you going to meet his need for 24/7 care?

THE WITNESS: I will be there for him and be able to take care of him responsibly with the help of — and support of my family and my friend.

THE COURT: Which family?

THE WITNESS: My mother and grandmother and grandfather back home in Tennessee.

THE COURT: Does that mean you would take . . . [B.W.K.] back home to Tennessee?

THE WITNESS: If I was permitted, yes.

THE COURT: Okay. And who would be providing the 24/7 care back in Tennessee?

THE WITNESS: Well, I mean, I could and — until we got something set up like he is now where he goes to daycare and stuff, but I'd rather him not just be in daycare all day. If it was my choice I'd — you know, take care of him and stuff, and I have the family support and means to where I would be able to stay with him.

THE COURT: How do you know you've got family support to get 24/7 care in Tennessee? How do you know you have it?

THE WITNESS: They've told me. My — my parents and grandparents have told me that they would do anything to help me that they needed to and they have the means to.

THE COURT: And what's the plan for his three times a week therapies and appointments?

THE WITNESS: For back in Tennessee?

THE COURT: Wherever you're taking him.

THE WITNESS: I have researched different doctors and stuff for Tennessee and tried to reach out and see if they would be able to take him — you know, take him in and —

THE COURT: Who specifically have you researched? I mean, where — where are they?

THE WITNESS: There was — I can't remember their names specifically, but it was doctors out of Morristown and Knoxville, Tennessee and specialist — there are specialists and good healthcare in Knoxville, which is close to Tennessee back home.

THE COURT: It's in a different state, isn't it? Or it's still in Kentucky?

THE WITNESS: No, they're both in — no, Knoxville's in Tennessee.

THE COURT: Okay. So how far from your home would Knoxville be?

THE WITNESS: It's just like 30 minutes.

THE COURT: Okay. And who would be providing the care for [B.W.K.]? Name, a facility, or person?

THE WITNESS: It — I don't remember the name of the facility.

THE COURT: Do you know how often he'd be going?

THE WITNESS: Probably the same amount as he is now. I mean, I would set everything up where nothing would be changed except, you know, his living area, pretty much. He would still be going to his therapies and doctors and stuff.

THE COURT: Okay. Back to you.

[(Department's attorney asks Knuckles three questions.)]

THE COURT: How long have you been going [to visits and therapy sessions with B.W.K.] regularly?

THE WITNESS: I got my bus card in mid-December.

THE COURT: So you're saying that you've been attending regularly since mid-December?

THE WITNESS: Well, the visits got — ended up getting canceled in January, but it was — me and Donna [Woodruff of A Place Called Hope], the supervisor [of the visits with B.W.K.], thought it was just the second missed, but Genora [Chappell, a case manager at A Place Called Hope,] had it down as the third. So it ended up — because my text was delayed to her, and she didn't get it until three hours after time had passed. It was too late, and she said it was the third one so they got canceled.

THE COURT: So you haven't had visits since January?

THE WITNESS: No, they're — they're active now.

THE COURT: Okay. When were they reactivated?

THE WITNESS: Just a couple weeks ago.

THE COURT: Have you missed any since then?

THE WITNESS: No.

THE COURT: How about his therapies?

THE WITNESS: No, I haven't missed them since.

THE COURT: You haven't missed any since mid-December?

THE WITNESS: There might have been a Monday one or something at the Puyallup the — that one, but they're — if it conflicted — if the appointments conflicted with the visit, then I chose to go to the visit.

[DEPARTMENT'S ATTORNEY]: If you —

THE COURT: What? You —

THE WITNESS: It's — it's — it's the —

THE COURT: You're saying [B.W.K.] was scheduled for visitation and therapy at the same time?

THE WITNESS: No. It's the — like, different appointments, like his doctors' appointments and stuff or if he had a visit that day and he had an appointment earlier that day, my concern was about making the buses and getting back to the appointment — to his visit on time. So I would choose to go to the visit instead of try to go make it and missing the visit and risk missing the visit. Does that make sense?

THE COURT: Not really.^[8]

This lengthy questioning demonstrates the trial court's involvement as well as its skepticism of and hostility toward the mother. For example, the court's question, "Did it mean anything to you at all that people were telling you that your child had about a zillion special needs and you had to be there for him," if asked by the Department would have appropriately drawn an objection from the mother's counsel.⁹ When a judge in a bench trial engages in this type of argumentative questioning, it puts counsel in an extremely difficult position—object to the inappropriate questions and risk angering the trier of fact, or remain silent to minimize the risk of an adverse outcome.

Many of the court's questions also either elicited or facilitated the admission of evidence supporting the Department. In the following excerpt, the court spends a considerable amount of time asking questions of two witnesses about a photograph of B.W.K. with the mother's boyfriend. The significance of the photograph turned on whether it was taken at a time when the boyfriend was prohibited from attending visits. The court dominated the questioning on this topic, starting with social worker Clarissa

⁸ Emphasis added.

⁹ Emphasis added.

Blackmer.

THE COURT: Okay. You got negative visitation reports at the first visit or at the first and second visit?

THE WITNESS: The first and second visit occurred in the same week, and so I got them approximately at the same time.

THE COURT: Was it the first or the second visit that corresponded with the posting of the pictures on Facebook?

THE WITNESS: The posting of the pictures —

[KNUCKLES' ATTORNEY]: Your Honor, again, no disrespect, objection as to hearsay.

THE COURT: It's not hearsay when she saw it herself —

[KNUCKLES' ATTORNEY]: I don't —

THE COURT: — on Facebook. The fact that it appeared on Facebook doesn't make it hearsay when it's photographs.

What was the relationship between the posting of the photographs in terms of when you saw them and the visit?

THE WITNESS: I do not recall actually the exact timing of when I saw the photographs. I know that I addressed it with the mother as soon as I saw them.

THE COURT: How, if at all, could you date what you were seeing in terms of what was posted on Facebook in terms of the visitation? I mean, how could you tell it wasn't some years earlier mall visit?

THE WITNESS: Well, at that point the child was not even a year old.

THE COURT: (Inaudible) just (inaudible) that.

THE WITNESS: The way I actually verified it — and I don't know if the CASA's already testified or not, but she can speak further. I actually connected to the CASA because she was receiving monthly photos of the child, and she frequently received photos while the child was at visits. So I requested copies of all of those photos. And that was how we were able to determine the exact date was because of the outfit that he was in at the mall in those photos and his size —

THE COURT: Uh-huh.

THE WITNESS: — his size, his shape. A four month old obviously looks significantly different than a ten or eleven month old. And so that was how we narrowed it down.

And I was on the phone with the CASA explaining what the concerns were while I was reviewing the pictures. And when we came across that and that the picture matched perfectly what he was wearing, his size, his developmental level at that point in time, that's how we knew it had occurred.

THE COURT: Who knew what the child was wearing on these two particular visits? I mean, where did that information come from?

THE WITNESS: The CASA had photos from the mall of — while the child was at the mall.

THE COURT: The CASA was there for one or both of these visits?

THE WITNESS: For part of the visit.

THE COURT: Both of them or one of them?

THE WITNESS: I — I don't recall on that one. I don't know —

THE COURT: Okay.

THE WITNESS: I don't know that I was aware that the CASA was there until I had asked her for pictures of [B.W.K.]. And I had asked her for the pictures to narrow it down on the developmental level that we're not talking about something that had occurred a month or two prior but something that was much more recent.

THE COURT: Okay. That part of this, the connection between the way the child looked in the photographs and the way he looked in the rest of the photographs, we'll await the CASA's testimony, but I want to come back to this timing. Okay. How soon was it after these visits that, however it was, whether via CASA or otherwise, these photographs came to your attention?

THE WITNESS: It would have been within the same week —

THE COURT: Okay.

[THE WITNESS]: — otherwise, we would have moved forward with the decreasing of the supervision.

THE COURT: Okay. And when you got this information about these photographs, and you looked at them, then what was the conversation between you and the mother then?

THE WITNESS: When I was able to reach her by phone, I expressed that there were some concerns as far as stepping down on visitation, and I wanted to take the time to talk with her about those concerns and hear her side of things before — before any formal decision was made as far as whether or not we were going to pursue the step-down on the visitation.

THE COURT: And how did you get in touch with mom?

THE WITNESS: I had to utilize the multiple phone numbers that I had until I found one that worked.

THE COURT: Okay. And what happened when you finally got a phone number that worked?

THE WITNESS: She had answered —

THE COURT: And what happened —

THE WITNESS: — on that one.

THE COURT: — then?

THE WITNESS: That's when I broached the subject with her in the manner I just described.

THE COURT: And what was mom's response?

THE WITNESS: Mom's response was initially complete denial that [the boyfriend] had been present at any visit stating it must have been

a visit from — the visits occurred at the DCFS^[10] offices prior to us being aware that [the boyfriend] was not the father, which would have put the child four months — four months of age. And at that point he was nearly — he actually had turned one on Thanksgiving that year, so he just turned one.

There was — so I asked her about that. I also had brought up the concerns from the visitation reports about her not fully supervising [B.W.K.] and not yet demonstrating that she was going to watch him 100 percent of the time. Part of the concerns were that we didn't want [B.W.K.] being left with strangers while she went into the bathroom.

THE COURT: And what did mom say in response to those conversations?

THE WITNESS: She stated that it was all entirely false, and that both visitation — it must have been both reports. That both visitation agencies were lying to make her look bad. And that it was about the money because they would not get paid as much if it switched to monitored.

She then explained that she had documentation to prove all of this and wanted to provide that to me and asked to do an in-person meeting with me, which we scheduled to be I believe the following Thursday or Friday.

THE COURT: Okay.

THE WITNESS: And then that initiated I believe three or four months of my attempt to do that office visit or a phone conversation with her further.

THE COURT: So what happened to the scheduled meeting?

THE WITNESS: She never showed, and she repeatedly would call me after the timing of the meeting to explain why she no-showed for the first I want to say three scheduled meetings. And then after that it was on me to attempt to connect back with her since there was no reason — there was no call, no follow-up on why she no-showed.

THE COURT: So let me get this right. Mom said she had documentation, she scheduled a meeting with you to show it to you, and then she did not show up?

THE WITNESS: Correct.

THE COURT: Did she call you and tell you she wasn't coming?

THE WITNESS: After the fact, yes.

THE COURT: After the fact. And then you scheduled two more meetings?

THE WITNESS: I scheduled multiple more meetings?

THE COURT: I know I got it, but —

THE WITNESS: But.

THE COURT: — this initial time, you scheduled two more meetings after that?

¹⁰ Division of Child and Family Services.

THE WITNESS: Both of which she no-showed, correct.

THE COURT: Okay. Did she call you in advance of either one of those?

THE WITNESS: No.

THE COURT: Okay. She called afterward to say why she hadn't appeared?

THE WITNESS: That's correct.

THE COURT: And then she didn't schedule another meeting with you?

THE WITNESS: I continually tried to schedule those. I continued my attempts to reschedule. In our subsequent phone calls for her — after she had not shown up for the office visits, we had the conversation about [B.W.K.]'s medical needs and really wanting to make sure she was fully understanding, and she had asked while she was there in person if we could go over [the] medical records, and I expressed I was more than happy to do that, so we had planned on including that in our meeting. And that was of vital importance for her to understand [the] medical needs in order to progress with moving [B.W.K.] home.

THE COURT: Did you succeed in scheduling a meeting with her?

THE WITNESS: No, I never did.

The court not only elicited detailed factual evidence that the Department had not presented, it assumed the role of advocate for the Department. The court also argued with the mother's attorney on evidentiary objections to the court's own questions.

The court continued the questioning about the photograph during the testimony of the CASA Janet Belles:

Q (By [CASA's attorney]) Earlier you testified that you could tell that [the photograph] was in a mall, and you gave an example of the chair —

THE COURT: No, she said specifically she knew it was in this mall —

[CASA'S ATTORNEY]: Okay.

THE COURT: — where the mother had arranged for these test visits. Okay. She mentioned chairs.

Is there anything else in this photograph that tells you where this was?

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

THE COURT: The mall or a mall?

THE WITNESS: It's the Tacoma Mall.

THE COURT: Okay.

THE WITNESS: And on the heading it actually says, "[B.W.K.] and I chilling at the mall."

THE COURT: I know what it says, but —

THE WITNESS: Sorry.

THE COURT: — I'm not really considering what [the boyfriend] has to say for the truth of what he's saying here. Okay.

THE WITNESS: So I would say it is in a — in the Tacoma Mall where the visits have been happening.

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

THE WITNESS: This photo isn't as clear as the one that I did see.

THE COURT: Mm-hmm.

THE WITNESS: [B.W.K.] had a, like, a sweatshirt that had a train on it.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: [B.W.K.'s] age.

THE COURT: Okay.

THE WITNESS: [B.W.K.] looks like . . . about 11 months there or a year.

THE COURT: Okay. And what is it about [B.W.K.'s] clothing?

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

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

THE WITNESS: Yes.

THE COURT: — okay, that was important? What is it about what [B.W.K.]'s wearing that's important?

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

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

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

THE COURT: I know.

THE WITNESS: Oh, sorry. Say it again?

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

THE WITNESS: Yes.

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

THE WITNESS: Oh, yes. Yes. Yes.

THE COURT: Okay. Do you know whether — when it was that you took the picture of the shirt that [B.W.K.]'s wearing here?

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

THE COURT: October or —

THE WITNESS: I am thinking it is now.

Q. (By [CASA's attorney]) Would looking at an October report help refresh your memory as to if that's the report?

A. Yes. Yes. Yeah.

.....

Q. (By [CASA's attorney]) I'm handing you what's been marked for identification purposes as CASA's Exhibit 153. If you could take a few moments and look at the front page of the date of your report and then the second page of a photograph, and see if it helps refresh your memory as to the date when you saw [B.W.K.] in that same shirt?

A. It looks like the hearing date was on 11/2/15.

THE COURT: What hearing date?

THE WITNESS: The —

THE COURT: Okay. So here's the question.

THE WITNESS: — permanency plan —

THE COURT: Can you — can you date the photograph? Your photograph, can you date it?

.....
[CASA'S ATTORNEY]: Can I follow up now?

THE COURT: Yeah.

.....

A. Oh, it's right there in front of me, yes, 10/29/2015. I apologize.

Q. Okay.

THE COURT: Okay. What's the significance of that?

THE WITNESS: That would tell me that that picture was around that time period.

.....

Q (By [CASA's attorney]) And if you could turn to the very last page as well?

THE COURT: Around 10/29/15?

THE WITNESS: Yes.

During cross-examination, CASA Belles testified she had been mistaken when she said she recognized chairs in the mall photograph. The court interjected, steered the witness in a different direction, and at one point answered a question for the witness.

Q. Okay. I believe you've testified that you recognized that photo because of the chairs that you recognized. Where are the chairs in that photo?

A. I stated early [sic] that I was mistaken by my memory.

Q. What were you mistaken about?

A. That there were chairs. There were no chairs.

Q. Okay.

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

THE WITNESS: I think they're signs.

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

THE WITNESS: Let me see it again.

THE COURT: — just behind [the boyfriend]'s right ear.

THE WITNESS: Let me see it again.

[KNUCKLES' ATTORNEY]: I'm sorry.

THE COURT: Just behind [the boyfriend]'s right ear sitting on the floor there, aren't those chairs?

THE WITNESS: They could be, yes.

THE COURT: Okay.

Q (By [Knuckles' attorney]) Is your testimony that you are seeing chairs or not seeing chairs, or you're not sure?

A. From this picture it's not a good picture, but that could be chairs in the center of the mall, but the reason I know it's in the mall is tile floors, the heading of the stores, the overhead lights and the — there's, like, a directory up above that looks like it has wordings and an arrow may be pointing.

Q. And how do you know it's a particular mall as compared to a different mall?

A. Well, [B.W.K.]'s visits are supervised, so it would have to be where [B.W.K.] goes for his visits, and that would be at the Tacoma Mall.

Q. Okay. But why couldn't it be a picture of [the boyfriend] with [B.W.K.] in a different mall that's not a supervised visit?

THE COURT: Because how would the mother get access to the child, Counsel?

THE WITNESS: She answered it.

THE COURT: Yeah, I mean —

[KNUCKLES' ATTORNEY]: Judge answered it?

THE WITNESS: Yes.

THE COURT: Yeah.

[KNUCKLES' ATTORNEY]: Thank you.¹¹⁾

The court assisted the CASA attorney in laying the foundation for admitting e-mail exhibits during the cross-examination of B.W.K.'s foster mother and rejected the objections of the mother's attorney as "nuts."

Q. (By [CASA's attorney]) . . . [W]e have in front of us an e-mail that is from []123@hotmail, which I believe is your public e-mail account —

A. Right.

Q. — dated November 4th, 2016 on Friday.

THE COURT: Okay. So, . . . let me ask you is your public e-mail account []123@hotmail.com?

THE WITNESS: Yes.

THE COURT: Okay.

Q. (By [CASA's attorney]) And —

THE COURT: And that's the address you used to communicate with the mother?

THE WITNESS: Yes.

THE COURT: At her address of []47@gmail.com?

THE WITNESS: Yes.

THE COURT: Okay.

....

....
[KNUCKLES' ATTORNEY]: But, Your Honor, for the record [the foster mother]'s not authenticated that this is her e-mail because she doesn't have it in front of her to authenticate it, so I am objecting for the record.

THE COURT: That's nuts . . . She just said verbally that this is her e-mail. She doesn't . . . have to have it in front of her. Okay. Overruled.

....
[KNUCKLES' ATTORNEY]: Continuing objection. Thank you.

¹¹ (First alteration in original) (emphasis added).

THE COURT: Noted. I think we have sufficient authentication.^[12]

The court commandeered the examination of the mother's witness Bonnie Kosanovich. Knuckles had been living with Kosanovich. Less than two pages into the testimony, the court began aggressively questioning Kosanovich about the mother's future living arrangements and overruled objections to its own questions.

THE COURT: When are you expecting [Knuckles] to move back to Tennessee?

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

THE COURT: Mm-hmm. When —

THE WITNESS: — until things are ready —

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

THE WITNESS: We have no expectations of that at the moment.

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

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

THE COURT: Okay. Can you explain what that means?

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

THE COURT: And what does that mean?

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

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

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

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: There is no expectation. No expectation on it. She could stay as long as she wants.

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

¹² Emphasis added.

THE WITNESS: Just until she is ready to leave.

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

THE WITNESS: He is okay with it.

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

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

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

[KNUCKLES' ATTORNEY]: That calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yeah.

THE COURT: It's her home.

[KNUCKLES' ATTORNEY]: Thank you.

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

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

THE WITNESS: Yes.¹³

During cross-examination of a social worker, the court almost immediately cut off the mother's attorney and challenged the attorney's understanding of the evidence despite the absence of an objection from opposing counsel:

BY [KNUCKLES' ATTORNEY]:

Q. You said it would be very difficult for A Place Called Hope to arrange feeding therapy at someone's home, correct?

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

[KNUCKLES' ATTORNEY]: Okay.

Q. (By [Knuckles' attorney]) So my question is —

THE COURT: She said it would be difficult —

Q. (By [Knuckles' attorney]) — it possible —

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

[KNUCKLES' ATTORNEY]: Okay.

¹³ Emphasis added.

Q. (By [Knuckles' attorney]) So it is possible to arrange therapy at a private home, correct?

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

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

THE COURT: Well, she's answered that one. Okay?

[KNUCKLES' ATTORNEY]: Okay.

During direct examination of Knuckles' mother, the court questioned her aggressively about Knuckles' relationship with her boyfriend L.J. The court's questions were decidedly not neutral in content or tone.

THE COURT: Who is [L.J.]?

THE WITNESS: Who is [L.J.]?

THE COURT: Yep.

THE WITNESS: That's someone [Knuckles] used to date.

THE COURT: How do you know that?

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

THE COURT: In Tennessee?

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

THE COURT: Did their relationship end after Kentucky?

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

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

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

THE COURT: Do you know about [L.J.]'s relationship with her here?

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

THE COURT: And?

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

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

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

THE COURT: Do you have any idea —

THE WITNESS: — again or — you know.

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

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

THE COURT: And what happened to [L.J.]?

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

THE COURT: And what happened —

THE WITNESS: Needless —

THE COURT: — to [L.J.] —

THE WITNESS: — to say, I didn't even want to talk or speak or know anything about [L.J.] after this episode —

THE COURT: You —

THE WITNESS: — because, of course, I was upset.

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

THE WITNESS: No, I didn't. I didn't care where he was or nothing. My concern was my children — my grandchildren and my child. I didn't have any concern for [L.J.] at the time.

THE COURT: To your knowledge —

THE WITNESS: Once my children were in CPS^[14] custody, I was worried about my chil- — my grandchildren and my child.

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

THE WITNESS: I don't know. No - I have no idea where [L.J.] is at —

THE COURT: You're not interested —

THE WITNESS: — or what he is doing.

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

THE WITNESS: No.

THE COURT: You're not —

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

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

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

THE COURT: But you don't ask her?

THE WITNESS: No, I don't.^[15]

¹⁴ Child Protective Services.

¹⁵ Emphasis added.

When the Department attempted to “clarify” exhibit 77, the March 2016 response filed by the mother’s former attorney concerning a Department social worker’s visit summary, the court took over the questioning, repeatedly mischaracterized the mother’s testimony, and ended with an inappropriate comment on the mother’s credibility.

DIRECT EXAMINATION (Resumed)

BY [DEPARTMENT’S ATTORNEY]:

- Q. So when we were last talking — oh, do you have the exhibit?
Thank you. You had said that there was a document that your lawyer had signed your signature to without your consent?
- A. Yes, that’s what I was told by [the social worker]. I had never seen the document myself.
- Q. So looking at Exhibit 77, had you ever seen this document before?
- A. No.
- Q. Okay. Give me a second here.

THE COURT: You were told by [the social worker] that [your former attorney] had forged your signature?

THE WITNESS: Well, [the social worker] was talking to me and going through this report here and I was saying that I didn’t say some of the stuff in here, and she said, “It’s got your name. It’s got your signature on it.” And I was like, “I have never even been around her to sign anything” you know, so I — and I had never seen this or, you know, agreed to it, so — but that’s when I found out about it. She was saying that she had had this paper in front of her and, you know, was kind of saying that I was blaming CPS for everything, and I told her I didn’t know what she was talking about and she said it had my signature on it. That’s why I thought that [my former attorney] had signed my name.¹⁶

THE COURT: I’m assuming, folks, that this was a file document?

[DEPARTMENT’S ATTORNEY]: Yes.

THE COURT: Okay. So let’s take a look at that. See the cause number here? It says case No. 15-7? See that?

THE WITNESS: Yes.

THE COURT: Okay. This means that it’s attached to this case file, right?

THE WITNESS: Yes.

THE COURT: And you know that this is a court file where all the documents filed in this case go, right?

THE WITNESS: Yes.

¹⁶ We note the signature on exhibit 77 is “/s/.” The typed signature line below the /s/ states the attorney’s name followed by “as reported by Mother” and the attorney’s bar number.

THE COURT: Okay. But you're telling us that you were informed by the social worker that your attorney had forged your signature, and you never saw this report which was filed with the court?

THE WITNESS: She said that my name was signed to it, and I knew I hadn't signed, so I assumed that she had signed my name to it. Because she said my signature was on it, she didn't —

THE COURT: I'm not following your story at all here. Okay, you're telling me that you were informed by the social worker that your lawyer had forged your name on a document filed with the court, and you never looked at this report?

THE WITNESS: I had asked. She — [the social worker] was supposed to mail me a copy, but I never got a copy of it.

THE COURT: Well, how about talking to your next lawyer about getting a copy of this or looking in the court file yourself?

THE WITNESS: I don't recall having the court file, I'm sorry.

THE COURT: You've never seen this document before today?

THE WITNESS: This one in front of me, 77, no, I haven't.

THE COURT: Which was filed in the court file? You never saw it?

THE WITNESS: No, ma'am, I haven't.

THE COURT: Okay.

[DEPARTMENT'S ATTORNEY]: Just to step back just a second, so now that you have a chance —

THE COURT: I'm admitting 77 as an impeachment item. All right.

(Exhibit 77 is admitted.)

[DEPARTMENT'S ATTORNEY]: All right. Thank you. So

[KNUCKLES' ATTORNEY]: I am sorry. Did you —

THE COURT: I'm admitting 77 for impeachment.

[KNUCKLES' ATTORNEY]: Oh, okay. Thank you.

- Q (By [Department's attorney]) You had a chance to review this document over lunch; is that correct? 77?
- A. This one I brief- — I think I've — [my attorney] showed me briefly right before we come [sic] back.
- Q. Okay. Is — is this the document that [the social worker] read to you?
- A. Yeah, we went — we went through it over the phone, yes.
- Q. Okay.
- A. That's when I initially, you know, found out about it.
- THE COURT: Was —

A. I mean [my former attorney] did tell me, we did have a short phone conversation and told me she was going to submit something to the court but I didn't know what. We didn't talk about what. She didn't send me a copy of it or nothing like that. And then I get a call from [the social worker] and she was saying, you know, what was said and stuff and wanted to know my responses. And I had told her I hadn't — no knowledge of — of saying this or writing this up with [my former attorney] and she said that my name was signed to it, and that's when I got concerned.

THE COURT: So [the attorney] was still representing you then, right?

THE WITNESS: Yes.

THE COURT: And you still had access to your email, correct?

THE WITNESS: It was sporadic when I had Ms. Warner as an attorney with the email and stuff, but we did try to keep contact in phone — through the phone.

THE COURT: You had access to email, did you not?

THE WITNESS: When I would leave to get Wi-Fi¹⁷, yes.

THE COURT: Well, there's Wi-Fi all over —

THE WITNESS: Yes.

THE COURT: — Tacoma and Pierce County, isn't there?

THE WITNESS: Yes.

THE COURT: Okay. So when you had access to Wi-Fi, which, really, you could have done by going anywhere near a Starbucks, okay, you had Ms. Warner's email address, correct? Your lawyer's email address, you had it?

THE WITNESS: We just talked by phone.

THE COURT: You never had your lawyer's email address?

THE WITNESS: I — I couldn't tell you. I might have it somewhere, but we just talked by phone is the only —

THE COURT: Are you seriously telling me that in all your representation with Ms. Warner you never were aware she had an email address?

THE WITNESS: We just didn't talk about email. We talked by phone.

THE COURT: Is that a "yes" or "no" that you knew she had an email address?

THE WITNESS: Yes.

THE COURT: Okay. And when you talked by phone, I assume you knew her phone number?

THE WITNESS: Yes, I had it in my phone.

¹⁷ Wireless fidelity.

THE COURT: So if you found out that allegedly she put in a document signed by you — or by her purporting to be you that had been filed in the court file, did you email her or call her?

THE WITNESS: We spoke on the phone briefly, but she had to go to take care of her horses and then I didn't hear back from her.

THE COURT: Ever?

THE WITNESS: Not until she told me she wasn't going to be my lawyer at court no more. We didn't talk again.

THE COURT: I see. Okay. I'll tell you bluntly, okay, I don't believe you.

THE WITNESS: I'm sorry, Your Honor. I'm just telling the truth.

THE COURT: I don't think you are, Ms. Knuckles. Back to you, [Department's attorney].^[18]

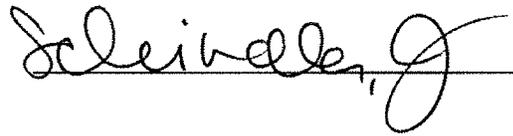
The tenor of the court's questions and remarks was that of an advocate, not a neutral arbiter.

Although we recognize it is appropriate and often necessary for a judge to ask questions of witnesses in a bench trial, and while such questioning is particularly important in cases where the safety of the child is at stake, we conclude the cumulative effect of the interjections and questions in this case demonstrated a lack of impartiality, constitutes manifest constitutional error, and violated Knuckles' due process right to a fair trial. The court asked an excessive number of questions, elicited evidence in support of the Department's case, aggressively challenged the credibility of the mother and other witnesses she called to testify, and helped elicit favorable evidence on behalf of the Department but foreclosed the mother's attempts to cross-examine or elicit

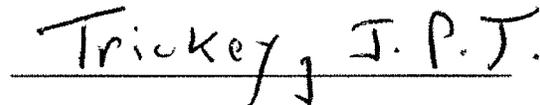
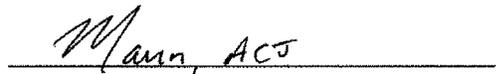
¹⁸ Emphasis added.

favorable testimony. In so doing, the court crossed the line from neutral arbiter to advocate.¹⁹

Because the court violated the mother's due process right to a fair trial, we reverse the order terminating the mother's parental rights to B.W.K. and remand for a new trial before a different judge.



WE CONCUR:



¹⁹ We note this is not the first time we have reviewed a challenge to the interjections and questions of this trial judge. In *In re Dependency of G.B.*, 187 Wn. App. 1017, 2015 WL 1979501, at *7, the same judge "questioned virtually all of the witnesses." The issue on appeal in *G.B.* was whether "certain remarks . . . and the court's active participation" in the proceedings "exhibited bias and lack of impartiality." *G.B.*, 2015 WL 1979501, at *1. The Department conceded in its brief that the judge made "harsh comments" about the father and "did not cautiously guard its comments." The opinion focuses on whether the judge harbored "actual or potential bias" against the father and concluded the record did not show such bias. *G.B.*, 2015 WL 1979501, at *3-*8. Because the court participated in the proceedings "without aligning herself with counsel for any of the parties," we rejected the due process challenge to the court's interjections and questions. *G.B.*, 2015 WL 1979501, at *7-*8.

APPENDIX B

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

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

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

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

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

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

THE COURT: Who is Lonnie. Jackson?

THE WITNESS: Who is Lonnie Jackson?

THE COURT: Yep.

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

THE COURT: How do you know that?

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

THE COURT: In Tennessee?

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

THE COURT: Did their relationship end after Kentucky?

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

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

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

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

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

THE COURT: And?

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

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

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

THE COURT: Do you have any idea –

THE WITNESS: -- again or – you know.

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

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

THE COURT: You understand that Mr. –

THE WITNESS: And that's it.

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

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

THE COURT: And then what?

THE WITNESS: Then she took him to the hospital –

THE COURT: And then what happened?

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

THE COURT: And what happened to Mr. Jackson?

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

THE COURT: And what happened –

THE WITNESS: Needless –

THE COURT: -- to Lonnie Jackson –

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

THE COURT: You –

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

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

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

THE COURT: To your knowledge —

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

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

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

THE COURT: You're not interested —

THE WITNESS: -- or what he is doing.

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

THE WITNESS: No.

THE COURT: You're not —

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

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

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

THE COURT: But you don't ask her?

THE WITNESS: I do not.

RP 780-84.

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

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

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

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

THE COURT: Mm-humm. When –

THE WITNESS: -- until things are ready

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

THE WITNESS: We have no expectations at the moment.

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

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

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

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

THE COURT: And what does that mean?

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

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

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

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

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

She could stay as long as she wants.

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

THE WITNESS: Just until she is ready to leave.

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

THE WITNESS: He is okay with it.

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

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

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

[DEFENSE COUNSEL]: That calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yeah.

THE COURT: It's her home.

[DEFENSE COUNSEL]: Thank you.

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

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

THE COURT: Okay.

RP 797-99.

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

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

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

irregular and demonstrates a lack of fairness.

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

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

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

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

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

THE COURT: The mall or a mall?

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

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

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

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

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

THE COURT: Okay. And what about his clothing?

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

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

THE WITNESS: Yes.

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

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

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

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

THE COURT: I know.

THE WITNESS: Oh, sorry. Say it again?

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

THE WITNESS: Yes.

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

THE WITNESS: Oh yes, yes, yes.

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

here?

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

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

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

THE COURT: Yeah...

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

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

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

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

RP 708-14.

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

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

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

RP 715-16.

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

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

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

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

THE COURT: This past winter or last winter?

THE WITNESS: It would have been 2006 winter.

THE COURT: 2016?

THE WITNESS: I think so, yes.

THE COURT: Okay.

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

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

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

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

[Defense Counsel]: What were you mistaken about?

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

[Defense Counsel]: Okay.

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

THE WITNESS: I think they're signs.

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

THE WITNESS: Let me see it again.

...

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

THE WITNESS: They could be, yes.

THE COURT: Okay.

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

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

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

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

THE WITNESS: She answered it.

THE COURT: Yeah, I mean –

[DEFENSE COUNSEL]: Judge answered it?

THE WITNESS: Yes.

THE COURT: Yeah.

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

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

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

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

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

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

The Court: She said it would be difficult –

[DEFENSE COUNSEL]: -- it possible –

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

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

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

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

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

RP 463-64.

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

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

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

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

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

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

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

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

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

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

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

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

judge to rub salt in the wound.

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

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

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

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

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