No. 76964-2-I (consolidated)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Welfare of

A. H. Minor Child,

N.A. (mother),

Appellant.

Snohomish County Cause No. 14-7-00499-7

The Honorable Judge Anita Farris

Appellant's Amended Motion for Accelerated Review and Opening Brief

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"The Court asks that you… resolve this case by entering a termination order."

> – Deputy Prosecuting Attorney Sara DiVittorio, representing Snohomish County Superior Court, to Judge Anita Farris. RP (9/23/16) 150.

"[T]his case should be immediately concluded with… a final termination order entered by the trial court judge assigned to this case, to serve the best interests of this child."

> – Snohomish County Superior Court's Response filed 9/9/16, CP 13668.

"I believe no Snohomish County Superior Court Judge ever should have ruled on anything in this case."

> — Judge Anita Farris, Order on Recusal filed 5/17/17, CP 12403.

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2. The termination order violated due process because the Superior Court fought against reunification throughout the dependency and termination proceedings.
3. The termination order violated due process because the Superior Court's attorney threatened legal action against the parents' lawyers for their advocacy in this case.
4. The termination order violated the appearance of fairness.
5. The trial judge improperly entered a termination order, months after announcing that she had a conflict requiring recusal.
6. The termination order violated due process because the child's interests were not protected by an attorney, a GAL, or a CASA.
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8. The termination order violated due process because the mother received no notice that her rights could be terminated based on her participation in a medically supervised methadone program ordered by the court.
9. The termination order violated due process because the mother received no notice that contact with the father could result in termination.
10. The termination order violated due process because it was based in part on the mother's compliance with the dependency court's repeated orders to follow the recommendations of service providers.
11. The evidence was insufficient because the mother's participation in a court-ordered medically supervised methadone program did not impact her ability to parent.
12. The termination order violated due process because the trial judge improperly shifted the burden of proof.
13. The evidence was insufficient because the assigned social worker could not say if termination was in the child's best interests.

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97. The trial court erred by entering the Order Denying Parents' Motion to Vacate on October 11, 2017. CP 11265-11267.

STATEMENT OF ISSUES

1. Did the termination order violate the appearance of fairness doctrine and the parents' right to due process because:

    a. The Superior Court appeared through counsel and explicitly asked the Superior Court to enter a termination order; and

    b. The Superior Court participated in both the dependency and termination proceedings, opposing the mother's and the department's efforts toward reunification; and

    c. The Superior Court threatened the mother's attorneys with unspecified legal action based on their advocacy on her behalf?

2. Did Judge Farris violate the appearance of fairness doctrine by entering a termination order after recusing herself from the case and noting that no local judge should have presided over any part of the case?

3. Did Judge Small improperly deny the mother's motion to vacate and for a new trial based on the wrong legal standard and his own misunderstanding of the record (which stemmed from his failure to review and consider relevant portions of the record)?

4. Did the termination order violate the family's right to due process because the child's interests were not protected by either an attorney or a GAL?

5. Did the termination order violate the mother's due process right to notice of the two alleged parenting deficiencies on which termination rested?

6. Did the termination order violate the mother's right to due process because it was based on her court-ordered participation in a medically supervised methadone treatment program?
7. Did the termination order violate due process because the trial judge improperly shifted the burden of proof?
8. Did the termination order violate due process because the mother's court-ordered and medically supervised methadone treatment did not make her an unfit parent and was not a "condition" to be remedied?
9. Was the evidence insufficient because the assigned social worker could not say that termination was in the child's best interests?
10. Did the Superior Court and its VGAL Program violate the mother's due process right to counsel by invading private attorney communications, threatening the mother's lawyers for their advocacy, and repeatedly retaliating against parents' attorneys?
11. Did the Superior Court and its VGAL Program violate the appearance of fairness by invading private attorney communications, threatening the mother's lawyers for their advocacy, and repeatedly retaliating against parents' attorneys?

INTRODUCTION AND SUMMARY OF THE CASE

Synopsis

Following a 2013 trial, Judge Linda Krese found Apple H. dependent.[1] Two years later, a different judge presided over a termination trial. With the support of Judge Krese, the Superior Court itself appeared through counsel in the termination proceeding. Judge Krese met with other judges to discuss the case, filed a declaration on behalf of the Superior Court, and sat in the courtroom as the court's attorney urged the trial judge to enter a termination order.

Throughout the dependency and termination proceedings, Judge Krese, her staff, and the court's attorney met privately and crafted informal policies hindering parents' efforts to obtain discovery from the Superior Court's Volunteer GAL Program. This allowed the program to steer the case toward termination while hiding activity later found to be misconduct.

The trial judge concluded that Superior Court employees had withheld discovery, destroyed evidence, lied to the court, and endangered the child. When she learned that the Superior Court itself had participated throughout the litigation, she recused herself. Six months after announcing her recusal, the trial judge entered an order terminating the mother's parental rights.

From thousands upon thousands of pages of documents and transcript, three themes emerge. First, judges, their staff, and the Superior Court's attorney participated in the litigation. Second, the Superior Court's Volunteer GAL program committed misconduct designed to thwart reunification. Third, Superior Court employees lied, destroyed evidence, and retaliated against the mother's attorneys for exposing misconduct.

Arguments

Due process. The Superior Court formally appeared through counsel and explicitly asked the trial judge to terminate. It also revealed its participation in the litigation since the start of the dependency. The court's involvement violated the mother's right to due process.

Appearance of Fairness. In addition to violating due process, the court's involvement violated the appearance of fairness. Likewise, the trial judge violated the appearance of fairness by entering a termination order after concluding she should not have presided over the case.

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[1] [1] Instead of initials, this brief uses pseudonyms. The child, A.H., will be called Apple H., the mother N.A. will be called Nichelle A., and the father C.H. will be called Cory H.

Recusal. Six months after recusing herself, the trial judge entered an order terminating the mother's rights. This was improper: her recusal announcement disqualified her from further action.

Child's Right to a Voice. The court did not appoint counsel for Apple H. The GAL pursued its own agenda rather than representing her best interests. The termination violated due process because no one protected the child's interests.

New Trial Motion. After the trial judge recused herself, a visiting judge denied the mother's new trial motion. He ignored much of the record and based his ruling on his misunderstanding of a statute that does not control. The Court of Appeals should disregard his ruling.

Lack of notice. No one told the mother her rights could be terminated because she (a) participated in a medically supervised methadone program, and (b) maintained contact with the father. This lack of notice violated the mother's right to due process.

Unfair termination. The dependency court ordered the mother to comply with a medically supervised methadone program. The termination order rested in part on her compliance with this order. This was fundamentally unfair and violated due process.

Insufficient evidence. Nothing suggested that methadone treatment impacted the mother's parenting or otherwise justified termination, and the assigned social worker could not say that termination was in the child's best interests. Insufficient evidence supported termination.

Right to counsel. The Court/Program improperly accessed communications between parents' attorneys, threatened the mother's lawyers with legal action, and retaliated against counsel when exposed. These actions violated the mother's due process right to counsel.

STATEMENT OF FACTS PART ONE

I. THE SUPERIOR COURT AND ITS VGAL PROGRAM

A. Court/Program Role in Child Welfare Cases

Snohomish County's VGAL program "is an arm of Snohomish County Superior Court." RP (11/4/16) 403. The Court/Program[2] does not merely supervise volunteers who investigate, file reports, and make recommendations (as described in RCW 13.34.105(1)).[3]

Instead, the VGAL Program is appointed as a second GAL. CP 10909, 12387-12408. "Program coordinators," who are court employees, appear in court,[4] represented by staff attorneys who are also court employees. RP (11/4/16) 401, 403; RP (11/18/16) 1861-1862; CP 12387-12408. The program coordinators are empowered to override the recommendations of volunteers, and to revise and sign reports on their behalf. RP (2/10/16) 187; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275,

[2] Because, as will be outlined in this brief, the record shows (and Judge Farris found) that the Superior Court and the VGAL Program are a single, indivisible entity, with no screen or wall separating judges from active cases, it will be referred to as "the Court/Program." CP 12387-12408.

[3] They also do more than "present evidence, examine and cross-examine witnesses," which are activities described in RCW 13.34.100(5).

[4] Although they are not attorneys, the program coordinators sit at counsel table during hearings. RP (3/24/16) 1505. They also approve, and amend, orders for presentation. RP (3/23/16) 1301.

1301; RP (9/23/16) 157; CP 12387-12408; Trial Ex. 12, 39.[5]

The staff attorneys take an active role in litigation, advancing the Court/Program's position by filing motions, cross-examining witnesses, raising objections, presenting argument, and adding provisions to court orders before signing them. RP (8/26/15) 47; RP (9/2/15) 950-954; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275, 1300-1301, 1508-1509; RP (3/25/16) 234; RP (9/23/16) 157; CP 10551-10552, 10803-10809, CP 12387-12408. In addition, program coordinators and staff attorneys handle all aspects of VGAL discovery, which is often voluminous.[6] RP (3/23/16) 1246-1247; RP (6/10/16) 64-67; RP (11/4/16) 463-464; RP (12/3/15) 14-16; RP (3/23/16) 1286; RP (11/18/16) 1875-1880.

Superior Court judges and senior court administration staff are directly involved in the workings of the VGAL program,[7] and there is no screening mechanism to avoid improper *ex parte* contact regarding active cases. RP (2/11/16) 331; RP (3/23/16) 1265; RP (11/4/16) 403, 422, 463-464, 513, 516-517; RP (11/18/16) 1876-1877; CP 12387-12408, 12880-

[5] Multiple sets of exhibits were filed as part of the Clerk's Papers in this case. Only trial exhibits were filed separately and will be cited as Trial Ex. Other exhibits were incorporated into the court file along with exhibit lists, and will be cited as CP.

[6] Discovery became an area of great contention in this case, as will be discussed further.

[7] Staff and volunteers use Superior Court letterhead (which lists the names of the judges), giving the appearance that the correspondence comes from the court. RP (2/10/16) 141-144; RP (2/11/16) 321-323; CP 22403; RP (2/12/16) 12.

12882.

When the Court/Program needs legal advice, it consults with civil deputies at the county prosecutor's office, including Sara DiVittorio, the deputy prosecutor who represents the Superior Court. RP (2/11/16) 325, 331; RP (2/25/16) 1139; RP (3/23/16) 1265; RP (11/4/16) 395, 397-401, 403, 463-464. In fact, in this case, prosecutor DiVittorio appeared on behalf of the Superior Court.[8] She explicitly urged the trial judge to terminate: "The Court asks that you… resolve this case by entering a termination order." RP (9/23/16) 150; CP 13663-13670.

Judges, their attorneys, and senior court administration officials[9] meet privately with program staff to create informal rules and to instruct staff on how to respond to issues; this includes directives on individual cases.[10] RP (11/4/16) 463-464, 516-517; RP (11/18/16) 1876-1877. On certain matters, program staff attorney Kirsten Haugen "had no choice or ability to exercise independent discretion as a lawyer for a VGAL."[11] RP (11/18/16) 1876-1877.

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[8] DiVittorio made clear that the Superior Court and the Court/Program "are not two independent entities; they are, in fact, one [and] the same." RP (11/4/16) 403.

[9] Including the Superior Court Administrator himself. RP (11/4/16) 463-464.

[10] Judge Farris called these "marching orders." RP (11/4/16) 463-464, 516-517; RP (11/18/16) 1876-1877.

[11] Presiding Judge Krese, who did not act as judge in any part of the termination trial, even filed a declaration noting her familiarity with the case. CP 12883-12888.

These private meetings allowed program staff and their attorneys to imply that they "got the O.K. from the court" for their actions. RP (11/4/16) 515. Thus, when disputes arose, opposing counsel would "have to bring a motion essentially against the court because we're the court." RP (11/4/16) 515.

B. Court/Program's Discovery Policies

Several issues that arose in this case were the culmination of ongoing policies and practices of the Court/Program. One continuing dispute that prompted significant judicial participation behind the scenes involved discovery requests by parents' attorneys. RP (3/23/16) 1246-1247; RP (6/10/16) 64-67; RP (11/4/16) 463-464; CP 12387-12408. Prior to 2012, parents' attorneys obtained discovery informally. RP (3/23/16) 1238-1239. But during a 2012 termination trial, staff attorney Haugen introduced into evidence an exhibit that had not been disclosed as part of discovery. RP (3/23/16) 1234, 1238-1239.

Following that incident, parents' attorneys began to request discovery from the Court/Program more often. RP (3/26/16) 1238-1239. VGAL program staff had a private meeting with the Superior Court and its lawyers. RP (11/4/16) 463-464; CP 12387-12408. The Court and its attorneys developed informal rules and instructed the Court/Program's staff attorneys how to respond to discovery requests. RP (3/23/16) 1239-1247; RP

(11/4/16) 463-464; CP 12387-12408.

Staff attorney Haugen was told to automatically object to every discovery request. She was directed to demand a discovery conference under CR 26 in every case. RP (3/23/16) 1246-1247; RP (6/10/16) 64-67; RP (11/4/16) 463-464; CP 12387-12408. At each conference, the Court/Program negotiated with opposing counsel with the goal of limiting what would be provided. RP (3/23/16) 1281; RP (3/25/16) 245; CP 12387-12408.

These negotiations sometimes involved playing parents' attorneys against each other, suggesting discovery in one case would be delayed because of allegedly burdensome requests in another. RP (6/10/16) 67-68; CP 12387-12408. Concerned that they would not get needed information, or that matters would be delayed, parents' attorneys felt coerced and reduced the scope of their requests. RP (3/23/16) 1244-1248, 1281, 1286-1287, 1291; CP 12387-12408. Even after these concessions, the Court/Program took months to produce the materials sought.[12] RP

[12] For example, in one case, the Court/Program waited six months to provide discovery, even though the Court/Program received no other demands in the interim. Even then, the Court/Program pressured the parent's attorney to reduce his demand. RP (3/23/16) 1289-1290. The Court/Program's practice was to have program coordinators assemble the discovery and provide it to the staff attorneys. No one checked to ensure that the program coordinators provided all discoverable material. RP (3/23/16) 1420-1421. In this case, as described elsewhere in this brief, the Court/Program withheld a significant quantity of discoverable material.

(3/23/16) 1289, 1291.

The Court/Program took the position that providing discovery was unnecessarily burdensome. RP (3/23/16) 1244-1248, 1281, 1286-1287, 1291; CP 12387-12408; RP (3/25/16) 243. However, when the ABC Law Group—the firm representing the mother in this case—offered to provide disks, or even to fund an upgrade to county computers to reduce the cost of discovery, the Court/Program rebuffed the firm's offer. RP (12/3/15) 40; RP (3/23/16) 1263.

In indigent cases, the Court/Program began to charge by the page, billing parents' attorneys personally for copies. RP (3/23/16) 1242, 1286; RP (6/10/16) 64-67; RP (11/4/16) 463-464; CP 10567-10571. By contrast, the Court/Program provided discovery on disks to privately retained attorneys, without charge.[13] RP (12/3/15) 38-40; CP 10517-10519. Even though the program did not charge other legal offices for discovery, staff attorney Haugen claimed to the mother's attorney that they in fact did charge all legal offices for discovery. RP (12/13/15) 38.

The Court/Program increased the cost to parents' attorneys by including repetitive materials in the discovery provided. RP (6/10/16) 64-67. This was so even though program staff knew that the Office of Public

[13]In addition, one attorney at ABC Law Group indicated that the Court/Program waived copying costs on one case but directed her not to tell anyone. CP 10517-10519.

Defense would not reimburse parents' attorneys for copies in cases involving indigent parents. RP (3/23/16) 1243-1244; CP 10517-10519. During negotiations about the cost of copies, staff attorney Haugen emphasized that waiving costs for indigent parents would impact the Superior Court's budget, implying that this would displease the judges. RP (12/3/15) 41; CP 10517-10519.

When attorney Mindy Carr (a member of the ABC Law Group at the time) brought a motion for waiver of copy costs in another case,[14] the Court/Program retaliated by arranging to have her client arrested when she appeared in court.[15] RP (2/10/16) 69-70; RP (2/11/16) 319-320; RP (6/10/16) 109-110. The Court/Program also changed its recommendations to be less favorable to Carr's client. CP 10517-10519. Ultimately, Carr prevailed in her motion, and the practice of charging parents' attorneys appeared to stop. RP (12/3/15) 39-41. But it had not stopped: staff attorney Haugen later affirmed that parents' attorneys are still charged for copies when they make a general request for discovery.[16] CP 10567-10571.

[14] A draft motion and associated private emails were stolen from a private listserv by a VGAL named Cynthia Bemis, who shared the stolen documents with staff attorney Haugen for use in discovery negotiations. RP (6/10/16) 69-70; CP 10517-10519. This misconduct is discussed in more detail below.

[15] The other parent also had an outstanding warrant on a more serious matter. He was permitted to appear in trial without being taken into custody. RP (2/11/16) 319-320; RP (6/10/16) 109-110.

[16] Most cases involved thousands of pages of discovery. RP (3/23/16) 1286.

In order to obtain discoverable materials, parents' attorneys were required to review items at the Court/Program's office, using a county computer under the supervision of program staff. RP (12/3/15) 41; RP (3/23/16) 1285, 1287; RP (11/4/16) 463-464, 516-517. Staff attorneys directed program coordinators to monitor opposing counsel by keeping track of the documents viewed and the copies requested. RP (3/23/16) 1285-1287; RP (6/10/16) 67; RP (11/4/16) 463-464, 516-517.

This monitoring, which allowed the Court/Program to focus its efforts when preparing for trial, apparently applied only to members of the ABC Law Group, which represented the mother in this case. CP 10517-10519. Attorney Carr declared that she was not subjected to such monitoring before she came to work for the ABC Law Group. CP 10517-10519.

These discovery policies, along with the consistent implications that the court approved of them, led the ABC Law Group to agree to not request any discovery unless a case was going to trial. RP (12/3/15) 41; RP (3/23/16) 1239-1242, 1290-1292; RP (11/4/16) 515; RP (11/18/16) 1879; CP 10517-10519. Based on assurances from staff attorney Haugen as well as program supervisor Gurley that cell phones were never used by volunteers and staff, the attorneys agreed to forego discovery of cell phone records (including texts and photographs). RP (3/23/16) 1244-1248, 1281-1283, 1286-1287, 1291; RP (3/25/16) 245; RP (6/10/16) 69. Haugen's

claim that no program coordinators or VGALs used cell phones except for calls turned out not to be true. In fact, in this case, photos and texts were important but not turned over to the parties.[17] RP (9/2/15) 834-840; RP (3/23/16) 1281-1283.

Parents' attorneys further agreed not to request email attachments. This was based on the Court/Program's assurances that attachments merely duplicated discovery provided by the department. RP (12/3/15) 89-90; RP (3/23/16) 1245; RP (3/29/16) 1773; RP (6/10/16) 69. Once again, these assurances were not accurate: many instances of attachments containing information not known to any of the parties would come to light in the many hearings that occurred.[18] RP (9/2/15) 833-845, 867, 886-887; RP (3/23/16) 1336-1340; RP (3/24/16) 1491-1494.

C. Court/Program Handling of Complaints

Another ongoing issue of contention that played a role in this case was how the Court/Program responded to complaints. A local Juvenile Court rule[19] outlines Snohomish County's grievance procedures for

[17] More information on this issue is provided later in this brief.

[18] This is discussed further, later in this brief.

[19] Enacted to comply with the requirements of GALR 7 ("Grievance Procedures").

VGALs. *See* Former Snohomish County LJuCR 9.4[20] The rule requires the head of the Court/Program[21] to make an initial determination of "potential merit." Former SCLJuCR 9.4(c).[22]

A finding of potential merit is akin to a prima facie case: the program head must "determine whether a complaint or grievance against a VGAL alleges" certain kinds of misconduct.[23] Former SCLJuCR 9.4(d). However, according to the practice of the Court/Program, the finding of "potential merit" could only occur if they considered the allegation true and accurate. RP (2/10/16) 50.

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[20] The rule has since been amended. However, the new rule does not address all the problems with the grievance procedure uncovered by Judge Farris in this case. *See* SCLJuCR 11.4; CP 209-526.

[21] The head of the VGAL program is also known as the community services supervisor. RP (3/23/16) 1268. Jaime Peniche filled the role during much of the time this case was pending. RP (3/23/16) 1268. Her predecessor was Jessica Gurley. RP (3/23/16) 1231-1234. This brief refers to that role as program supervisor.

[22] Following a determination of potential merit, the complaint would be reviewed by the assistant administrator for Juvenile Court, who would issue a written decision. RP (2/10/16) 41; former SCLJuCR 9.4(f). Because no complaint had ever lead to a finding of potential merit, this provision of the rule had never been invoked prior to the hearings held by Judge Farris. RP (2/10/16) 64, 68; RP (2/11/16) 326. Even after Judge Farris uncovered evidence of egregious misconduct in this case, the Court/Program declined to find any violation. RP (2/11/16) 357, 372; CP 10679-10686.

[23] According to the text of the rule, if the program supervisor finds "potential merit", then the VGAL may be notified of the complaint and provided a copy. Former SCLJuCR 9.4(c), (e). Among other things establishing potential merit, the rule lists violation of a code of conduct, misrepresentation of qualifications, breach of confidentiality, providing falsified information, violation of state or local laws or court rules, *ex parte* communication with a judicial officer, an actual or apparent conflict of interest or impropriety, a lack of independence, objectivity, and the appearance of fairness, or any other action or failure to act that reasonably brings into question the VGAL's suitability. SCLJuCR 9.4(d). In this case, Judge Farris later found that the VGAL, her program coordinator, and the Court/Program itself violated all of these provisions, as outlined below. CP 209-526.

Absent a finding of potential merit, the Court/Program head must keep the complaint, investigation, and any initial report confidential. Former SCLJuCR 9.4(i). Judge Farris reviewed this rule and concluded that the purpose of the confidentiality requirement is to protect the complainant from retaliation by the VGAL and the Court/Program. [24] RP (2/10/16) 10; RP (2/25/16) 1140, 1142.

The Court/Program does not follow this interpretation of the rule. RP (1/29/16) 22; RP (2/10/16) 3-5, 11-12, 15-17, 91-93; RP (2/25/16) 1140-1141, 1149. Before making a preliminary determination about merit, or otherwise investigating the matter, the program supervisor shared the information, including the identity of the complaining party, with the VGAL accused of misconduct and their assigned program coordinator. [25] RP (2/10/16) 3-5, 15-16, 91-93; RP (2/25/16) 1140-1141, 1149. This was done for the purpose of "investigation." RP (2/10/16) 11-12, 54, 60-63, 73. If the program coordinator denied the volunteer's misconduct, the

[24] As explained elsewhere in this brief, the Court/Program did then and still does interpret the rule to require the complainer to maintain the confidentiality of the VGAL complained of. RP (1/29/16) 27.

[25] Program supervisor Peniche believed that the confidentiality provision allowed her to share everything except the complaint document itself with the subject of the complaint prior to a finding of potential merit. RP (2/10/16) 22.

complaint was dismissed as unfounded. [26] RP (2/10/16) 91-92

By sharing the complainant's identity and the specific allegations, the Court/Program created an opportunity for retaliation against attorneys who complained and against their clients. RP (2/25/16) 1142; RP (6/10/16) 106-108. This occurred on multiple occasions.

For example, VGAL program coordinator Sue Walker learned of a grievance filed by the ABC Law Group relating to her misconduct in this case.[27] She searched the internet, downloaded naked images of another dependency client of the ABC Law Group,[28] and had the images distributed on thumb drives at the next hearing.[29] RP (3/23/16) 1394; RP (3/25/16) 211-219, 238-239, 260, 264, 266; RP (3/29/16) 1672-1687; RP (6/10/16)

[26] At some point during the hearings in this case, the program supervisor discovered that she was supposed to make a finding of potential merit just by reviewing the complaint, without investigating. RP (2/10/16) 21, 31.

[27] Additional information about the complaint and the response to it is provided elsewhere in this brief.

[28] Program coordinator Walker had no connection to the case involving that client; in fact, at the time, all of her other cases had been reassigned to other program coordinators. RP (6/10/16) 111; (3/23/16) 1309-1310; RP (3/29/16) 1706-1707. The client was seeking custody in anticipation of dismissal of the dependency. RP (3/29/16) 1678; RP (6/10/16) 111-113. She had been raped by the father in that case. RP (3/29/16) 1672-1673; RP (6/10/16) 111-113. The naked images were shared with the father, who was also seeking custody. RP (3/23/16) 1394; RP (3/29/16) 1678; RP (6/10/16) 111-113. Staff attorney Haugen was involved in the dissemination of the photos. CP 12947.

[29] Snohomish County requires special permission before county computers can be used to download images that may be pornographic. RP (3/25/16) 260; RP (6/10/16) 110-111. Walker downloaded and Haugen disseminated the images without obtaining permission. RP (6/10/16) 111. In fact, program supervisor Jaime Peniche, had instructed her not to distribute the images. RP (3/25/16) 264.

111; CP 12947. These thumb drives were provided immediately, even though the case was set for dismissal. RP (3/25/16) 211-219, 238-239, 260, 264, 266; RP (3/29/16) 1672-1687; RP (6/10/16) 111. This effort toward "openness" and quick dissemination of information was a sharp contrast to the Court/Program's usual practice of delaying discovery. RP (3/25/16) 211, 238-239; RP (6/10/16) 111-113. Judge Farris later concluded that the distribution of these naked images was intended to send a message to the ABC Law Group.[30] RP (6/10/16) 112.

In another matter, the ABC Law Group brought forward a foster parent's complaint that a volunteer named Cynthia Bemis lied in her reports regarding how often she visited the child in their care.[31] RP (12/3/15) 36-37; CP 10520-10527. The Court/Program quickly rejected the complaint and filed a motion to move the child to another home.[32] RP (12/3/15) 35-38; CP 10520-10527.

The Court/Program also responded to complaints from the ABC Law Group by contacting the Office of Public Defense (OPD) with the

[30] Judge Farris went so far as to compare Walker and Haugen's conduct to "revenge porn." RP (3/25/16); *see* RCW 9A.86.010.

[31] VGAL Bemis committed additional misconduct, which is addressed elsewhere in this brief.

[32] After this experience, the foster parents decided they no longer wished to participate in the foster care system. CP 10520-10527.

goal of jeopardizing the firm's financial future. [33,34] RP (12/3/15) 35-37; RP (3/23/16) 1292-1295, RP (6/10/16) 112-113. This issue came up during a hearing in this case, when the Court/Program attempted to deny their action:

> MR. BALLOUT[35]: Following trial and following my complaint against Ms. Walker, the Office of Public Defense was contacted by the VGAL program, my contractor in Olympia by the program. Not saying, hey, we're going to –
> THE COURT: Is that true? Is that true?
> MS. HAUGEN: No, it's not true.
> MR. BALLOUT: They're here, Your Honor. The Office of Public Defense is present in court today, and based on those --
> MS. HAUGEN: I'm sorry. I thought you said the civil division of the prosecutor's office. The Office of Public Defense was contacted for what?
> MR. BALLOUT: You tell me, Ms. Haugen.
> MS. HAUGEN: I'm sorry. I didn't hear what you said. The judge just asked me if that's true. I think I misheard.
> MR. BALLOUT: Your Honor, maybe you can do this.
> MS. HAUGEN: I was taking notes. I'm sorry, Your Honor. You asked me if what was true, and I think I misheard what we were talking about.

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[33] Another action against the ABC Law Group was taken by a VGAL who went by the pseudonym Catherine Newman. Newman had been the subject of a grievance; she wrote a letter addressed to all the Superior Court judges complaining about the ABC Law Group. CP 12595-12599. The letter outlined Newman's criticisms of the ABC Law Group and included several references to this case and one of her own cases. CP 12595-12599. She offered to allow the judges to review pertinent documents "in camera." CP 12595-12599. Although the letter involved improper *ex parte* contact with the entire bench regarding a pending case, the letter was not provided to the ABC Law Group or other attorneys on cases it referenced; instead, the attorneys obtained a copy through a public records request, much later. CP 12600-12602.

[34]Yet another instance of retaliation related to a complaint lodged by a parent's attorney, one not affiliated with the ABC Law Group. She described that it was met with such a "vehement" and "rabid" response that the she withdrew from the case, and further resolved not to complain in future. RP (6/10/16) 107-108.

[35] Adam Ballout was one of the mother's two attorneys in this matter. He and Flint Stebbins, her other attorney, are both members of ABC Law Group.

RP (12/3/15) 36-37.

These retaliatory actions were made possible by the Court/Program's interpretation of the local rules. According to the Court/Program and its attorney at the prosecutor's office, the grievance procedure limited the rights of those who complained and sheltered those accused of misconduct. RP (12/1/15) 991-995; RP (2/10/16) 16, 27, 28, 30-31, 37, 38, 46-50; RP (2/11/16) 325. Volunteers and staff viewed the grievance process as a system for protecting their rights, including a perceived "right" to confidentiality regarding their own misconduct. RP (2/10/16) 16, 27, 28, 30-31, 37, 38, 46-50, 196; RP (2/11/16) 325; RP (6/10/16) 86-90.

As the Court/Program articulated the rule, the confidentiality provision[36] prohibited discussion of any VGAL misconduct with anyone, including the public. RP (12/1/15) 991-995; RP (2/10/16) 16, 27, 28, 30-31, 37, 38, 46-50; RP (2/11/16) 325; RP (6/10/16) 86-90; CP 9524-9528.

Thus, according to the Court/Program, a person aggrieved by VGAL misconduct could either speak to others (including the public) about the misconduct or they could file a grievance. They could not do both.[37] RP (12/1/15) 991-995; RP (2/10/16) 16, 27, 28, 30-31, 37, 38, 46-

[36] Former SCLJuCR 9.4(i).

[37] Apparently, this is still the Court/Program's policy: that the confidentiality provisions prohibit complainants from discussing their grievances and the underlying misconduct absent a finding of potential merit.

50; RP (2/11/16) 325; RP (6/10/16) 86-90; CP 9524-9528.

The attorneys who represented the mother in this case believed they were subject to additional retaliation. Three anonymous bar complaints were lodged against one of the mother's attorneys while this case was pending. At least one of these was for sharing Judge Farris's (publicly announced) findings of Court/Program misconduct, even though Judge Farris had specifically authorized distribution. CP 9097-9102, 9464. Further, on behalf of the Court/Program, prosecutor DiVittorio wrote a letter threatening ABC Law Group with legal action for filing materials associated with a complaint in this case.[38] CP 10714-10715; RP (2/11/16) 325.

Prior to this case, no complaint against a VGAL had ever resulted in a finding of potential merit.[39] RP (2/10/16) 64, 68; RP (2/11/16) 326. As a result, no VGAL had ever been asked to respond to a complaint in writing, and the Juvenile Court Administrator had never reviewed a complaint. RP (2/10/16) 64, 68, 98; RP (2/11/16) 326.

Judge Farris later found that the Court/Program used the grievance process to conceal violations. RP (6/10/16) 86-90. She held that the

[38] This is discussed elsewhere in this brief.

[39] The ABC Law Group's complaint against program coordinator Walker was ultimately found to have potential merit. RP (2/11/16) 371; CP 10679-10686, 10733-10735. However, even when provided Judge Farris's findings that Walker had committed misconduct, the Court/Program concluded that the complaint was unfounded. RP (12/3/15) 34; RP (2/11/16) 339-341, 362-369, 372. The Court/Program's rule violations regarding the Walker complaint are outlined below.

Court/Program's longstanding violations of the grievance procedure had the effect of insulating it from any meaningful review. RP (2/25/16) 1152.

II. COURT/PROGRAM ROLE

A. VGAL Brook and Program Coordinator Walker

Very soon after the Termination Petition was filed, the court appointed the Court/Program to represent Apple H.'s best interests.[40] CP 10909. The court also appointed volunteer Denece Brook[41] as Volunteer Guardian ad litem.[42] CP 10908.

Later, at the termination trial, the department social worker who had the case the longest would testify that the VGAL program was one of

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[40] Instead of initials, this brief uses pseudonyms for the family involved. The child, A.H., will be called Apple H., the mother N.A. will be called Nichelle A., and the father C.H. will be called Cory H.

[41] Brook's real name is Denece Estabrook; however, she will be referred to as "Brook" in this brief to conform with references in the transcripts and pleadings.

In Snohomish County, volunteers are given pseudonyms as a matter of course. The Court/Program allows this without making any individualized inquiry to determine if a false name is "necessary for [the volunteer's] safety." RCW 13.34.100(3). The appointing judge does not examine the *Ishikawa* factors before allowing use of a pseudonym. *See Doe G v. Dep't of Corr.*, 190 Wn.2d 185, 410 P.3d 1156 (2018) (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)). This use of pseudonyms prevents verification of each VGALs qualifications; it also means that parents' attorneys cannot conduct background checks or otherwise investigate a VGAL's history.

[42] This was, and remains, a consistent practice in Snohomish county. RP (3/24/16) 1504-1509; CP 10908. This allows program coordinators to handle discovery, override volunteers, and appear in court. RP (2/10/16) 187; RP (3/24/16) 1504-1509.

two major barriers to reunification. RP (8/31/15) 456.[43] VGAL Brook's own program coordinator, Sue Walker, concluded that Brook committed deliberate misconduct as part of her strategy to prevent reunification and to ensure termination of the parents' relationship with their daughter. RP (12/1/15) 1034-1035; RP (3/24/16) 1475.

Soon after the Court/Program was appointed, it filed a pleading misstating VGAL Brook's qualifications, adding years of education to her resume.[44] RP (3/24/16) 1434-1439; CP 22300-22336. Brook told her program coordinator, Walker, that the Court/Program had misstated her qualifications.[45] RP (3/24/16) 1434-1439. The Court/Program never corrected the error.[46] RP (3/24/16) 1436-1438.

Program rules and the state's Guardian ad Litem Rules (GALR)[47]

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[43] This was not the only case in which the Court/Program obstructed reunification efforts: in another case a supervisor for the department went so far as to submit a formal complaint against a VGAL for unreasonably thwarting a child's return home. RP (3/24/16) 1629-1630.

[44] This could not be known, however, due to the Court/Program's consistent use of pseudonyms.

[45] Under program rules, misstating qualifications is grounds for removal. RP (3/24/16) 1438; SCLJuCR 9.4.

[46] Furthermore, the emails discussing the error were not provided to the parents' attorneys in discovery. CP 22300-22336.

[47] Walker and all the other program coordinators claimed ignorance of the GALR and pertinent local court rules and provided no training to volunteers on those subjects. RP (2/12/16) 90-91, 112-113; RP (3/23/16) 1249-1250; RP (3/24/16) 1542, 1612; RP (3/29/16) 1724-1730. The "best practice manual" for program coordinators makes no reference to the GALR. RP (3/23/16) 1312. Even after learning of their existence, one program coordinator did not read the rules. RP (2/12/16) 96; RP (3/23/16) 1390. The person charged with training volunteers did not plan to discuss the GALR at the next training. RP (2/12/16) 96; RP (3/23/16) 1390. Judge Farris later noted that the requirements imposed by the GALR are

required program coordinator Walker to document her own work, and to ensure that VGAL Brook documented her work as well. RP (12/3/15) 69-72; RP (2/12/16) 92; RP (3/25/16) 276-279; *see* GALR 2(p). However, the program trains volunteers to be "thoughtful about the written communication" and to communicate by phone to avoid making a record that could be obtained through discovery. RP (9/2/15) 806. VGAL program supervisor, Jaime Peniche, testified that neither program coordinator Walker nor VGAL Brook appeared to document "anything".[48] RP (3/25/16) 278-281.

1. Brook's support of adoption

VGAL Brook knew of the foster mother's strong desire to adopt Apple H. RP (3/24/16) 1447-1449. Brook repeatedly assured the foster mother that the adoption would take place, even after being told she could not give such assurances. RP (3/24/16) 1481. Staff attorney Haugen later commented that the case was unique because of the very high level of communication Brook had with the foster mother.[49] RP (12/3/15) 94.

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mirrored in the local VGAL handbook, and thus program staff knew the substantive requirements. RP (6/10/16) 10-13.

[48] Judge Farris later found that program coordinator Walker's failure to ensure adequate documentation impaired the parents' ability to know about case events, or to present relevant information to the court at review hearings. RP (6/10/16) 29-36. She also noted that Walker's inability to remember or explain events impacted the trial. RP (6/10/16) 29-36.

[49] Staff attorney Haugen was attempting to defend her claim that VGAL Brook hadn't committed misconduct in her other cases, even though an assessment of those cases had yet to be undertaken. RP (12/3/15) 94. Subsequently, a court-ordered examination of Brook's

Although she knew that Brook gave these assurances to the foster mother, program coordinator Walker took no action to halt the practice, reprimand Brook, or tell the parties that it was occurring. RP (3/24/16) 1481.

VGAL Brook told the foster mother that she would oppose any efforts to expand the parents' visitation with their daughter. RP (3/24/16) 1450; CP 11609-11610. She assured the foster mother that the judge would side with the Court/Program in any visitation dispute. RP (3/24/16) 1451.

In violation of program policy, VGAL Brook communicated with the foster mother (and others) using her personal email account rather than the county email address supplied by the Court/Program.[50] RP (6/10/16) 21-23; CP 11580-11596. This rendered her messages about the case unavailable for discovery distribution, and completely unreviewable by even her program coordinator. Brook also used a cut-and-paste procedure to

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other cases revealed that her practice of breaching confidentiality was not limited to this case. CP 9438-9439, 9603. From what was reviewed, however, the magnitude of Brook's misconduct in this case far exceeded the improprieties found in her other cases. CP 9438-9439, 9603.

[50] The county email system allowed program coordinators to access the volunteer's account. In theory, the messages were preserved and available for discovery. In practice, program coordinator Walker and others went through multi-step procedures to delete or hide emails so they wouldn't be provided to parents' attorneys RP (2/12/16) 33-34, 74, 83-84; RP (6/10/16) 22-24, 92; CP 11580-11596; CP 1050, 1052, 2558, 2724, 4019-4088, 5627, 5627, 5629. In addition to the multi-step deletion process, Walker hid hundreds of case-related messages by placing them in an email folder marked "personal;" as a result, the information was not provided in discovery. RP (6/10/16) 50-51.

hide her case-related use of personal email. RP (6/10/16) 22-24, 92; CP 11580-11596, 1050, 1052, 2558, 2724, 4019-4088, 5627, 5627, 5629.

Program coordinator Walker knew that VGAL Brook used her personal email account for case-related communication and took no action to stop her or provide the materials to the parties. CP 9026-9029. The trial judge would later conclude that Brook's use of her personal email should have resulted in her removal from the case.[51] RP (6/10/16) 22-24; CP 11570-11573, 11615-11616. By using her personal email, VGAL Brook was able to send the foster mother confidential information about this case without fear of being discovered.[52] RP (6/10/16) 21, 23; RP (3/25/16) 285, 298.

2. Distribution of confidential parent documents

In response to multiple orders for production, it came to light that VGAL Brook emailed the foster mother unredacted departmental reports filled with confidential information.[53] RP (12/3/15) 76-78, 155-156; RP (6/10/16) 14; CP 3983-4018, 10182-10268, 11541-11545. The

[51] Judge Farris noted that VGAL Brook should have been removed for other reasons as well, but that program coordinator Walker and the Court/Program concealed her misconduct from the court and the parties. CP 11707.

[52] VGAL Brook also sent some of the material to Deborah Collins, the social worker from the adoption agency working with the foster mother. CP 1772, 3226-3253; RP (3/25/16) 285.

[53] The department provides foster parents an abbreviated version of its reports to the court; such reports include information about the child, but do not include confidential information about the parents or other aspects of the case. RP (6/10/16) 15.

confidential reports improperly shared by VGAL Brook included updates regarding the mother's mental health counseling and her methadone treatment, summaries regarding the parents' services, urinalysis test results, the mother's response to allegations that she was the victim of domestic violence, and the father's psychological and domestic violence evaluations (including extensive personal information and raw testing data). RP (12/3/15) 76-78, 155-156; RP (6/10/16) 14; CP 10572-10678, 11541-11545. The trial judge later described this breach as "egregious," and noted that it violated the GALR as well as state and federal laws.[54] RP (6/10/16) 15.

Program coordinator Walker was aware that VGAL Brook had forwarded confidential information to the foster mother.[55] RP (12/3/15) 24-25; CP 11541-11545. She took no action to prevent further breaches of confidentiality and did not report the misconduct to the court or the parties. RP (12/3/15) 24-25, 78-79; CP 11541-11545.

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[54] Although VGAL Brook never received training on the Guardian Ad Litem Rules, she did understand confidentiality; she was a retired nurse who'd worked with private information her entire career. RP (3/24/16) 1431-1432; RP (6/10/16) 14. Furthermore, Walker had trained Brook about the Court/Program's confidentiality requirements, which prohibited volunteers from giving out information. RP (3/24/16) 1431.

[55] The foster mother and her adoption social worker later filed declarations confirming they'd received confidential information. CP 10561-10564. The foster mother was told by her adoption social worker to delete the confidential material; neither Brook, Walker, nor anyone else associated with the VGAL Program asked her to do so. CP 10561-10562. A later filing revealed that the foster mother had retained additional confidential information that she had not deleted. CP 10182-10268.

3. Incident at foster home

VGAL Brook shared confidential information without authorization on other occasions as well. During a home visit at the foster mother's, social worker Green felt it necessary to intervene; she asked Brook to stop sharing information and making negative claims. RP (9/2/15) 857; RP (12/3/15) 137; RP (3/25/16) 152-153, 157, 177. VGAL Brook told the foster mother that the parents were drug dealers, drug addicts, criminals, and identity thieves. RP (9/2/15) 857; RP (12/3/15) 137; RP (3/25/16) 152-153, 157, 177; CP 11545-11554. Brook told the social worker, apparently with the child present, that they were horrible parents and would not engage in services to reunite with their daughter. RP (9/2/15) 857; RP (3/25/16) 152-153, 157, 177; CP 11545-11554.

During this home visit, VGAL Brook also claimed that the parents had been terminated at least 10 times. RP (9/2/15) 857; RP (3/25/16) 152-153, 157, 177; CP 11545-11554. This was not accurate.[56] Brook apologized, but also told Green that she (Green) was new to the case and didn't yet understand that the foster mother should be allowed to adopt the child. RP (3/25/16) 178-179; RP (3/25/16) 152-157; CP 11545-11554.

[56]The mother has nine older children. RP (8/26/15) 14-17. Even though she no longer has a legal relationship with some of them, she sees all her children at least once a week. RP (8/26/15) 14-17, 93-94; Trial Ex. 1, 2, 4, 5. She also has a new baby, born after the termination trial in this case. CP 9158-9179, 22286-22287. Without interference from the VGAL Program, the mother retained custody of her newborn. CP 9158-917, 22286-22287.

VGAL Brook made no promises about maintaining confidentiality and stayed with the foster mother after social worker Green left the home. RP (3/25/16) 152-157; CP 11545-11554. Green departed with the clear impression that Brook had improperly shared confidential information more than once before. RP (3/25/16) 152-156; CP 11545-11554.

VGAL Brook called program coordinator Walker and told her she'd been caught sharing confidential information pertaining to multiple parties. RP (3/24/16) 1439-1440, 1445; CP 11545-11554. Walker also received an email expressing concern about Brook's behavior from social worker Green's supervisor at the department. RP (3/24/16) 1626-1627; CP 11545-11554. The trial judge would later conclude that Brook's conduct during this home visit showed bias against the parents and violated their right to confidentiality. RP (6/10/16) 16-17; CP 11545-11554.

Program coordinator Walker admitted that she was aware of the incident but took no further action.[57] RP (3/24/16) 1627; CP 11545-11554. She did not contact social worker Green, or anyone else, to ask about Brook's conduct. RP (3/24/16) 1628; RP (3/25/16) 155-157; CP 11545-11554. Further, Walker did not document the incident in any way. RP

[57] After testifying about the incident in detail and quoting from her conversation with Brook, Walker would later claim that she knew nothing of the misconduct until asked about it during trial. RP (12/3/15) 141-148.

(3/24/16) 1439-1440; CP 11545-11554. Nor did she notify the court or the parents' attorneys about the incident. RP (12/3/15) 24; CP 11545-11554.

Nothing about the breach or Brook's biased statements appeared in discovery provided to counsel prior to the termination trial. RP (12/3/15) 137-138; CP 11545-11554, 11566-11569, 11573-11577. The email from Green's supervisor was not among the emails produced in discovery. RP (12/3/15) 137-138; CP 11545-11554, 11566-11569, 11573-11577. Staff attorney Haugen later blamed the department for failing to notify the parents' attorneys about the breach by the VGAL. RP (12/3/15) 137-138, 140.

4. Sharing of additional confidential materials

Within a few days of the incident witnessed by social worker Green, VGAL Brook emailed confidential material about the parents to the foster mother. This included unredacted records (obtained by Walker) from the Seattle Police Department.[58] RP (9/2/15) 886-888, 891-893; RP (12/3/15) 24-26; RP (2/10/16) 244-246; RP (3/24/16) 1474; RP (6/10/16) 43, 130-131; CP 3226-3253, 10572-10678, 10867-10878, 11554-11565, 11566-11569; Trial Ex. 152. Among other things, the records included confidential information about foster parents who had previously adopted

[58] Walker obtained these records using a limited release form signed by the parents; the release did not authorize disclosure by the Court/Program. RP (9/2/15) 891-893; CP 11554-11565.

Apple H.'s siblings. CP 10572-10678, 11554-11565. The records stated clearly on their face they were not to be re-distributed. Trial Ex. 152; CP 3226-3253.

Program coordinator Walker did not notify the court or the parties of this breach either. RP (12/3/15) 24-26, 79; CP 11554-11565, 11566-11569. Emails and other documentary evidence of the breach were omitted from the materials provided to the parents' attorneys in pretrial discovery. RP (12/3/15) 79; CP 11554-11565, 11566-11569, 11573-11577.

5. Brook's attempt to attend parenting class

VGAL Brook also attempted to observe the mother's parenting class, which multiple families. RP (9/2/15) 846-847; RP (12/3/15) 23; RP (6/10/16) 13-14; CP 11537-11539. One instructor refused permission and asked her to leave. Instead of accepting this response, Brook tried to get into the class by asking a different staff person. RP (9/2/15) 857; RP (6/10/16) 13-14; CP 11537-11539. Although she did not reveal that she'd already been turned away, her second request was refused as well. RP (9/2/15) 857.

The instructors described VGAL's behavior as "unprofessional". RP (12/3/15) 23; CP 2059-2096, 2713-2718. Walker did not take any action or notify anyone about Brook's actions, or the service provider's view of it. RP (12/3/15) 23; RP (6/10/16) 13-14; CP 11539-11541. Instead,

Walker decided that Brook's actions were appropriate. RP (12/3/15) 23.

Program coordinator Walker acknowledged that she was aware of this incident and other violations of the parents' confidentiality.[59] RP (9/2/15) 846-847, 857, 886-887; RP (9/11/15) 5-6. She did not investigate or take any action to prevent additional violations; nor did she document any of VGAL Brook's misconduct or her own responses.[60] RP (9/2/15) 894-895; RP (6/10/16) 15-16; CP 11551-11565.

B. Foster Mother

In contrast to her treatment of the parents' confidentiality, VGAL Brook supported the foster mother's strong desire to protect her own privacy. RP (3/24/16) 1433; RP (3/25/16) 300-301. Brook told the foster mother that information could be kept secret, and she saw it as her job to enforce the foster mother's confidentiality. RP (3/25/16) 300; RP (6/10/16) 25-26.

1. Apple H.'s medical records

This extended to Apple H.'s medical providers. According to one

[59] Judge Farris later found that VGAL Brook had breached the parents' confidentiality on other occasions as well. CP 11566-11569. Program coordinator Walker made no effort to document or correct these breaches and did not notify the court or the parties. CP 11537-11551.

[60] Even before much of the misconduct was brought to light, Judge Farris told the parties she was "appalled" by program coordinator Walker's failure to take action or remove Brook. RP (9/11/15) 4.

social worker, attending the child's medical appointments would have assisted the parents with reunification. RP (8/31/15) 478-479. But at the foster mother's request, the parents were not allowed to attend any of their daughter's medical appointments, or to have any contact with the providers. The parents were not permitted to know the name of the doctors, or clinics, or even the pharmacy that filled a prescription for Apple H. RP (8/27/15) 298-299; RP (8/31/15) 482, 552; RP (9/1/15) 762; RP (9/2/15) 872; CP 7715, 11605-11609. Brook promised the foster mother that she would not share this information with the parents and enforced this rule with the department. RP (6/10/16) 26; CP 11605-11609.

The foster mother also sent Brook medical records regarding Apple H., urging her to keep the records confidential. CP 7715; RP (12/3/15) 105. There is no indication Brook ever reminded the foster mother that she could not keep information confidential.[61] RP (12/3/15) 105, 121-128. Some medical records were not distributed until after multiple orders to compel, months after the court gave its oral termination ruling. CP 1537, 1975, 4291-4295, 5962. This secrecy regarding the child's medical care played a significant role in the case. RP (9/11/15) 9.

[61] When asked about this, staff attorney Haugen claimed that VGAL Brook probably told the foster mother over the phone and didn't document it. RP (12/3/15) 107. Pressed further, Haugen acknowledged that she had no support for her claim. RP (12/3/15) 107-110.

2. The food list

In what Judge Farris later described as a thinly veiled attempt to manufacture evidence against the parents, VGAL Brook urged the foster mother to provide a restrictive food list for the parents to follow during visits.[62] CP 10736-10749; RP (9/1/15) 647-650; RP (9/2/15) 852; RP (3/23/16) 324-325. The list was presented to appear to be based on orders from Apple H.'s doctor(s) based on allergy concerns. RP (9/2/15) 853; RP (9/11/15) 9. In fact, Apple H. was never considered medically fragile, and no social worker (or Walker) ever saw any of the illnesses claimed by the foster mother. RP (8/27/15) 285, 292-293; RP (8/31/15) 521, 553; RP (9/2/15) 854.

The Court/Program asked to have the parents' visitation terminated if the parents failed to adhere to the list.[63] RP (9/1/15) 647-650, 734; RP (9/2/15) 852. At the Court/Program's urging, this requirement was included in the court's orders, even after the Court/Program learned that Apple H. had no food allergies.[64] RP (6/10/16) 37; Trial Ex 38, 40.

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[62] Initially (in November of 2013), the foster mother had asked only that Apple H. not be fed bananas. RP (9/1/15) 763.

[63] In addition, the foster mother directed that the parents should not be able to give Apple H. water during visits and to use a certain brand of lotion on Apple H. RP (8/27/15) 299-300; RP (9/1/15) 657, 734; CP 4291-4295, 4599.

[64] VGAL Brook told social worker Green that it was her (Green's) job to enforce compliance with the food list. RP (3/25/16) 177-179. When Green obtained the medical records, she learned that the child had no allergies. RP (3/25/16) 177-179. She shared this with Brook,

The foster mother created the list herself without input from the child's doctor. RP (9/2/15) 852; RP (3/25/16) 324. She claimed that Apple H. suffered ill effects from food provided by the parents during visits.[65] RP (8/27/15) 299-300; RP (9/1/15) 657, 734; CP 4291-4295.

The foster mother wanted visit supervisors to report in detail on the food provided by the parents. She also wanted them to intervene to make the parents follow the foster mother's food list. RP (9/2/15) 810-812. When the supervising agency refused, the Court/Program sought its dismissal from the case. RP (9/2/15) 810-812. The agency explained that refereeing food issues exceeded the visit supervisor's job description and objected to being threatened for declining to micromanage food choices. RP (9/2/15) 810-812, 833-834.

The Court/Program claimed that it supported the foster mother's food list because it was created "in conjunction" with Apple H. 's medical providers. RP (9/2/15) 852. But no VGAL or program staff ever spoke with any medical providers; nor did they review any medical records suggesting the need for such a list. RP (9/2/15) 853. Walker claimed the list

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who told Green that she didn't understand because she was new to the case. RP (3/25/16) 177-179. It appears that neither Brook nor Green shared the information with the parents, their attorneys, or the court. RP (9/2/15) 873-874; RP (6/10/16) 37.

[65] Although she obtained an EpiPen as a precaution against an allergic reaction, she refused to allow it to accompany Apple H. to visits. RP (9/2/15) 844.

was made in conjunction with medical staff because VGAL Brook was a retired nurse. RP (9/2/15) 853. When asked, the foster mother readily acknowledged that she created the list herself. RP (3/25/16) 324.

At one point, the visit supervisor suggested that the foster mother provide food for visits, instead of asking staff to police the food. RP (9/2/15) 819, 865-866, 879. The foster mother was willing, but VGAL Brook wanted the parents to "prove themselves."[66] RP (9/2/15) 819, 865-866, 879; RP (3/24/16) 1512-1513; CP 2537, 2543. The foster mother took an increasingly active role, including demanding that visit supervisors report on her ingredient lists from foods brought by the parents. RP (9/2/15) 848-854.

Ordinarily, only medically fragile children have food restrictions at visitation.[67] RP (9/1/15) 698. Apple H. was never considered medically fragile. RP (8/27/15) 284; RP (8/31/15) 521, 553; RP (9/1/15) 698, 728-734. None of the five social workers who testified, nor Brook or Walker, ever saw any signs that Apple H. suffered after eating food that was not on the list. RP (8/27/15) 285, 292-293; RP (8/31/15) 521, 553; RP (9/2/15)

[66] No one told the parents about this exchange, and so they had no opportunity to bring the issue to court. RP (3/24/16) 1514-1517. Nor was the interaction disclosed—to the court or the parties—when the Court/Program sought and obtained orders conditioning the parents' visitation on their adherence to the food list. RP (3/24/16) 1519.

[67] A DSHS supervisor explained that parents have the right to make food choices for their own children, absent genuine medical issues. RP (3/24/16) 1621-1624.

854.

The foster mother was asked to provide photographs documenting Apple H.'s alleged reaction to "inappropriate" foods. RP (9/2/15) 864-865. She did not do so. RP (9/2/15) 855, 864-865. Social worker Williams later testified that she knew the child was not allergic to any foods, including foods that were on the foster mother's "do not feed" list.[68] RP (9/1/15) 647-650.

Until program coordinator Walker's testimony, the Court/Program had not shared medical test results[69] showing Apple H. had no food allergies. RP (9/1/15) 728-734; RP (9/2/15) 873-877. The court order requiring the parents to abide by the food list had remained in effect, even after the Court/Program (and the department) learned that the child had no food allergies.[70] RP (3/24/16) 1639; Trial Ex. 38, 40. The parents obeyed the court-ordered limits, and never deviated from the list. RP (9/2/15) 905.

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[68] Williams also testified that she never saw Apple H. unhealthy. RP (9/1/15) 646.

[69] The foster mother provided the VGAL a "final allergy report" regarding Apple H. RP (9/2/15) 873-874. The Court/Program did not provide the report to Judge Farris, the parents, or their attorneys. RP (9/2/15) 873-874; RP (6/10/16) 37. After admitting she had the final report at trial, program coordinator Walker later sought to downplay its importance by claiming an earlier report with preliminary results was the "final" report. RP (9/2/15) 873-877; RP (6/10/16) 40-43, 96-97.

[70] In June of 2015, social worker Williams obtained medical records directly from the child's doctor and was able to confirm that Apple H. was not allergic to any of the foods on the list. RP (3/24/16) 1639.

Neither the department nor the Court/Program provided this information to Judge Farris or the parties before trial. RP (9/2/15) 873-874; RP (12/3/15) 110-136; RP (3/25/16) 177; RP (6/10/16) 37-38; CP 564.

3. Text conversation with visit supervisors

During the push for enforcement of the strict food list, the foster mother had a text conversation with the visit supervisor and forwarded a copy of it to VGAL Brook. RP (9/2/15) 822-826, 833-837.

In the conversation, the foster mother gave the impression that she may not cooperate with visits. It appeared that her cooperation was contingent on the agreement of the visit supervisor to report to her in detail about food Apple H. had been given. Trial Ex. 136. The agency that supervised the visits saw the texts from the foster mother as threatening: they implied that failure to cooperate with the foster mother's demands could lead to the agency losing this contract for work. RP (9/2/15) 822-826, 833-837. During Walker's cross-examination at trial, the Court/Program acknowledged that the texts were not provided to anyone, nor was anyone notified that they existed.[71] RP (9/2/15) 833-840.

4. Other actions by foster mother

The Court/Program showed an allegiance to the foster mother in

[71]As will be described in more detail elsewhere in this brief, the Court/Program uploaded documents to its discovery portal after the discovery cutoff date and without notice to the parties. One message in that bundle referred to text attachments. Trial Ex. 139. The content of the message made clear that a text conversation between the foster mother and a service provider had occurred and that the service provider saw the foster mother as threatening. Trial Ex. 139. The texts themselves had been preserved by the Court/Program, even while they took the position that providing attachments was burdensome, and text messages were not used. RP (9/2/15) 839.

other ways as well. VGAL Brook helped obtain a social security number for Apple H. so the foster mother could claim a tax deduction. RP (9/1/15) 668; RP (6/10/16) 25; CP 1062-1106, 1831-1875, 4053-4062, 4822-4831, 11596- 11605. Brook helped the foster mother get the necessary approvals to go on vacation. CP 1686-1700. Brook even emailed the department at the foster mother's request when the foster mother's two nannies hadn't been paid.[72] CP 1686-1700, 1831-1875.

In addition to seeking, and getting, significant help from VGAL Brook and the Court/Program, the foster mother also became heavily involved in the parents' situation. She emailed the department frequently about the parents' participation in services and their compliance with visitation rules. RP (8/31/15) 548-553. She asked the department to impose unusually strict rules regarding confirmation of visits. RP (9/1/15) 699; CP 1399-1448. She repeatedly tried to get the parents' visits terminated because of perceived rule violations. CP 1975, 5122-5129.

The foster mother also exchanged emails directly with the parents' service providers without the parents' permission.[73] RP (8/31/15) 548-550;

[72] When Brook learned that the department would not automatically pay for two nannies, in addition to the daycare payments, she expressed her frustration by calling the decision "garbage!" RP (9/2/15) 829.

[73] Psychologist Dr. Michael O'Leary later testified that any parent would find it very stressful to have a foster parent get confidential information about the parent's visits and services. RP (9/1/15) 628. He indicated that such could reasonably give rise to a worry that

RP (9/1/15) 660-661, 664. She frequently contacted the parents' visit supervisors directly. RP (9/2/15) 867; CP 1975. She was also close friends with the person who transported Apple H. to visits and parenting classes; this person sometimes stayed to watch and reported back to the foster mother.[74] RP (8/31/15) 550; RP (9/1/15) 769.

In addition, the foster mother changed the child's name, taught her to identify herself with her new name, and displayed the new name in the child's bedroom. RP (3/24/16) 1638.

C. Program Coordinator Walker

As it came out later, Walker was part of most email conversations that VGAL Brook had, including many with the foster mother. CP 3909-3912, 4438, 4473, 4766- 4771. She was also aware of the occasion in which a service provider sought help with Brook's "unprofessional" behavior. CP 4301-4309. She was told directly by Brook about the time Brook shared confidential information at the foster mother's home; she was also notified by the department.[75] RP (9/1/15) 774; RP (3/24/16)

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the department was in league with a foster parent opposing the parents' interests. RP (9/1/15) 628.

[74] The foster mother also filed, more than once, extremely detailed logs which focused heavily on the foster mother's perceptions of the parents' actions. CP 22393-22402.

[75]None of these incidents came out until after trial. Walker mistakenly believed that she had discretion to withhold information about VGAL misconduct from the court and the parties. RP (12/3/15) 78-79; RP (6/10/16) 17-19. Judge Farris pointed out that GALR

1445; CP 2650, 7891.

Walker also encouraged Brook to avoid actions that might reveal Brook's bias. Walker cautioned Brook that evidence of her bias might impede termination.[76] RP (3/25/16) 180, 289-290; RP (6/10/16) 21, 28-29; RP (3/24/16) 1567-1570; RP (6/10/16) 21, 26-29; CP 11612-11615.

Later in the proceedings, in one of many interesting courtroom exchanges, staff attorney Haugen attempted to defend Walker's failure to document misconduct or notify the parties and the court. RP (12/3/15) 161-166. First, Haugen claimed that Walker believed the misconduct would be revealed in the department's discovery. RP (12/3/15) 161. Haugen next claimed that Walker believed the misconduct was not, after all, improper. RP (12/3/15) 162. Then she argued that the misconduct did violate rules, but that the violations were only minor transgressions. RP (12/3/15) 162. Finally, Haugen said that Walker did not disclose the information because she believed everyone already knew it. RP (12/3/15) 166.

Judge Farris concluded that program coordinator Walker's silence following each violation encouraged Brook to commit additional

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2(e) requires a GAL to "advise the court and the parties" of potential improprieties. GALR 2(e); RP (6/10/16) 16, 13, 17-19, 28, 29, 31, 32, 43, 54, 61 134.

[76] Several other direct examples of bias came to light and are detailed elsewhere in this brief. Walker knew of these instances. RP (3/24/16) 1627; RP (6/10/16) 16-18; CP 11545-11554, 11644, 11645.

misconduct.[77] RP (6/10/16) 13-14; CP 11566-11569. Farris also saw Walker's silence as revealing her own bias in favor of the foster mother. RP (6/10/16) 16-18; CP 11644, 11645.

D. Walker's GAL Appointment

While the case was pending, VGAL Brook passed away. RP (3/24/16) 1535-1540; RP (3/29/16) 1814. Program coordinator Walker told the foster mother that Brook had died. RP (3/25/16) 286, 320-322.

However, she did not notify the court, the parents, or opposing counsel. RP (3/24/16) 1535-1540. Instead, the Court/Program submitted paperwork indicating that Brook was "no longer able to work the case." RP (3/24/16) 1539; CP 10902. Even the assigned social worker did not find out about Brook's death until she learned of it later from another worker. RP (3/25/16) 150; CP 11698.

Upon VGAL Brook's death, program coordinator Walker took

[77] VGAL Brook apparently did not trust the department's social workers: at one point she refused to inspect the mother's home if the social worker was present. RP (9/2/15) 804-805. Judge Farris later concluded that this reflected bias against the mother and an inability to protect the child's best interests. CP 11611-11612. According to program coordinator Walker, Brook's refusal to cooperate with social workers stemmed, at least in part, from her perception that they did not adequately understand the issues. RP (9/2/15) 804-805. While Brook worked on the case, the department assigned seven different social workers. RP (8/26/15) 95, 96; RP (8/27/15) 262-263, 450, 451, 547.

over as GAL.[78] RP (3/29/16) 1814; CP 10901. Walker never introduced herself to the parents or told them that she was the new GAL assigned to the case. In fact, she had never spoken with either parent before recommending termination at trial.[79] RP (9/1/15) 753; RP (3/24/16) 1589; RP (3/29/16) 1814; CP 11698. During her tenure, Walker spoke with only one service provider[80] and did not contact the child's medical providers. RP (9/1/15) 788-789, 833; RP (6/10/16) 36-37; CP 11698-11699.

After presentation of evidence began in the termination trial, program coordinator Walker sought to "catch" the parents living together despite their statements that they were not in a relationship. RP (8/31/15) 772. Because she feared the parents would recognize her, she sent a colleague to park outside the mother's home and watch her leave for court. RP (8/31/15) 772-773, 784.

Walker's "investigation" came out during cross-examination by the mother's attorney. RP (8/31/15) 772, 784. Joelle Kelly, another

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[78] Walker asked to be assigned to the case because she knew it so well. CP 10728-10732. But, as Judge Farris later outlined at length, Walker's testimony showed that she knew very little about the case. CP 11617-11645.

Although Walker took on the role of GAL, this brief will continue to refer to her as "program coordinator" rather than "GAL" for consistency.

[79] Juvenile Court Administrator Brooke Powell acknowledged that the better practice would have been for Walker to introduce herself to the parents as the new GAL, sometime during the months prior to the termination trial. CP 10679-10686.

[80] Therapeutic Health Services (THS), the mother's methadone maintenance clinic. RP (8/31/15) 496.

employee of the Court/Program, testified that she saw the father talking to the mother before the mother drove off. RP (9/2/15) 912. During cross-examination, Kelly acknowledged that she had taken photos, but no photos had been turned over the any of the parties. RP (9/2/15) 923-924. Kelly said she took the photos with her phone. RP (9/2/15) 924. After further questioning, Kelly admitted that the photos did not show the father at the mother's apartment. RP (9/2/15) 928.

Judge Farris ultimately described Walker's testimony as "uninformed, inconsistent, dishonest and biased." CP 11617-11622. She also opined that Walker had "completely written off the parents" from the moment she was assigned to the case. CP 11697-11704; RP (6/10/16) 36-37.

E. Social Worker Turnover

Another factor that rendered the case uniquely vulnerable to the consequences of the Court/Program's misdeeds had its source in the department. Frequent social worker turnover magnified the Court/Program's influence; the department assigned seven different social workers during the dependency. RP (8/26/15) 95; RP (8/27/15) 262-263. This meant that there were seven workers spread over the time from when Apple H. was born, in February of 2013, until the start of the trial in August of 2015, just 28 months. The transition from one social worker to the next rarely, if

ever, included a meeting with the parents.[81] RP (8/26/15) 96.

Social worker Sheila Green, whose eight-month tenure was the longest, had five different supervisors while she was on the case. RP (8/31/15) 451. She later testified that the high number of supervisors alone made reunification very difficult. RP (8/31/15) 452. Social worker Hollenbeck acknowledged that she did not have the case long enough to develop a relationship with the parents. RP (8/31/15) 547.

One service provider opined that domestic violence victims are more sensitive to high social worker turnover, and it can negatively affect their progress. One of the issues at trial here was that Nichelle A. was the victim of domestic violence.[82] RP (8/27/15) 224-226. The difficult process of building trust with a DV survivor must start afresh with each new social worker. RP (8/27/15) 224-226. This was echoed by social worker Green, who agreed that trust was very important in moving a case forward, and that gaining trust was more of a challenge with domestic violence victims. RP (8/31/15) 454-456.

In addition to building trust with the mother, each new social worker had to learn about the case by reviewing many volumes of files

[81]At least one of the transitions did not even include a meeting between the departing social worker and the newly assigned one. RP (8/31/15) 450.
[82] The impact of domestic violence history and allegations will be addressed elsewhere in this brief.

and speaking with multiple service providers and others involved in the case. RP (8/26/15) 96. One social worker testified that it took her about six weeks to get up to speed after she was assigned. RP (8/27/15) 273. Social worker Williams, the assigned social worker at the time of trial, testified that she had not spoken with service providers or watched a visit even after 10 weeks on the case. RP (9/1/15) 693-694.

By contrast, Brook and Walker were the only representatives of the Court/Program for the duration of the case. CP 10901, 10908. Similarly, the foster mother had one adoption social worker, Deborah Collins, who worked with her for the entire case. Collins was present for all meetings and home visits, including every meeting the foster mother had with VGAL Brook or program coordinator Walker. RP (9/1/15) 769; RP (3/25/16) 285.

F. Mother's Visits

This disparity proved especially important on the issue of visitation. As outlined below, the Court/Program proved very effective in limiting the mother's visitation, including her opportunity to participate in parenting classes with her daughter.[83] CP 11609-11610.

[83] While the basis for this statement is outlined below, including Walker's statement that this was exactly what Brook intended to accomplish, when asked directly, program coordinator Walker denied that they actively tried to disrupt visits. RP (9/2/15) 802.

Social worker Green testified that liberalization of visits is an important marker of progress toward reunification. RP (8/31/15) 489. She described how parents start with supervised visits, progress to monitored visits, and eventually have unsupervised visits. RP (8/31/15) 489.

Program coordinator Walker, too, confirmed that progress in visitation is a significant benchmark in dependency cases. RP (3/24/16) 1464. Walker agreed that reunification could occur if visits moved from supervised to monitored, to unsupervised, to overnight. RP (3/24/16) 1464. She testified that the Court/Program considers visit progress in formulating a recommendation on reunification. RP (3/24/16) 1471.

Social worker Williams described visitation as her highest priority when getting a new case, addressing it before reviewing services or meeting with parents. RP (9/1/15) 670-671. In this case, she wanted to expand visitation to include supervised home visits, which she described as a necessary step toward reunification. RP (3/24/16) 1640-1641.

Department social workers consistently described the mother's visits with her daughter as positive: the mother was affectionate, kind, interactive, and appropriate.[84] RP (8/27/15) 255-256, 294; RP (8/31/15) 477,

[84] At the time of trial, the mother went regularly to visits with her daughter and also spent time with her at parenting classes. RP (8/26/15) 83. Because Judge Farris did not enter a

536, 542. None of the social workers who testified[85] had any concerns about the mother's visits.[86] RP (8/31/15) 432, 477, 536; RP (9/1/15) 665. Professional visit supervisors believed that visits could safely occur in the community. RP (9/1/15) 795, 860-862.

Although the department wished to expand the mother's visits, newly assigned social workers repeatedly deferred to the VGAL, who had been on the case longer. RP (8/27/15) 306-307; CP 4233-4240. Because the VGAL consistently opposed liberalization, visits remained supervised and took place throughout much of the case at the department's office. RP (8/27/15) 307; RP (3/24/16) 1463; CP 12374-12386.

According to program coordinator Walker, the high number of social workers meant that the only way to move visitation forward was to work with the VGAL. RP (9/1/15) 766. She admitted that the VGAL contested every effort to liberalize visits.[87] RP (9/1/15) 767.

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termination order until October of 2016, the mother continued visiting Apple H. long after the court's oral termination ruling. CP 9159-9160, CP 22286.

[85] At least one social worker acknowledged that she never watched any of the mother's visits. RP (8/31/15) 513.

[86] The only concerns about visits came from the foster mother, who was consistent in her desire to restrict or terminate the parents' visits. RP (8/31/15) 542.

[87] At one point, the Court/Program took the position that it would not agree to liberalize the mother's visits without seeing the lease for her rental apartment. RP (9/1/15) 783. Program coordinator Walker acknowledged that visit supervisors could prevent others from attending visits, and that a person could live in a home without being on the lease. RP (9/1/15) 783-786. Social worker Green found the Court/Program's position difficult to understand, since the visits would remain safe and supervised. RP (3/25/16) 157-158. She noted that the

The mother made requests (and brought motions) for more visits and for visits in public locations or at her home. RP (8/27/15) 280-281; RP (9/2/15) 902. Although the mother had the department's support, the VGAL successfully blocked her efforts.[88] RP (8/27/15) 280-281; RP (9/1/15) 736-737; RP (9/2/15) 902; RP (3/24/16) 1463-1464.

The Court/Program's stated reason for opposing professionally supervised community visits was its concern that one parent might show up at the other parent's visit. RP (9/2/15) 859-863. However, when asked, Walker could not think of a single time that a professional visit supervisor proved unable to terminate a visit when necessary. RP (9/2/15) 862. Additionally, program coordinators were not supposed to override the recommendations of professional visit supervisors, including their assessments of safety issues. RP (3/23/16) 1301, 1304. Despite this, Walker overruled the visit supervisor's conclusion that the mother could safely visit her child in the community. RP (9/1/15) 795, 860-862. She later would admit that supervised visits posed no risk, regardless of where they took place. RP (3/24/16) 1463-1464.

VGAL's demand to see the lease was far from typical in dependency cases. RP (3/25/16) 157-158.

[88] At one point, the parents were granted four hours of visits in the community. RP (3/25/16) 166. VGAL Brook sought to prevent these visits by arguing that parenting classes attended by the child should count as community visits. RP (3/25/16) 166. Brook also (falsely) alleged that the mother had cut short community visits; in fact, visits had been cut short by the person transporting Apple H. to and from visits. RP (3/25/16) 166-167; CP 13373-13387.

In another effort to expand visits, the department wished to transition to supervised in-home visits for the mother. RP (8/31/15) 458; RP (3/24/16) 1640-1641. Social workers had visited the home and found it appropriate and safe. RP (8/31/15) 458. The department believed the change was in the child's best interests. RP (8/31/15) 458; RP (3/24/16) 1640-1641. VGAL Brook disagreed, and supervised visits continued in a department office setting. RP (8/31/15) 488; CP 4233-4240, 12374-12386.

At trial, program coordinator Walker testified that her support for termination stemmed in part from the parents' failure to progress to monitored or unsupervised visits. RP (9/1/15) 737. She confirmed that this was largely due to the Court/Program's successful opposition to visit liberalization. RP (9/1/15) 736-737. Walker acknowledged that their position was not motivated by safety concerns. RP (9/1/15) 783-786, 795; RP (3/24/16) 1463-1464. Instead, the Court/Program resisted in-home supervised visits because they might (if successful) lead to monitored and then unsupervised visits. RP (9/1/15) 736-737, 783-786, 795; RP (3/24/16) 1464.

During one of the hearings in the case, Walker admitted the true reason for the Court/Program's stance. She said that the Court/Program blocked progress on visitation because it wanted the foster mother to adopt. RP (3/24/16) 1464-1465. She reiterated that the program opposed loosening supervision requirements even though monitored visits

presented no risk to the child. RP (3/24/16) 1465-1467. She acknowledged that the Court/Program posed the only barrier to liberalization of visits. RP (3/24/16) 1471. She said she was aware that the parents would have made progress on visitation—and hence toward reunification—if the Court/Program had allowed them to. RP (3/24/16) 1464, 1471-1473.

The Court/Program's success in obstructing visit liberalization did not always come about by persuading the court to keep restrictions in place. CP 4233-4240. Instead, VGAL Brook and program coordinator Walker often used provisions the Court/Program had added to court orders. Trial Ex. 38, 40. The added language gave the VGAL authority to approve or veto progress in visitation. RP (3/24/16) 1507-1508; Trial Ex. 12, 38, 39, 40.

Judge Farris later noted that visits would likely have been liberalized if VGAL Brook and program coordinator Walker had been removed for misconduct at the first or even the second instance of misconduct. RP (3/29/16) 1806-1808. As program coordinator Walker and social workers Green and Williams explained, liberalized visits would have marked significant measurable progress toward reunification. RP (8/31/15) 489; RP (9/1/15) 670-671; RP (3/24/16) 1464, 1471, 1640-1641.

G. The Mother's Parenting Classes

Apple H.'s participation in parenting classes with her mother was

also delayed, at least in part by the Court/Program. Review orders admitted at trial included an order for parenting classes. Trial Ex 10, 11, 12, 38, 39. The classes would be professionally supervised in a closed environment. RP (8/27/15) 279; RP (8/31/15) 528. However, through no fault of the mother's, classes did not begin until May of 2015, just three months before the termination trial commenced. RP (8/26/15) 157; RP (8/31/15) 465.

Parenting program staff confirmed that they received a referral for the classes. RP (8/26/15) 157. However, VGAL Brook resisted, and because a program coordinator had added the phrase "subject to VGAL approval" to the court's order,[89] the Court/Program was able to prevent or delay the department's efforts to include Apple H. in the class.[90] RP (8/27/15) 279-280; RP (8/31/15) 488.

Accordingly, the service was not provided in 2013 or 2014, even though it had been ordered by the court. RP (8/27/15) 279-280; RP (8/31/15) 465, 488. The service would have given the mother an opportunity to show what she had learned about parenting her child. RP

[89] At court hearings, program coordinators routinely handwrote this term on orders from their seats at counsel table. RP (2/10/16) 165; RP (3/23/16) 1271-1272; Trial Ex. 12, 38, 39, 40.

[90] Part of the delay stemmed from transportation difficulties for the child. RP (8/26/15) 157. The foster mother refused to provide transportation, which created challenges in getting Apple H. to visits and services. RP (9/1/15) 649-652.

(8/37/15) 282-283. Once the structured parenting classes started, mother and child did well together. RP (8/31/15) 464-466.

Program coordinator Walker later acknowledged that VGAL Brook's misconduct affected the direction of the case and impaired the parents' chance of a fair process. RP (3/24/16) 1476-1477. She believed that Brook's actions undermined confidence in the final decision of the court and harmed the child. RP (3/24/16) 1477-1478.

III. JUDGE FARRIS'S MISCONDUCT INQUIRY

Staff attorney Haugen defended the Court/Program and offered explanations for Court/Program actions. Haugen claimed that the foster mother already knew the confidential information that had been forwarded to her by VGAL Brook. RP (12/3/15) 67; CP 22300-22336. According to Haugen, the foster mother, a police officer, had used police resources to gather information about the parents. RP (12/3/15) 67; RP (3/25/16) 327; CP 22300-22336. This was vehemently denied by the foster mother. RP (3/25/16) 327; CP 22300-22336.

Haugen also claimed attorney-client privilege and refused to respond to some questions posed by Judge Farris. CP 9524-9528. This claim of privilege extended to conversations that transpired without any attorneys present. RP (12/3/15) 205; CP 10163-10172. According to the Court/Program, even the date staff discovered that a volunteer's

misconduct was privileged information. CP 10163-10172.

A. Court/Program's Response to Judge Farris's Inquiry

As described elsewhere in this brief, staff attorney Haugen asked the court to seal court documents relating to the misconduct of another VGAL.[91] She also asked Judge Farris to redact references to this volunteer to protect her "right" to privacy and confidentiality. RP (12/1/15) 989-991; CP 10803-10809. Consistent with the Court/Program's interpretation of their own right to confidentiality, Haugen maintained that the Court/Program's determination that the complaint lacked merit meant that no one could refer to anything pertaining to the alleged misconduct, either in court filings or in conversations outside of court. RP (12/1/15) 994, 995; CP 9524-9528, 10803-10806.

Haugen's arguments were supplemented by a letter threatening legal action against the mother's attorney, for filing documents from their complaint in the termination file. CP 10714-10715; RP (2/11/16) 325; CP 12387-12408. According to prosecutor DiVittorio, the Court/Program can sue attorneys for such "violations," and the letter threatened "further legal

[91] This volunteer had improperly accessed a confidential listserv run by the Washington Defenders Association for parents' attorneys. This misconduct is described at length elsewhere in this brief. The misconduct combined with revelations about Brook and Walker prompted Judge Farris to put the termination on hold while she held hearings on the Court/Program's wrongdoing. CP 10503-10514.

steps". CP 10714-10715; CP 12387-12408. This threat came after multiple breaches of parent confidentiality had been exposed with no action taken by the Court/Program.[92] RP (11/4/16) 432-439, 516-517; CP 12387-12408; CP 10714-10715.

After Judge Farris ordered another volunteer GAL[93] to testify and refused to further seal the file, "court administration" filed a motion to re-consider. CP 10547-10550, 10557-10560. The pleading was submitted by prosecutor DiVittorio; "Court Administration" did not seek permission to intervene as a party before filing its motion for reconsideration. CP 10547-10550. DiVittorio would later explain that the Court/Program was a single indivisible entity.[94] *See* RP (11/4/16) 401; RP (11/18/16) 1857-1858.

According to the Court/Program, Judge Farris lacked any power to address VGAL misconduct occurring in her courtroom. CP 10547-10550. Judge Farris denied "Court Administration's" motion noted that she was not conducting a "review" of the administrative grievance process. CP

[92] In a later order addressing the issue, Judge Farris reminded the Court/Program that the documents they considered confidential were actually filed by the Court/Program. CP 10503-10514. Judge Farris entered a limited protective order which did not maintain the VGAL's confidentiality. CP 10557-10560. The Court/Program filed an additional motion, apparently seeking further redaction of records. CP 9736-9768.

[93] This was Cynthia Bemis; more of her actions are described elsewhere in this brief.

[94] Under this logic, "Court Administration" would not need to intervene, since it was already a party in its incarnation as the VGAL Program, which had been appointed to the case. CP 10908. DiVittorio later took the position that the Court/Program was not a party. CP 13663-13670.

10503-10514.

B. Court/Program Response to Parents' Discovery Demand

In this case, like all others, the Court/Program had negotiated with the mother's attorney to attempt to limit discovery that the program would need to provide. RP (3/23/16) 1244-1248, 1263, 1286-1287, 1291; RP (3/25/16) 243, 245; RP (6/10/16) 64-68; RP (11/4/16) 463-464; CP 10567-10571, 12387-12408. The ABC Law Group made concessions based on staff attorney Haugen's assurances that there were no pertinent cell phone texts or photographs, and that email attachments merely duplicated material in discovery provided by the department. RP (3/23/16) 1244-1248, 1263, 1286-1287, 1291; RP (3/25/16) 243, 245; RP (6/10/16) 64-68; RP (11/4/16) 463-464; CP 10149-10162, 10567-10571, 12387-12408.

It would turn out during trial that all three of these types of information not only existed, but also contained important facts. Text conversations, photos, and attachments all proved significant here. RP (8/31/15) 772-773, 784; RP (9/2/15) 822-826, 833-840; 886-888, 891-893, 912, 923-924; RP (12/3/15) 24-26; RP (2/10/16) 244-246; RP (3/24/16) 1474; RP (6/10/16) 43, 130-131; Trial Ex. 136, 152; CP 3226-3253, 10572-10678, 10867-10878, 11554-11565, 11566-11569.

Prior to the discovery cutoff date in this case, the Court/Program uploaded 1341 pages of materials to its online portal and notified opposing

counsel. RP (12/3/15) 14; CP 5674-5686, 10567-10571. The discovery omitted numerous emails and other records, including messages relating to VGAL Brook's misconduct. RP (12/3/15) 14-15, 17, 137-138; RP (3/25/16) 246-247; CP 22300-22336, 11573-11577.

Some such messages should have appeared in the discovery multiple times, in Brook's "sent" folder, and in program coordinator Walker's email as well.[95] CP 22300-22336, 3909-3912, 4438, 4473, 4766-4771. Much of the information would not be discovered until multiple orders compelling production were entered, long after the department rested their case. RP (1/13/16) 1052-1055; RP (1/29/16) 1091, 1104, 1109; RP (6/10/16) 90-92; CP 8953-8962, 9440-9443, 9454-9457, 10800-10802, 10848-10850, 10879, 22300-22336.

After the discovery cutoff date, the Court/Program uploaded nearly 1,000 additional pages to its online portal. CP 5674-5686, 10567-10571. This time, they did not notify the parents' attorneys. RP (12/3/15) 14-16; CP 10567-10571. This late discovery – uploaded after cutoff without notice to the parents' attorneys—contained evidence showing multiple instances of misconduct. RP (12/3/15) 14-16.

[95] At various times, the Court/Program would claim that Brook and/or Walker's email had been "corrupted" and thus could not be retrieved. RP (12/3/15) 45, 50; CP 10149-10162. This proved to be untrue. CP 9440-9443, 11727-12287.

At trial, during cross-examination of program coordinator Walker, an administrative assistant for the Court/Program was tasked with checking to see if the parents' attorneys had accessed the late discovery. RP (12/3/15) 16; CP 10728-10732. She confirmed to Walker that no one viewed the materials. RP (12/3/15) 16; CP 10728-10732.

Despite this, no one alerted the parents' attorneys that they were missing nearly 1,000 pages of discovery. RP (12/3/15) 16. Instead, the attorneys continued their cross-examination of program coordinator Walker, ignorant of the evidence of misconduct contained in the late discovery.[96] RP (12/3/15) 16.

A review of the late discovery revealed that it, too, was incomplete. CP 22300-22336, CP 11573-11577. Even including the late addition to the discovery portal, the documents provided did not include numerous emails and other information revealing program misconduct.[97] RP (3/23/16) 1339-1340; CP 22300-22336, 11573-11577. Judge Farris noted a trend: evidence of misconduct had consistently not been turned over. RP

[96] According to staff attorney Haugen, the Court/Program would have told the parents' attorneys about this portion of the missing discovery if the attorneys had asked about it. CP 10567-10571.

[97] Despite multiple orders directed at the Court/Program, as well as an order for limited data extraction by the county's Department of Information Services (DIS), Judge Farris and the parties never received a complete set of emails and other records relating to the Court/Program's misconduct. RP (1/13/16) 1052-1055; RP (1/29/16) 1091, 1104, 1109; RP (6/10/16) 90-92; CP 8953-8962, 9440-9443, 9454-9457, 10553-10556, 10800-10802, 10848-10850, 10879, 22300-22336.

(3/29/16) 1696-1697.

Following closing arguments, Judge Farris issued an oral ruling. RP (9/11/15) 1-32. In her oral ruling, she told the parties she planned to terminate. RP (9/11/15) 10-32. However, when evidence of misconduct began to emerge, Judge Farris did not enter a termination order. RP (12/3/15) 10; RP (3/29/16) 1813-1814; RP (2/17/17) 191-192; *see* CP 10553.

As a result, the mother continued to visit her daughter for more than a year after the court's oral ruling. CP 9159-9160, 22286-22287. She also continued to participate in services. CP 22413, 9159-9160, 22286-22287.

Judge Farris noted on more than one occasion that her oral termination ruling might not stand. RP (12/3/15) 168, 172-180; RP (1/29/16) 1114; RP (3/29/16) 1808-1809, 1814; RP (6/10/16) 63, 76; CP 12390.

C. Walker's Testimony

In her trial testimony, program coordinator Walker revealed information showing what Judge Farris called VGAL Brook's bias and misconduct. This included Brook's improper sharing of confidential material with the foster mother. RP (9/1/15) 768, 773-774, 886-888. However, Walker testified later, again under oath, that she hadn't known Brook was emailing confidential information at the time. RP (9/1/15) 775, 782, 886. This

claim came despite the emails showing Walker had been copied on many of Brook's messages throughout the case. RP (9/1/15) 756, 768, 787, 807, 844; CP 3909-3912, 4438, 4473, 4766-4771, 10728-10732.

In her later testimony, Walker averred that her earlier testimony, which outlined some misconduct and described her response to it as it occurred, was incorrect. RP (12/3/15) 141-148; RP (3/24/16) 1600-1604; CP 10565-10566. She maintained that she'd accidentally testified untruthfully, repeatedly and in great detail at trial, because she'd been "rattled" by the allegations of misconduct. CP 10728-10732.

Among other things, her claim of ignorance was undermined by her ability to quote from a conversation she'd had with Brook about one breach of confidentiality immediately after it happened. RP (9/1/15) 774; RP (3/24/16) 1445.

Addressing this, Judge Farris concluded that "Walker falsely recanted her trial testimony."[98] CP 11654. She found that Walker "made this false repudiation willfully and in bad faith for the purpose of trying to avoid a removal for cause and other negative consequences arising out of [her] trial testimony." CP 11655.

On behalf of the Court/Program, staff attorney Haugen argued that

[98] Staff attorney Haugen confirmed that program coordinator Walker had discussed VGAL Brook's improprieties with her (Haugen). CP 10572-10678.

Walker was not responsible for knowing the contents of her own emails and their attachments. RP (12/3/15) 85-91, 97, 141-143 CP 10716-10727. This was so, according to Haugen, because Walker's trial preparation included a review only of those materials provided in discovery, which omitted many of the emails and all of the attachments. RP (12/3/15) 27, 85-91, 97, 141-144; CP 10716-10727, 10728-10732.

D. Judge Farris's Order of Production

Testimony at trial made clear that the Court/Program had not provided complete discovery to the parents' attorneys. RP (8/31/15) 606-607; RP (9/1/15) 775; RP (9/2/15) 837-838, RP (12/3/15) 14. Judge Farris ordered the Court/Program to produce all communications between Brook and the foster mother. RP (8/31/15) 606-607; RP (9/11/15) 5, 30-32; CP 10879. When the Court/Program failed to comply, Judge Farris entered a second order compelling production. CP 10848-10850. When this too produced no result, she entered a third order. CP 10800-10802.

Despite these orders, the Court/Program never provided a complete copy of the email correspondence.[99] CP 8953-8962, 9454-9457, 10553-10556, 11283-11395, 11537-11616, 22300-22336.

[99]A partial extraction of the emails over a limited period by the county's DIS hinted at the number of emails withheld. RP (6/10/16) 90-92; CP 22300-22336, 9440-9443. The extracted emails also revealed multiple rule violations in other cases. RP (6/10/16) 93-94.

The Court/Program did respond, nearly three months after the court's initial order. CP 10572-10678. The Court/Program acknowledged that VGAL Brook had committed multiple acts of misconduct. CP 10572-10678. But Judge Farris had directed production of all communication between Brook and the foster mother; the Court/Program's response remained incomplete.[100] CP 8953-8962, 9454-9457, 10553-10556, 11283-11347, 11348-11395, 11537-11616, 22300-22336. Judge Farris again, for the fourth time, directed the Court/Program to provide this material, as well as Brook's communication with the foster mother's private adoption social worker. CP 10553-10556.

E. 8000 Pages of Discovery

Then, in January of 2016, the Court/Program provided Judge Farris nearly 8,000 pages of material. RP (1/13/16) 1052-1055. The Court/Program did not file these materials. CP 8953-8962, 9716-9733, 12288-12291, 13714-13716. What they gave to the attorneys was in a different order and did not contain all the materials included in the version given to Judge Farris. RP (9/23/16) 199; CP 8904-8908, 8953-8962, 13714-13716, 14216-22274.

[100] One source of information that made this clear was the foster mother, who provided additional emails and unredacted confidential reports that Brook had shared with her. CP 10182-10331.

Even in the version given directly to the judge, the documents had been scrambled, making it impossible to determine if any pages were missing. RP (1/29/16) 1109; RP (3/25/16) 344-347; CP 14216-22274. Later testimony established that the only way for this to have occurred was if it had been done intentionally by someone within the Court/Program; however, the culprit was never identified. RP (3/25/16) 361-369; RP (3/29/16) 1711-1715; RP (6/10/16) 81-82; CP 9653-9654, 9703-9704, 11283-11347.

The 8,000 pages of material also included multiple copies of certain random documents. RP (6/10/16) 81; CP 769-8768, 11283-11347. Most of the documents were unrelated to the court's order to produce VGAL Brook's correspondence with the foster mother. CP 769-8768, 11283-11347. Judge Farris later concluded that this "document dump" was a deliberate attempt by the Court/Program to hide proof of misconduct.[101] CP 769-8768, 11283-11347.

The Court/Program provided a set of documents to Judge Farris, and a different set to the mother's attorneys. This occurred in January of 2016. CP 9705-9706, 9707-9708, 10499-10502, 10149-10162, 22407-22409. The Court/Program did not file what they provided. Later, in

[101] Without having reviewed the full record, Judge Small would later suggest that Judge Farris had asked for the 8000 pages. RP (6/28/17) 5, 7, 17; RP (10/6/17) 5-6.

August of 2016, they filed a set of documents totaling over 8000 pages, which apparently did not match what they provided directly to the judge. CP 769-8768.

Even this 8,000-page "document dump" did not include all the available material proving Brook's misconduct. CP 769-8768, 22300-22336. The court continued to order production of missing records. CP 9454-9457, 9694-9700.

At Judge Farris's direction, an outside specialist from the county's Department of Information Services (DIS) extracted emails from Brook's account. RP (6/10/16) 90-92; CP 9440-9443, 12459-12594, 22300-22336. Even though the court limited the extraction to a period of two months, the DIS specialist found many additional emails showing VGAL Brook's misconduct. RP (6/10/16) 90-92; CP 22300-22336, 12459-12594. These emails had not been provided in the discovery or the "document dump." CP 22300-22336, CP 8904-8908, 8953-8962, 12459-12594, 13714-13716.

Despite numerous requests for clarification, the program supervisor and other staff members failed to explain how or why the 8,000-page scrambled document dump had been prepared. RP (3/29/16) 1711; CP 9705-9706. No one could explain why the vast trove of information was missing critical documents, how the materials became scrambled, why it vastly exceeded the scope of Judge Farris's original order directing

production, or why it included so many duplicate copies. RP (3/29/16) 1711-1712; CP 769-8768, 9705-9706.

F. Brook's Box of Case Materials

During one of the many hearings in this case, Judge Farris learned that the Court/Program had custody of a box of documents comprising VGAL Brook's paper file. CP 9432-9433. Brook's family had discovered the box after her death and brought it to the Court/Program's office. CP 9432-9433.

The box was stored in program coordinator Walker's office. RP (3/24/16) 1490, 1618; CP 9449-9453. When Walker mentioned the box during a hearing, Judge Farris ordered the Court/Program to produce it. Walker agreed but returned to court the next day claiming that she could not find the box.[102] RP (3/25/16) 145-148; RP (3/25/16) 206, 258-259, 274-275; CP 9180-9189.

Neither Walker nor program staff could explain how it had vanished. RP (3/25/16) 145-148; RP (3/25/16) 206, 258-259, 274-275; CP 9109-9127.

After months spent seeking the box or an explanation for its

[102] Judge Farris reminded program staff of their duty to archive and retain records. CP 9180-9189.

disappearance, Judge Farris noted that "The 'very large box' of all of VGAL Brook's original notes and the entire original VGAL Brook hard file for this case *disappeared in the middle of this litigation without a trace*." CP 22300-22336 (emphasis in original).

Judge Farris noted that the disappearance of the box came during proceedings relating to the Court/Program's concealment of evidence. CP 22300-22336. She described this as "telling hubris," and remarked that some court employees "operated as if they are above the law." CP 22300-22336.[103]

G. Walker's Removal

ABC Law Group continued to try to use the grievance system to correct some of the misconduct that had been uncovered. After program coordinator Walker's misconduct came to light, they filed a complaint against Walker. RP (2/10/16) 16; CP 10680-10686. Walker was notified before any finding of potential merit. RP (2/10/16) 16, 17. Staff attorney Haugen advised Walker as Walker drafted her lengthy response to the

[103] In a subsequent hearing, she made the following comment regarding the missing box: "We have now a recognition that the court took control of all of the VGAL's records and lost them in the middle of the litigation." RP (11/4/16) 517.

complaint. [104] RP (1/29/16) 18, 55; RP (2/10/16) 18, 38; RP (6/10/16) 100-102; CP 10728-10732. Haugen also advised program supervisor Peniche, who reviewed the complaint.[105] RP (1/29/16) 18, 55; RP (2/10/16) 18, 38; RP (6/10/16) 100-102.

For the first time in its history, the Court/Program made a finding of "potential merit." RP (2/11/16) 371; CP 10679-10686, 10733-10735. The ABC Law Group notified the Court/Program that it wished to reply to Walker's response.[106] RP (2/10/16) 24, 35. It was not given an opportunity to do so. RP (2/10/16) 24, 35; RP (2/11/16) 340, 356, 372.

Without any reply from the complainer, ultimately, Juvenile Court Administrator Powell dismissed the complaint. RP (2/11/16) 339-341, 356, 372; CP 10679-10686. Even though she had been presented with Judge Farris's oral ruling outlining numerous instances of misconduct, Powell labeled the complaint unfounded. RP (2/11/16) 357, 372; CP

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[104] Walker claimed she'd first learned of the existence of the GALR during trial. RP (3/24/16) 1542. She repeatedly argued that a 40-hour work week didn't give her enough time to learn the rules that governed her job duties. CP 9444-9448, 9496-9512.

[105] Despite a court order, program supervisor Peniche and staff attorney Haugen discussed Peniche's testimony on the subject. RP (3/23/16) 1315-1316. After Peniche told the court they had discussed the matter, Haugen contradicted her, claiming that she played no role in program coordinator Walker's response. RP (6/10/16) 101; RP (2/11/16) 384. Although Peniche had affirmed that Haugen was present multiple times, she later claimed to be "unsure," given Haugen's denial. RP (3/23/16) 1316-1317. Even after saying she was unsure, Peniche was able to specifically describe where Haugen sat during the meeting with Walker. RP (3/23/16) 1330-1331.

[106] As permitted under former SCLJuCR 9.4(f).

10679-10686.

In addition to using the county's grievance procedure, the mother's attorney filed a motion seeking removal of Walker as GAL in this case. CP 22337-22392.[107] In response, the Court/Program argued that the court could not address the motion because the grievance was still pending.[108] CP 10716-10727.[109]

Ultimately, Judge Farris removed Walker (and the Court/Program) for cause.[110] CP 11669-11704. She appointed an independent Attorney GAL (AGAL) named Paige Buurstra to represent the best interests of the child. CP 9716-9733, 22406. Buurstra would later urge Judge Farris to set aside her oral ruling and order a new trial.[111] RP (3/29/16) 1825; RP

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[107] The motion was originally filed in October of 2015, but in the dependency file. CP 411.

[108] The grievance was still pending because the Court/Program had failed to process the complaint within the timeline required under Former SCLJuCR 9.4. RP (2/11/16) 382; CP 10733-10735.

[109] The Court/Program later argued that Judge Farris had no authority to remove a VGAL for misconduct. CP 10547-10550. In fact, prosecutor DiVittorio argued on behalf of the Superior Court that a trial judge could only remove a GAL based on misrepresentation of qualifications as found through the administrative grievance process. CP 10547-10550.

[110] Following this, program supervisor Peniche notified the court that program coordinator Walker would no longer be available to answer the court's questions because she had been placed on "protective leave." CP 9651-9652.

[111] AGAL Buurstra held this opinion prior to the entry of a termination order. At that point, she believed that Court/Program misconduct made the risk of reversal on appeal too great, and a faster resolution could be obtained through a new trial. RP (3/29/16) 1825. More than a year later, after entry of a termination order, Buurstra changed her position. She opposed the mother's motion to set aside the decision. RP (10/6/17) 19-22. Judge Farris had also suggested that it might be faster and less expensive to retry the termination immediately rather than going through the entire appellate process first. RP (3/29/16) 1809.

(2/17/17) 190-193.

The mother moved to vacate the termination findings and requested sanctions. CP 9546-9580.[112]

IV. RECUSAL AND TERMINATION ORDER

A. Superior Court's Role

Judge Farris watched with apparently mounting shock and disbelief as the program lied and ignored her orders to produce relevant information. She had found that the Court/Program engaged in abusive litigation tactics, concealed evidence, hid misconduct, and gave false information. RP (6/10/16) 5, 127-128. She also found that the Court/Program retaliated against those who exposed misconduct, "reaping revenge" against attorneys who zealously advocated for their clients.[113] RP 6/10/16)

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[112] Among other things, Walker claimed immunity and argued that her ignorance of the GALR precluded sanctions. RP (9/23/16) 55; RP (3/29/16) 1723-1735. Haugen denied committing misconduct. RP (10/6/17) 52-64, 76-77, 85-91. The Court/Program argued that it had immunity, was not a party, and could not be sanctioned. RP (10/6/17) 79-82.

[113] Yet another example of retaliation came up as part of the impact of this case on others. The Court/Program removed a contract attorney named Susan Harness from all cases in which she represented a VGAL or the VGAL program, including a case scheduled for the next day. RP (3/23/16) 1223-1230, 1298-1299. The Court/Program took this action after receiving a letter signed by Harness and 19 other local parents' attorneys in response to Brook's breaches of confidentiality and program coordinator Walker's failure to take corrective action. RP (3/23/16) 1223-1230, 1298-1299. The letter revoked releases that had been signed by parents to enable Walker and the Court/Program to obtain confidential information. RP (3/23/16) 1223-1230, 1298-1299; CP 12929-12941. The Court/Program told Harness that signing the letter created a conflict, even though none of her cases involved Walker. RP (3/23/16) 1225. The Court/Program had previously dealt with conflicts by screening counsel (including staff attorney and former AAG Gwen Forrest Reider) from

5, 127-128. She described the impact of such retaliation:

> It is impossible to measure how and to what extent retaliation against a small firm in this small community affects the willingness of all parents' attorneys to zealously advocate to protect their clients' constitutional rights to raise their children.
>
> How many local parents' attorneys will never ask for full discovery, will never bring the contested motion, or will hold back on vigorously attacking the VGAL for fear they will be the next target of retaliation?
>
> When VGALs retaliate, they're placing their personal passions for revenge ahead of the needs of any children whose best interest they're supposed to protect.
>
> Retaliation is contrary to permanency….
> RP (6/10/16) 127-128.

Judge Farris increasingly hinted that the actions taken by individuals as well as the support of those actions by the Court/Program could lead to sanctions. RP (7/22/16) 1831. DiVittorio, the deputy prosecutor who represented the Snohomish County Superior Court, entered an appearance.[114] CP 22297-22299.

In a document captioned "Snohomish County Superior Court's

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conflict cases. RP (3/23/16) 1223-1230, 1298-1299. The Court/Program later denied that Harness had been fired. RP (3/23/16) 1297.

[114] At oral argument, DiVittorio told Judge Farris that she was appearing "as the representative here of the Snohomish County Superior Court's Program." RP (9/23/16) 44. She emphasized the point again later, stating that she was "representing the Snohomish County Superior Court." RP (9/23/16) 151. Judge Farris had previously ruled that Court Administration was not a party to the proceedings. CP 10503-10514. It became clear, however, that the Superior Court had been a party all along, since the Court/Program was appointed as a second GAL in the early stages of the dependency. CP 10901, 10908.

Response to Mother's Motion for Sanctions," prosecutor DiVittorio announced the Superior Court's view of the best interests of the child and directed Judge Farris to terminate: "[T]his case should be immediately concluded with… a final termination order entered by the trial court judge assigned to this case, to serve the best interests of this child." CP 13668.

DiVittorio repeated the Superior Court's request at oral argument. RP (9/23/16) 150. On behalf of the Superior Court, DiVittorio told Judge Farris "The Court asks that you… resolve this case by entering a termination order." RP (9/23/16) 150.

The Court/Program characterized the mother's sanctions motion as a request "to impose sanctions against the Court," and objected to any ruling on sanctions. [115] CP 13663-13670; RP (9/23/16) 187.[116] At argument, prosecutor DiVittorio reiterated that the VGAL Program is "part of Snohomish County Superior Court." RP (9/23/16) 58. She also described

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[115]The Court/Program also accused Judge Farris of infringing on Presiding Judge Krese's general supervisory authority (as described in GR 29). CP 13663-13670. The Court/Program asserted that Presiding Judge Krese had delegated authority over the VGAL program to the Superior Court Administrator, not to any of her colleagues on the bench. CP 13663-13670. According to the Court/Program, "Absent such delegation, the trial court judge assigned to this case has no authority to enter orders that impact the functions, personnel, or administration of the Court's program." CP 13663-13670.
Program coordinator Walker's attorney also argued in favor of review by the Presiding Judge. RP (9/23/16) 57. This was, in part, to protect Walker's "constitutional interest in [her] reputation," though counsel did not explain what section of the constitution supported this right. RP (9/23/16) 56.

[116] Throughout her pleadings, prosecutor DiVittorio quoted Judge Farris's rulings but substituted the "[the Court]" in place of the phrase "the VGAL Program." CP 13663-13670.

it as "an arm of Snohomish County Superior Court." RP (9/23/16) 153.

DiVittorio argued that the Court/Program's misconduct should be addressed by the judges behind closed doors:

> [I]t's the court's position that this is appropriately remedied—both the issues with Ms. Walker, as well as the issues within the Program are remedied by a referral to the presiding judge and the rest of the bench to deal with this on an administrative level…
> RP (9/23/16) 58.[117]

DiVittorio emphasized that Judge Farris was one of the judges who would address the misconduct, privately, along with her colleagues:

> [Y]our Honor has the ability to address these issues in another forum… As a member of The Court, your Honor is in a position to address these issues outside the context of this dependency action…
> RP (9/23/16) 58.

The Court/Program argued that it could not be subject to sanctions because it lacked party status. RP (9/23/16) 163, 170, 180. Judge Farris ordered the Court/Program to show cause why it should not be treated as a party. CP 12889-12921.

Judge Farris's building horror and frustration was starting to show. In just one of her orders relating to the Motion to Recuse, her words included: "failed to advise," "improperly exploited," "abdicated her duty," "trick," "hide GAL misconduct," "retaliation," "attempt to improperly

[117] DiVittorio repeated this argument multiple times. RP (9/23/16) 150, 154, 170, 184.

influence," "bad faith," "falsely claiming," "nearly impossible," "no explanation," "falsely telling the court," "never checking," "never correcting," "material false facts," "failed to respond," "directed the withholding," "most egregious breach," "incriminating emails," "factually false and misleading," "not reasonable," "lied," "misrepresented facts," "false claim," "misleadingly claimed," "bogus excuse," "lack of preparation," "falsely swore," "violated a court order," "knowing it was false," "inaccurately claimed," "inaccurately made a claim in court," "made up fake details," "representing fictional facts," "concocted details," "failure to disclose," "facts were made up," "repeatedly misleadingly stated," "misleadingly denied," "misrepresent herself," "knew was false," "created a false narrative," "false version of the facts," and "improper purpose. CP 12889-12911.

Some form of the word "fail" appeared at least 25 times in the 22 pages of the Show Cause Order. CP 12889-12911.

Another round of briefing was done. CP 12820-12825, 12840-12855, 12883-12888. The Court/Program continued to argue that Judge Farris must recuse because there was "the fundamental misunderstanding that a Program of the Court is an independent entity[;] [i]n fact, it is not."

CP 12820-12825, 12883-12888; RP (11/4/16) 409; RP (11/18/16) 1852.[118]

B. Judge Krese's Role

In response to Judge Farris's orders to show cause regarding party status, the Court/Program filed a declaration signed by Presiding Judge Linda Krese. CP 12880-12882. This was not Judge Krese's first contact with the family. In her declaration, she avowed that she was "personally familiar with this case." CP 12880-12882.

At the start of the dependency, Judge Krese had signed the pick-up order removing Apple H. from her parents' care. CP 12314. Following a contested shelter care hearing, she had entered an order placing the child in foster care. Trial Ex. 8. She had presided over the dependency trial, found Apple H. dependent, and refused to order an in-home dependency. Trial Ex. 9. Presiding Judge Krese had also appointed Brook and the Court/Program as the child's GAL in the dependency proceeding. CP 1234.

Judge Krese met with other Superior Court judges to discuss this case while it was pending.[119] CP 12880-12882. She held this meeting one day before Judge Farris began a round of hearings regarding

[118] Despite this, the Court/Program argued that "the same conflict does not exist" for the dependency and termination. CP 12820-12825.

[119] Judge Farris did not attend this meeting. CP 12880-12882.

Court/Program misconduct. RP (3/23/16) 1222.

Judge Krese also had two conversations about the case with Judge Farris. CP 12880-12882. According to Judge Krese, these conversations required Judge Farris to recuse herself because Judge Farris made false statements about them.[120] CP 12880-12882.

The Court/Program reiterated this point in its pleadings, arguing that Judge Farris's "inaccurate statements" required recusal. CP 12820-12825; *see also* CP 12883-12888. The Court/Program claimed it would call Presiding Judge Krese as a witness if Judge Farris did not recuse herself.[121] CP 12820-12825. The Court/Program also noted that Presiding Judge Krese herself believed there was a conflict. CP 12820-12825.

In her declaration, Judge Krese asserted "that there is a conflict"—at least on the sanctions motion—and "that such a conflict cannot be addressed by 'a wall.'" CP 12880-12882. According to Judge Krese, she would not have told Judge Farris "that we can maintain a wall so as to avoid any conflict…"[122] CP 12880-12882.

Presiding Judge Krese did tell Judge Farris "something to the

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[120] Judge Farris later insisted that her statements were consistent with those of Presiding Judge Krese. RP (11/18/16) 1899-1903CP 502-510.

[121] The type of court procedure that involves offering live testimony *after* a motion is denied was never explained.

[122] According to Judge Farris, Presiding Judge Krese had said a wall could be maintained to prevent conflicts. RP (9/23/16) 153.

effect of 'it would be good if [this case] got wrapped up." CP 12880-12882. In her declaration, Judge Krese announced her belief that "it was in the best interests of… the child… and the court, for the case to be resolved." CP 12880-12882.

Prior to the next hearing, Judge Farris received an anonymous communication in her internal message box, which was accessible only to court personnel. CP 12630-12631. The communication was a "Judicial Ethics Bulletin" addressing disqualification of judges. CP 12630-12631. Judge Farris took this as an attempt to sway her decision. CP 490-492.

Presiding Judge Krese, as well as another Superior Court Judge, attended the next hearing on the case. CP 479-480. The two judges sat behind prosecutor DiVittorio as she presented argument on behalf of the Court/Program. RP (11/4/16) 393-518; RP (11/18/16) 1852-1853; CP 479-480. Far from a common occurrence, this got Judge Farris's attention. RP (11/18/16) 1852-1853. She described it later:

> They brought two judges to the courtroom for the hearing, including the presiding judge…. [T]hey brought the presiding judge to the hearing, and then asked [me] to rule in "the Court's" favor.
> RP (11/18/16) 1852-1853.

Judge Farris saw this as an attempt to "improperly influence or pressure the trial judge" and to "intimidate or pressure the parents' attorneys." CP 480.

With the presiding judge at her back, prosecutor DiVittorio told Judge Farris that it had become "abundantly clear that there is an unfortunate miscommunication that has occurred within this case that has made it appear that the program is an independent entity…[T]hey are not two independent entities; they are, in fact, one [and] the same." RP (11/4/16) 403. Judge Farris asked her about this:

> THE COURT: So the VGAL program has always been the court both before, during, and after the trial?
> MS. DI VITTORIO: The VGAL program is -- is an arm of Snohomish County Superior Court. Every employee within the program itself is a court employee.
> RP (11/4/16) 403.

Judge Farris questioned DiVittorio at length about the relationship between the judges and the VGAL program, trying to ascertain how she could rule on the termination given the Court/Program's unitary nature and its argument that she could not impose sanctions. RP (11/4/16) 393-450, 497-518.[123]

> THE COURT: When you say you represent the Court, do you mean you're representing the judges?
> MS. DI VITTORIO: I represent the entire court.
> THE COURT: Including the judges?
> MS. DI VITTORIO: Correct.
> THE COURT: Is it your position that the VGAL program and its employees are the court?
> MS. DI VITTORIO: Yes.

[123] According to DiVittorio, the Court/Program's position was that the termination was effectively complete, and that the sanctions issue could be bifurcated and heard by a different judge. RP (11/4/16) 399-401; *see* CP 12818-12825.

> THE COURT: So the acts of the VGAL program and its employees are acts of the court?
> MS. DI VITTORIO: Yes.
> RP (11/4/16) 401.

Judge Farris also asked if anything had been done to screen judges from active cases.

> THE COURT: Is there anything being done by the court to separate and keep independent the VGAL program from the court?
> MS. DI VITTORIO: I can't answer that question, Your Honor.
> RP (11/4/16) 402.

> THE COURT: Is there any effort by the court to treat that particular arm differently than other arms of the court?
> MS. DI VITTORIO: I guess I don't understand what you're getting at, Your Honor. I mean, there's a program administrator that administrates that program. …. I'm not – I'm not understanding what kind of separation you would be thinking of.
> THE COURT: All right.
> RP (11/4/16) 403.[124]

C. Judge Farris's Recusal

At the next hearing, Judge Farris recused herself. She noted the pressure applied by the attendance of the judges on behalf of the

[124] Another quotation from the extended colloquy:

> THE COURT: [A judge] should not get involved in litigation disputes… between the VGAL program and the people they litigate against. So to your knowledge, did your client do anything to prevent that?
> …
> MS. DI VITTORIO: [Under CJC 2.12], if the court administration is deemed to not be able to do anything that the Court can't do… then I would have to answer no. Because I know there has been involvement or there was involvement on a singular issue by court administration that I'm aware of.
> RP (11/4/16) 512-513.

Court/Program at the last hearing. RP (11/18/16) 1852-1853. After recusing herself, Judge Farris entered an order of termination. CP 12374-12386.

Judge Farris found she had a conflict that spanned the entire case and recused herself from further proceedings. CP 12387-12408. She announced her decision in a lengthy oral ruling, memorandum opinions and an Order on Recusal. RP (11/18/16) 1850-1912; CP 209-526, 11283-11395, 11537-11616, 12387-12408.

Judge Farris concluded that "No ethical firewall or boundary protocol existed between the Snohomish County Superior Court and the Snohomish County VGAL Program" even though court employees were actively involved in the litigation for one side.[125] CP 12387-12408. She described the Court/Program as a single "indivisible" entity and noted that judicial involvement in the Court/Program "turned the court into a party." RP (11/18/16) 1857-1858.

She criticized the superior court bench for "involving itself in the

[125] Judge Farris decried the lack of accountability for program staff and attorneys, even where they were guilty of "the blatant withholding and destruction of evidence and the rampant continuing lying that went on" here. RP (11/18/16) 1870. As she put it, "[t]he Court… just announced loud and clear that all VGAL Program attorneys and employees can withhold discovery and lie in Snohomish County Superior Court pretty much with impunity." RP (11/18/16) 1869.

litigation behind the scenes" without disclosing its involvement.[126] RP (11/18/16) 1894. Judge Farris concluded that "the bench or its direct staff aligned with the guardian ad litem party, had *ex parte* communications with that party's lawyer, and assisted or directed the party's lawyer against opponents." RP (11/18/16) 1896-1897. In this case, judges and their staff "specifically directed the guardian ad litem's attorney how to respond to discovery requests by the parents' attorneys." RP (11/18/16) 1875.

She pointed out that judges met secretly with staff attorney Haugen to create "informal rules" and to give "marching orders" and "mandatory directives" regarding dependency and termination cases. RP (11/18/16) 1876, 1879.[127] She pointed out that staff attorneys' dual representation of the GAL and the Court meant that parents' attorneys "could not oppose the GAL's attorney without also opposing the Superior Court's attorney representing the Superior Court because it was the same person."[128] CP

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[126] Another aspect of the inconsistency of positions taken by the Court/Program, Judge Farris noted: "The VGAL Program/Court had no problem at all asking this judge to rule, assuming that the last-minute show of court pressure and connection would result in a summary decision in its favor… [T]he VGAL Program/Court had no problem exploiting [the] conflict to work in the VGAL Program's favor." RP (11/18/16) 1853-1854.

[127] These "mandatory directives" and "informal rules" required the Court/Program to (1) object to all discovery requests, (2) refuse to produce any discovery without a discovery conference, and (3) charge the attorneys of indigent parents by the page for any discovery produced. RP (11/18/16) 1875-1877. These informal rules forced the ABC Law Group to make concessions in "a desperate attempt to get any discovery at all." RP (11/18/16) 1878.

[128] Apparently, the bar association believed this dual role was a conflict requiring Haugen to withdraw. CP 22410-22411.

12397.

As Judge Farris put it:

> [T]he Superior Court was a party before the Superior Court… [T]he Court appeared before the Court to argue for one side of the case… [T]he Court appeared [in court] to argue the Court's interest to the Court.
> RP (11/18/16) 1861-1862.

Judge Farris concluded that the systemic problems she'd uncovered violated due process:

> The now disclosed failure of the Snohomish County Superior Court to create any separation or division and to instead become wholly enmeshed and intertwined with the VGAL Program impedes the due process rights of the other parties.
> RP (11/18/16) 1867.[129]

She determined that "no Snohomish County Superior Court Judge ever should have ruled on anything in this case," and that the Superior Court's involvement denied the parents their "due process constitutional right to a judiciary whose impartiality is without question." CP 12387-12408.

D. Judge Farris's Termination Order

Judge Farris recused herself in November of 2016; she entered a termination order in May of 2017. RP (11/18/16) 1850-1912; CP 12374-12386.

[129] *See also* RP (11/18/16) 1899: "[B]ecoming one with a litigant before the Court is not ethically or constitutionally permissible."

During her colloquies with prosecutor DiVittorio and in her ruling on recusal, Judge Farris had noted that the conflict existed since the start of the dependency proceeding. RP (9/23/16) 241-249; RP (11/4/16) 393-518; RP (11/18/16) 1850-1912. She saw no meaningful way to differentiate between the sanctions motion and the parents' motion to set aside the termination order, since the Court/Program had participated in the litigation as a party during the dependency and at the termination trial.[130] CP 209-526, 11283-11348-11395, 11537-11616, 12387-12408; RP (11/18/16) 1861-1862.

The mother agreed, arguing that the Superior Court and VGAL Program were one entity and had always been one entity, creating a conflict that stretched back to the start of the case. CP 12613-12616. The Court/Program took the position that the conflict did not affect the termination order, because the conflict did not exist until sanctions were considered. RP (11/4/16) 399-401; CP 12617-12618, 12820-12825, 12883-12888.

Although she had described the conflict at length and announced that she was recusing herself, Judge Farris held another hearing, and filed multiple memoranda. RP (2/17/17) 181-212; CP 209-526, 11283-11347,

[130] Following the hearing, Judge Farris ordered further briefing to address her concern that conflict impacted the termination. CP 12627-12629.

11537-11616, 12387-12408. She announced her recusal on November 18, 2016 but did not enter a written order until May of 2017. CP 12387-12408.

Over objections from the parents and from AGAL Buurstra, Judge Farris signed a termination order which included detailed Findings of Fact and Conclusions of Law. [131] RP (2/17/17) 190-193; RP (3/29/16) 1825; CP 12374-12386. She described this as a "ministerial act." [132] RP (2/17/17) 182-185; CP 12387-12408.

The parents appealed from her ruling. CP 10910-10914, 11240-11243.

E. Visiting Judge Small

After Judge Farris entered the termination order and her written order on recusal, a visiting judge (Judge "Chip" Small of Chelan County) held two brief hearings. RP (6/28/17); RP (10/6/17). Prosecutor DiVittorio

[131] In the termination order, Judge Farris reiterated that she did not consider the testimony or recommendation of the GAL. CP 12374-12386.

Of note here is the fact that AGAL Buurstra was listed as a party to the termination. Trial began on August 26, 2015, program coordinator Walker testified in September, and was removed as GAL in January of 2016. CP 9716-9733. Buurstra was appointed AGAL on February 11, 2016, 5 months after the State rested its case. CP 22406.

[132] In addition, despite her conclusions that VGAL Brook, program coordinator Walker, and the Court/Program had all acted against the child's best interests (and had even endangered the child), she suggested that the child's best interests had been protected throughout the proceedings. RP (6/10/16) 144; CP 11537-11616.

appeared at these hearings representing the Court/Program. RP (6/28/17) 3-4; RP (10/6/17) 79.

Judge Small denied the mother's motions to vacate the termination order.[133] RP (10/6/17) 38. CP 11265-11267, 12297-12373, 22277-22283. He did not review the entire record. RP (6/28/17) 5, 7; RP (10/6/17) 5-6. In his words,

> I think I got in pretty deep but I obviously haven't read everything. I don't know how many weeks that would actually take, but I think I have a feel for it.
> RP (6/28/17) 5.

His summary of what he had read included a limited number of documents filed in the court file.[134] RP (6/28/17) 5, 7; RP (10/6/17) 5-6. He did not review transcripts from any of the multitude of hearings held in the case, and thus had not read most of the testimony on which Judge Farris based her conclusions. RP (6/28/17) 5, 7; RP (10/6/17) 5-6. There is no indication that he reviewed any of the exhibits, or that he looked at any portion of the 8,000-page document dump (in any of its various forms).

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[133] He also refused to impose sanctions on Haugen or the Court/Program. RP (10/6/17) 82, 94-96; CP 11268-11280, 11244-11246. Judge Small believed the Court/Program was not a party and could not be held accountable for the misconduct of its employees. RP (6/28/17) 15; CP 11244-11246. In Judge Small's words: "The way the Court looks at the court is you may have a cause of action against a court, but sanctions aren't something you do… against the Court." RP (6/28/17) 14. He described the VGAL Program as "just a program," and explained "they're nothing." RP (6/28/17) 14.

[134] Judge Small also listed documents he reviewed in ruling on the mother's sanction motions CP 11268-11280, 11244-11246.

RP (6/28/17) 5, 7; RP (10/6/17) 5-6

Judge Small expressed his belief that Judge Farris's rulings outlining her findings were irrelevant since she had recused herself.[135] RP (6/28/17) 5, 7; RP (10/6/17) 5-6. He apparently read only a small portion of Judge Farris's decision on recusal, did not read any of her other detailed written rulings, and did not review transcripts of her oral rulings. RP (6/28/17) 5, 7; RP (10/6/17) 5-6.

Based on his limited review of the record, Judge Small summarily dismissed the Court/Program's position that it is a single indivisible entity. RP (6/28/17) 20; RP (10/6/17) 38-39; CP 11265-11267. He based this conclusion on the statutory framework rather than the facts of the case:

> The court's defined, and so is the GAL and they're two separate things. No offense, Ms. DiVittorio. They're not the equivalent.
> RP (6/28/17) 20.
>
> It's pretty clear in the statute… we have two distinct entities…The program itself is not a party to this action.
> RP (10/6/17) 38-39 (citing RCW 13.34.030).
>
> The terms "guardian ad litem" and "guardian ad litem program" are defined in RCW 13.34.030. There are two distinct entities; one is the individual GAL or VGAL, and then the program itself, which is a part of the Superior Court. The program itself is not a party to this action, however, the VGAL is.
> (emphasis added) CP 11266.

[135] Judge Small apparently believed that no conflict arose until after the parents filed a motion seeking sanctions. RP (6/28/17) 18-19. The mother's attorney pointed out that this allowed any party to disqualify a judge by bringing a sanctions motion. RP (6/28/17) 45.

Judge Small did not appear aware that the Snohomish County VGAL Program was appointed by court order as a second GAL, and that VGAL Program staff attorneys filed a notice of appearance on behalf of the VGAL Program.[136] Nor did he seem aware that the Snohomish County VGAL Program does more than simply investigate and report to the court. RP (6/28/17) 523-585; RP (10/6/17) 1-98; CP 10908. Instead, Judge Small explained to the attorneys, who had been dealing with the issue for months, the role of the GAL: "[t]he role of the GAL is to investigate the relevant facts concerning the child's situation…" CP 11265-11267. Without having read the court file or reviewed the many hearings involved, Judge Small helpfully pointed out that the GAL "identifies the course or courses of action that best serve the child's best interest, and makes a report and recommendation to the court concerning these interests." CP 11265-11267; *see also* RP (10/6/17) 41.

Judge Small did not mention the local features peculiar to the Snohomish County VGAL Program. He made no reference to the fact that

[136] However, his findings on the motion for sanctions against Haugen note that she filed one Notice of Appearance "on behalf of VGAL Denece Brook *and the VGAL Program*" and a second Notice of Appearance "on behalf of GAL Walker *and VGAL Program.*" CP 11268-11280 (emphasis added). He found that the "*VGAL Program [was] represented* by Nancy Beckford, a contract attorney" at the termination trial, and that "contract attorney Kari Petrasek *represent[ed] [the] VGAL Program*" at a subsequent hearing. CP 11268-11280 (emphasis added). He also made reference to numerous motions, responses, and other pleadings filed by the VGAL Program, and to argument presented by Haugen on behalf of the program. CP 11268-11280.

program coordinators appear in court and can veto VGAL recommendations or revise their reports. He did not describe how the program handles all aspects of discovery and, in this case, was responsible for withholding and destroying discoverable material. He did not mention the fact that program staff attorneys bring motions, raise objections, make arguments, and add terms to court orders. RP (6/28/17) 523-585; RP (10/6/17) 1-98;

In reaching his conclusion, he did not address any of the evidence showing that Superior Court judges (including Judge Krese, who signed the dependency order) created polices, gave case-specific direction to program staff, involved themselves in the litigation, helped draft motions and even a threatening letter, and had no mechanism for screening themselves from active cases. RP (10/6/17) 38-39. He also failed to see any specific harm caused by the Superior Court's involvement—including the Superior Court's direction that the VGAL Program "play hardball in discovery." RP (6/28/17) 39.

Judge Small saw no connection between any misconduct and the outcome of the termination trial. RP (6/28/17) 19, 22; RP (10/6/17) 37. He also did not see the VGAL Program as a "prevailing party" at trial and suggested it would be unfair to the State to grant a new trial based on misconduct by the Court/Program. RP (10/6/17) 37-38; CP 11265-11267.

This led him to conclude that the Court/Program's misconduct

involved "the program just kind of going off on its own." RP (6/28/17) 29. He also opined that the misconduct was cured by Judge Farris's decision to disregard Walker's misconduct.[137] RP (6/28/17) 33; RP (10/6/17) 37. Judge Small did not seem to be aware that the VGAL Program did more than simply investigate and report in this case. RP (10/6/17) 41.

He also suggested that there was no appearance of impropriety because Judge Farris's rulings seemed fair, and because there was no evidence that she herself had committed misconduct. RP (6/28/17) 18, 29, 44, 47. He opined that the appearance of fairness doctrine did not apply "absent evidence of a judge's actual or potential bias," and saw no problem with the court's direct involvement in the litigation. RP (6/28/17) 47. He also drew a distinction between senior court administrators and the judges who oversee them. RP (6/28/17) 39.

Judge Small did not make any reference to Presiding Judge Krese's statement filed in the case. Nor did he mention the fact that she personally came to a hearing and sat behind the prosecutor during the Program/Court's argument that termination, but not sanctions, should

[137] Judge Small also apparently believed it was inappropriate for Judge Farris to respond to misconduct that had occurred in her courtroom by entering orders *sua sponte*. RP (10/6/17) 27-34, 40-41, 43.

occur.[138] Judge Small also concluded that the VGAL Program did not violate the appearance of fairness or the parents' due process rights "because the VGAL had no duty to the parents." CP 11265-11267.

The mother appealed from this ruling. CP 10910-10914, 11240-11243.

STATEMENT OF FACTS PART TWO

V. BASES OF TERMINATION ORDER

All of the events described above took the focus away from the family. The following section shifts the focus to the family. Nichelle A. and Cory H. are the parents of Apple H., born in 2013.[139]

A. Best Interests

In the late summer of 2015, the court heard evidence for five days on the State's Petition to Terminate Parental rights. RP 8/26/15) 9-173; RP (8/27/15) 189-372; RP (8/31/15) 374-609; RP (9/1/15) 610-800; RP (9/2/15) 801-987. Over those days, only one witness was asked what would be in the child's best interests. That witness was social worker Latisha Williams. RP (8/31/15) 592. Williams was the assigned worker at the

[138] Appellant has assigned error to many of Judge Smalls' findings on the sanctions issue, but the mother does not argue that sanctions should now be imposed.

[139] Instead of initials, this brief uses pseudonyms. The child, A.H., will be called Apple H, the mother N.A. will be called Nichelle A., and the father C.H. will be called Cory H.

time of trial and had been on the case for 10 weeks. RP (9/1/15) 693-694. Williams was unable to say that termination was in the child's best interests:

> Q. And in your opinion, is termination of the parental rights in the child's best interests?
> A. I don't believe I have enough time on the case to say definitively.
> RP (8/31/16) 592.

No one asked any of the four other testifying social workers if termination would serve the child's best interests.

Social worker Horness had the case from April 2013 until July of 2013; she was not asked if termination was in Apple H. 's best interests. RP (8/31/15) 503-525. Social worker Hollenbeck had the case from July 2013 until November of 2013; she was not asked if termination was in the child's best interests. RP (8/31/15) 525-557. Social worker Beck had the case from April 2014 until October of 2014; she was not asked if termination was in Apple H. 's best interests. RP (8/27/15) 240-307. Social worker Green had the case next, from Beck's departure until June of 2015; as with the others, she was not asked if termination was in Apple H.'s best interests. RP (8/31/15) 419-495.

At trial, the court specifically found that program coordinator Walker was not qualified to address the child's best interests. RP (9/1/15) 746-748; CP 11617-11622, 11644-11645. Walker was the only witness

over the five days of testimony on the subject who suggested that termination would be in Apple H.'s best interests. RP (9/1/15) 739.

In addition to finding her unqualified to address the best interests issue, Judge Farris determined that Walker was wholly lacking in credibility. RP (9/11/15) 9; CP 11626-11645. The court announced that she would give program coordinator Walker's testimony no weight and would not rely on it in ruling. RP (9/11/15) 10; RP (6/10/16) 139; CP 11626-11645, 12374-12386.

B. Methadone Treatment

The mother is a recovered addict who entered a medically-supervised methadone program in October of 2012.[140] RP (8/26/13) 24. She had previously abused the prescription opioid Percocet.[141] RP (8/26/15) 23-24. Apple H. testified positive for methadone at birth (in February of 2013).[142] RP (8/26/15) 13, 17, 24; RP (9/11/15) 19.

In its termination petition, the department did not allege that the

[140] Her entry into the methadone program marked a turning point in her life. Before she entered the program and achieved sobriety, courts had terminated her legal relationship with five of her children. Trial Ex. 1, 2, 4, 5. She sees all her children at least once a week. RP (8/26/15) 14-17, 93-94; Trial Ex. 1, 2, 4, 5. She also has a new baby who remains in her care. CP 9159-9160, CP 22287.

[141] More than a decade earlier, Nichelle A. had abused crack cocaine. RP (8/26/15) 23. By the time of trial, she'd been clean from crack for fifteen years. RP (8/26/15) 23.

[142]She was immediately placed in foster care. RP (8/26/15) 13, 17, 24; RP (9/11/15) 19; Trial Ex. 8.].

mother's participation in her methadone program was a parenting deficiency that could result in termination. CP 577-580. At trial, no one testified that they'd warned the mother that taking methadone under a doctor's supervision could cause her to lose her relationship with her child.[143]

In addition to complying with her methadone program, the mother attended a co-occurring disorders group and submitted to urinalysis testing. RP (8/26/15) 24, 86. She also participated in mental health counseling and took medication prescribed for depression. [144] RP (8/26/15) 12-20, 88.

The dependency court ordered the mother to follow the recommendations of service providers. Trial Ex. 9-12, 38-40. Every day, the mother took the methadone dose prescribed by the doctor who supervised the program. RP (8/26/15) 48-49, 101; RP (8/31/15) 498-499. Social worker Green agreed that Nichelle A. was appropriately engaged with her methadone treatment. RP (8/31/15) 461.

At one point, Nichelle A. sought to reduce her methadone dose, but the attempt was deemed unsuccessful: the lower amount did not abate her

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[143] Program coordinator Walker admitted that she had never told the mother that she was concerned about the mother's methadone dose. RP (9/1/15) 752; RP (9/2/15) 815; CP 11700. In fact, neither VGAL Brook nor Walker had ever expressed concern about the mother's methadone dose to anyone (until trial). RP (9/2/15) 815; CP 11700.

[144] She was also offered a limited, modified form of dialectical behavioral therapy (DBT). RP (8/26/15) 87, 157-158; RP (8/31/15) 462. The modified DBT did not include individual sessions, and Apple H. did not attend the mother's classes. RP (8/26/15) 164-167. Parents make the most gains in DBT when the child attends the last hour of class. RP (8/26/15) 166-167.

symptoms effectively. RP (8/26/15) 48-49; RP (9/2/15) 816. Clinic staff did not recommend further attempts at reduction until the mother's life stressors -- notably including the stress caused by the impending termination proceedings—abated. RP (8/31/15) 499. Dr. O'Leary agreed that methadone is generally not tapered until after a person's life becomes stable.[145] RP (8/27/15) 312-318.

Three department social workers—Horness, Green, and Beck—testified that the mother's participation in the methadone program had no negative impact on her parenting, her interactions with her child, or the quality of the visits. RP (8/27/15) 295, RP (8/31/15) 461, 522.

In fact, no one testified to any negative aspects of the mother's contact with her daughter. Social worker Beck said the mother's visits "went very well", noting that there were never any impacts on the visits stemming from any mental health or substance abuse issues on the part of the mother. RP (8/27/15) 255. 294-295. Social worker Green echoed this: she said the visits were loving and she had no concerns. RP (8/31/15) 432, 457, 477.

In her termination ruling, Judge Farris relied on the mother's

[145] Dr. O'Leary had evaluated the parents in 2011. He opined that the mother's methadone dose was at the top end of prescribed levels but admitted it would not give her a high. RP (8/27/15) 312-318.

compliance with the methadone program—ordered by the dependency court— as a parenting deficiency.[146] RP (9/11/15) 17-18. Judge Farris acknowledged that the mother had been in the methadone program "for an extremely long period of time." Finding No. 2.46, 2.45-2.51, CP 12381-12382. She also admitted that there was no evidence of any impact on the mother's ability to parent Apple H. Finding No 2.51, CP 12382.

However, Judge Farris saw the mother's sobriety and her compliance with the methadone program as an attempt "to gloss over" her problems. RP (9/11/15) 17. According to Judge Farris, the mother had "essentially switched the use of one narcotic for another." RP (9/11/15) 17-18.

Judge Farris concluded that the doctor's failure to taper the mother's dose left the child in as much danger as if the mother had continued to abuse crack cocaine or Percocet.[147] RP (9/11/15) 17-20; CP 12374-12386. She did not specify any evidence supporting her finding on this point. CP 12374-12386.

C. Domestic Violence

Neither the dependency petition nor the termination petition

[146] The other focus of Judge Farris's decision involved the father's domestic violence problem. RP (9/11/15) 3-32.

[147] The court announced these findings in her oral ruling, which was later incorporated into the written termination order. RP (9/11/15) 3-32; CP 12374-12386.

suggested that the mother's alleged parenting deficiencies included issues relating to the father's domestic violence. CP 577-580; Trial Ex. 6 and 7 Dependency Petitions; RP (9/1/15) 653-654. The mother's attorney pointed out that she had "not been given notice of a parental deficiency of being a domestic violence victim," either in the petition or in any of the "service letters" outlining her required services. RP (9/1/15) 718. Despite this, Judge Farris terminated Nichelle A.'s parental rights based in part on the father's domestic violence history CP 12374-12386; RP (9/11/15) 3-32.

The mother ended her intimate relationship with Cory H. after he assaulted her in March of 2014.[148] RP (8/26/15) 26, 28-29. The couple separated, but his abusive behavior continued intermittently: he slashed her tires and threatened her in July 2014, and he stole her car in December of that year. RP (8/26/15) 35, 53-54.

Following the December incident, Nichelle A. sought and obtained a protection order against Cory H.[149] RP (8/26/15) 35; Trial Ex 105. She later testified that she would have maintained a protection order against the father if she'd known it would have helped her reunify with Apple H.

[148] He had committed prior acts of domestic violence in 2011, 2012, and 2013. Trial Ex. 1-9.

[149] She did this on her own, without help from the department. RP (8/31/15) 464.

RP (8/26/15) 66.

No one told Nichelle A. that contact with the father outside of an intimate relationship could impact her prospects for reunification.[150] Social workers Beck, Green, and Williams all acknowledged that they never told Nichelle A. that her contact with the father could harm her chances of reunifying with her daughter.[151] RP (8/27/15) 274; RP (8/31/15) 459, 524-525; RP (9/1/15) 704.

In fact, the department kept the parents together for visitation even after they'd ended their intimate relationship.[152] RP (8/26/15) 67, 71; RP (8/31/15) 524-525, 535, 543, 569. When the mother asked to visit her daughter separately, the department either refused to allow separate visits or told her separate visits would mean less time with Apple H.[153] RP

[150] In fact, it does not appear that social worker Hollenbeck (who had the case several months while the two were still in a relationship) ever told the mother that staying with the father in an intimate relationship might lead to termination. RP (8/31/15) 525-557. Indeed, Hollenbeck did not even mention domestic violence in her notes when she transferred the case to the next social worker. RP (8/31/15) 556.

[151] Program coordinator Walker also acknowledged that she never spoke to the mother about domestic violence as a barrier to reunification. RP (9/1/15) 752; CP 11700.

[152] Initially, the parents visited together because they were still in a relationship and planned to parent Apple H. as a couple. RP (8/31/15) 524-525, 542. The department did not suggest separate visits, even though the assigned social worker (Hollenbeck) knew of prior domestic violence issues. RP (8/31/15) 542-543. Hollenbeck acknowledged that domestic violence victims are sometimes unwilling to discuss a partner's abusive behavior, but she elected not to separate the visits because she took the mother's denials at face value. RP (8/31/15) 545.

[153] At one point, the department set up separate reduced-time visits; however, both parents wished to maximize time with Apple H. and so each came to visit during the other parent's time. RP (8/31/15) 543-544.

(8/26/15) 67, 71; RP (8/31/15) 524-525, 535, 543, 569; Trial Ex. 11. The mother chose to spend more time with her daughter. RP (8/27/15) 296; RP (8/31/15) 543-544.

At the start of the dependency (in 2013), the department did not offer the mother any services relating to domestic violence. RP (8/26/15) 22. In 2014, social worker Beck offered the mother victim's support services, but did not insist after Nichelle A. made clear her relationship with Cory H. had ended. RP (8/27/15) 246.

Later in the case, the mother completed a DV survivor's class through a program called SafeBabies/SafeMoms. RP (8/26/15) 99. At the time of trial, she was participating in a domestic violence support group (in addition to her DBT group and parenting classes). RP (8/26/15) 153; RP (8/31/15) 442. Among other things, the DV support group taught survivors how to avoid returning to a violent partner. RP (8/26/15) 160.

Christy Richardson, the support group leader, was not told that the department remained concerned about Nichelle A.'s contact with Cory H. RP (8/26/15) 172-173. Had the concern been raised, Richardson could have tailored the mother's services to address the issue. RP (8/26/15) 172-173. Richardson testified that she did not believe the parents were in a relationship when asked at trial. RP (8/26/15) 158-159. Social worker Green, who had spent the most time on the case, never saw the parents

together. RP (8/31/15) 441.

Shortly before the termination trial, program coordinator Walker sent a coworker to Nichelle A.'s home to "catch" her with the father. RP (9/2/15) 911-913. This coworker took pictures, but the father did not appear in any of them. RP (9/2/15) 923-928. At trial, Nichelle A. testified that she lived alone. [154] RP (8/25/15) 13.

Despite the department's insistence that the parents visit Apple H. together, the absence of recent incidents, and the mother's successful and ongoing participation in victim's support services, the department pursued termination of the mother's relationship with her daughter based on the father's past acts of domestic violence. Williams, the assigned social worker at the time of trial, described domestic violence as a parenting deficiency for the mother and one barrier to reunification. RP (8/31/15) 590; RP (9/1/15) 653-654. But Williams acknowledged that she hadn't had the case long enough to assess the impact of domestic violence and admitted it would make a difference to the department if the parents were not in a relationship with each other. RP (8/31/15) 598-599. In closing argument, the

[154] Although, the parents may have recommended an on-again-off-again relationship at some point after they separated. The mother gave birth to a new child on January 6, 2016. CP 9159-9160, 22287. In the absence of Court/Program interference, the child remains in her care CP 9159-9160, 22287.

department focused on domestic violence as the mother's key parental deficiency. RP (9/2/15) 930-948.[155]

Judge Farris questioned the department's attorney about the failure to notify Nichelle A. of this alleged deficiency prior to trial. RP (9/2/15) 982-986. The department's attorney acknowledged that the termination petition did not allege that the mother had a parenting deficiency related to domestic violence; he argued that notice to the father of his parenting deficiencies provided adequate notice to the mother. RP (9/2/15) 982.

Despite her questions about the adequacy of notice, Judge Farris terminated the mother's relationship with her child Apple H., relying on domestic violence as one of two parental deficiencies. RP (9/11/15) 13-17. She did not make a finding that the parents were in a relationship or that they lived together. CP 12374-12386.

D. New Baby

Nichelle A. had a new baby in January of 2016. CP 9159-9160, 22287. In the absence of interference from the Court/Program, the child was allowed to remain in the mother's care.[156] CP 9159-9160, 22287.

[155] The GAL supported this theory as well. RP (9/2/15) 950-954.

[156] The child has unsupervised visits with the father. CP 22287.

ARGUMENT

I. THE TERMINATION PROCEEDINGS VIOLATED DUE PROCESS BECAUSE THE COURT APPEARED BEFORE ITSELF AS A PARTY ALIGNED AGAINST THE PARENTS' INTERESTS.

The Superior Court's attorney asked the Superior Court to enter an order terminating the mother's rights. The Court disclosed that it had no ethical firewall separating judges and their agents from active cases. The Superior Court also revealed that judges, their attorneys, and their staff created secret policies and gave direction to one side in this case. Among other things, the Court's attorney threatened legal action against the mother's attorneys for their advocacy. For all these reasons, the mother was denied her due process right to a fair trial. The Superior Court should not have entered an order terminating her relationship with her daughter.

A. The Superior Court violated due process by urging Judge Farris to enter a termination order.[157]

The Snohomish County Superior Court asked Judge Farris to "resolve this case by entering a termination order." RP (9/23/16) 150. The Court told the judge that the case "should be immediately concluded with… a final termination order…to serve the best interests of this child." CP 13668.

[157] Alleged constitutional errors are reviewed *de novo. State v. Cornwell*, --- Wn.2d ---, ___, 412 P.3d 1265 (2018); *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017).

Presiding Judge Krese supported the Superior Court's directives to Judge Farris. Krese met with other judges about the case, declared that she was "personally familiar with [the] case," and sat in the courtroom while the Superior Court's attorney argued the Court's position—that Judge Farris should "resolve this case by entering a termination order." RP (9/23/16) 150; RP (11/18/16) 1852-1853; CP 12880-12882. In addition, Judge Krese filed a sworn declaration that "it was in the best interests of… the child… and the court, for the case to be resolved," and she told Judge Farris that "it would be good if [this case] got wrapped up." CP 12880-12882.

By asking Judge Farris to terminate, the Superior Court violated the mother's right to due process. U.S. Const. Amend. XIV. This requires reversal.

One "basic requirement of due process" is "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Nowhere is this "basic requirement" more important than in termination cases: "[t]erminating parental rights is one of the severest of state actions and implicates fundamental interests." *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005).

Parents have a fundamental liberty interest in their right to parent their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re the Matter of the Dependency of M.S.R.*, 174

Wn.2d 1, 14-23, 271 P.3d 234 (2012). Children also have fundamental liberty interests at stake in dependency and termination cases. *M.S.R.*, 174 Wn.2d at 20; *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 97, 401 P.3d 442 (2017), *review granted*, 189 Wn.2d 1030, 408 P.3d 1094 (2017) . The Washington Supreme Court "has been zealous in its protection of familial relationships." *M.S.R.*, 174 Wn.2d at 15.

When the government seeks to "destroy weakened familial bonds," it must provide "fundamentally fair procedures." *Santosky*, 455 U.S. at 753–754. The proceedings here were fundamentally unfair because the Superior Court appeared as a party in the case and explicitly asked itself to terminate the mother's relationship with her daughter. RP (9/23/16) 150; CP 13663-13670, 12880-12882.

It is axiomatic that no person "can be a judge in [their] own case and no [person] is permitted to try cases where [they have] an interest in the outcome." *Murchison*, 349 U.S. at 136. This basic requirement of due process is echoed in RCW 2.28.030, which prohibits a judicial officer from acting in any "proceeding to which he or she is a party, or in which he or she is directly interested." RCW 2.28.030(1).

Here, the Superior Court asked the Superior Court to enter a

termination order.[158] RP (9/23/16) 150; CP 12880-12882, 13663-13670. By arguing that the Superior Court should terminate, the Superior Court was "acting as both a litigant and the court." CP 12387-12408; *Murchison*, 349 U.S. at 136. Judge Farris presided over a case in which the Superior Court had an expressed "interest in the outcome." *Id.*

At the time, Judge Farris had made an oral ruling, but had not entered Findings of Fact, Conclusions of Law, or a written Order of Termination. RP (9/11/15) 1-32; CP 12374-12386. The mother continued to visit Apple H. and to participate in services for more than a year after the court's oral ruling. CP 22413, CP 9159-9160, 22286-22287.

An oral ruling "'is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.'" *DGHI, Enterprises v. Pac. Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (*Ferree v. Doric Co.*, 62 Wn.2d 561, 566–67, 383 P.2d 900 (1963)). Judge Farris's oral ruling had "no final or binding effect." *Id.* Instead, only the written order, entered at the behest of the Superior Court, settled the termination issue. *Id.*

This denied the mother her due process right to "[a] fair trial in a

[158] Judge Farris, Judge Krese, and all of their colleagues *are* the Superior Court, the party prosecutor DiVittorio represented and on whose behalf Judge Farris was asked to enter a termination order. RP (9/23/16) 150.

fair tribunal." *Id.* It also violated RCW 2.28.030(1). A party should not be required to litigate against the Court itself. Instead, opposing parties should meet on an even playing field, with the Court as a neutral decision-maker. By appearing before itself and instructing itself to enter a decision against the mother, the Court/Program violated the mother's right to due process. *Id.* The termination order must be reversed, and the case remanded for a new trial. *Id.*

B. The Superior Court violated due process because the Court and its VGAL Program are a single, indivisible entity, whose employees fought for termination and against reunification.

Court employees make up the staff of the Court/Program. RP (11/4/16) 401, 403; RP (11/18/16) 1861-1862; CP 12387-12408. Judges and their immediate staff are directly involved in the Court/Program, and the Court/Program has no way to screen judges from active cases. RP (2/11/16) 331; RP (3/23/16) 1265; RP (11/4/16) 403, 422, 463-464, 513, 516-517; RP (11/18/16) 1876-1877; CP 12387-12408, 12880-12882. Judges and their staff meet with Court/Program staff to develop policies, some of which disadvantage parents and their attorneys. RP (3/23/16) 1239-1247; RP (11/4/16) 463-464; RP (11/18/16) 1876-1877; CP 12387-12408.

Deputy prosecutor DiVittorio represents the entire Superior Court, including judges, court administrators, the Court/Program, and court

employees. RP (2/11/16) 325, 331; RP (2/25/16) 1139; RP (3/23/16) 1265; RP (11/4/16) 395, 397-401, 403, 463-464. As the Court/Program's spokesperson, she told Judge Farris that the VGAL Program is not an independent entity, and she acknowledged that "the acts of the VGAL program and its employees are acts of the court." RP (11/4/16) 401; *see* CP 12387-12408. She made these statements with Presiding Judge Krese sitting behind her in the courtroom. RP (11/4/16) 401; *see* CP 12387-12408.

In this case, those "acts of the court"[159] created a major barrier to reunification. RP (8/31/15) 456. In addition to all the other misconduct it committed and covered up, the Court/Program blocked all efforts to liberalize visits for reasons unrelated to the child's best interests. RP (8/27/15) 280-281, 306-307; RP (8/31/15) 488; RP (9/1/15) 736-737, 767, 783-786, 795; RP (9/2/15) 902; RP (3/24/16) 1463-1467, 1471; CP 4233-4240, 12374-12386. Its goal during the entirety of the dependency was to prevent the family from moving toward reunification. RP (9/1/15) 783-786, 795; RP (3/24/16) 1463-1467, 1471.

A family that does not have unsupervised visits can never reunify. *See* RP (8/31/15) 489; RP (9/1/15) 670-671; RP (3/24/16) 1464, 1471, 1640-1641. Typically, parents start with supervised visits, advance to

[159] RP (11/4/16) 401.

monitored visits, and eventually have unsupervised visits. RP (8/31/15) 489; RP (3/24/16) 1464.

The department supported a transition from supervised to monitored visits in this case. RP (8/31/15) 489; RP (3/24/16) 1453; RP (3/25/16) 157-158. The Court/Program prevented this from happening, even though monitored visits posed no risk of harm to the child. RP (9/1/15) 736-737, 783-786, 795; RP (3/24/16) 1453, 1463-1467; RP (3/25/16) 157-158. Because of this, the family remained stuck with supervised visits. RP (8/27/15) 307; RP (8/31/15) 488; RP (3/24/16) 1463; CP 4233-4240, 12374-12386.

The department supported in-home visits here; the Court/Program blocked this step despite the absence of any risk to the child. [160] RP (8/27/15) 280-281; RP (8/31/15) 458, 488; RP (9/1/15) 736-737; RP (9/2/15) 902; RP (3/24/16) 1463-1464, 1640-1641; CP 4233-4240, 12374-12386. The family remained stuck with visits in an office setting, with only a few community visits. RP (8/27/15) 307; RP (8/31/15) 488; RP (3/24/16) 1463; CP 4233-4240, 12374-12386.

Absent the Court/Program's interference, the mother would have been allowed monitored visits in the community and in her home. RP

[160] Visits may be restricted to an office setting, may move into the community, and may finally take place in the family home. RP (8/31/15) 458; RP (3/24/16) 1640-1641.

(8/27/15) 279-281, 306-307; RP (8/31/15) 458, 488-489; RP (9/1/15) 670-671, 736-737, 766-767, 783-786, 795; RP (9/2/15) 902; RP (3/24/16) 1464, 1471; 1640-1641, 1464-1467, 1471-1473; RP (3/29/16) 1806-1808. By interfering with visitation progress for reasons unrelated to the child's welfare, the Court/Program made it impossible for the family to reunify.

Even before it formally appeared and explicitly asked Judge Farris to terminate, the Superior Court actively opposed reunification. It blocked unsupervised visits for reasons unrelated to the child's best interests, it committed and covered up egregious misconduct, it destroyed evidence, it violated discovery rules, and it created secret policies to keep the parents from learning what went on behind the scenes.

The Court/Program's efforts to prevent reunification were not the actions of a few rogue employees; they were the actions of the Superior Court itself. The Court/Program's involvement in the case made it unfair for any Snohomish County Superior Court Judge to hear the case. By entering a termination order under these circumstances, Judge Farris violated the mother's right to due process. *Murchison,* 349 U.S. at 136.

Due process requires recusal when the probability of bias is "'too high to be constitutionally tolerable.'" *Rippo v. Baker,* --- U.S. ---, ___, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017) (quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). To evaluate whether

due process requires recusal, a reviewing court must determine "whether, as an objective matter, 'the average judge in [this] position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams v. Pennsylvania*, --- U.S. ---, ___, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) (quoting *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (internal quotation marks omitted).[161]

In this case, the probability of bias among all Snohomish County Superior Court judges was "too high to be constitutionally tolerable." *Rippo*, --- U.S. at ___ (internal quotation marks and citation omitted). As the record shows (and as Judge Farris found), the Superior Court and its VGAL Program were a single indivisible entity, enmeshed and intertwined. RP (11/18/16) 1857-1858, 1867.

Under these circumstances, "the average judge" was unlikely to be neutral; instead "there [was] an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (internal quotation marks omitted). Judge Farris herself recognized the need for recusal and opined that "no Snohomish County Superior Court Judge ever should have ruled on anything in this

[161] The "unconstitutional potential for bias" giving rise to a due process violation is distinct from the non-constitutional "appearance of fairness doctrine," which is discussed separately. *See Tatham v. Rogers*, 170 Wn. App. 76, 92, 283 P.3d 583 (2012)

case." CP 12387-12408.

In her words, this enmeshment "impede[d] the due process rights of the other parties." RP (11/18/16) 1867. Although she signed a termination order (after she had recused herself), she questioned "whether the trial verdict can survive given the substantive reasons for entry of the recusal." CP 12390.

A violation of due process stemming from "the participation of an interested judge is a defect 'not amenable' to harmless-error review." *Williams,* --- U.S. at ___ (citation omitted). Even before the Superior Court formally appeared and expressed its interest in the outcome, the Court/Program's participation in the case violated due process and barred Judge Farris from making any decisions. *Caperton*, 556 U.S. at 881.

This error is not amenable to harmless-error review. *Williams,* --- U.S. at ___. Because of this, the termination order must be set aside, and the case remanded for a new trial. *Id.*

C. The Superior Court violated due process by entering a termination order after threatening the mother's attorneys for their advocacy in this case.

Acting on behalf of the Superior Court, prosecutor DiVittorio wrote a letter threatening legal action against the ABC Law Group. CP 10714-10715. The letter addressed the mother's counsel's conduct in this case. CP 10714-10715. She accused counsel of violating rules that

(purportedly) protect the identity of VGALs, including "having conversations with other members of the legal community" about VGAL misconduct. CP 10714-10715. The letter closed with reference to "further legal steps". CP 10714-10715. Because DiVittorio represented the Superior Court, and because Judge Farris is a member of the court, the threat of legal action amounted to a threat from Judge Farris.

Judicial bias may manifest as prejudice against a party's attorney. *See, e.g., In re Marriage of Kelso*, 67 Cal. App. 4th 374, 383, 79 Cal. Rptr. 2d 39 (1998); *Tierney v. Four H Land Co. Ltd. P'ship*, 281 Neb. 658, 664, 798 N.W.2d 586 (2011); *Ohio State Bar Assn. v. Evans*, 137 Ohio St. 3d 441, 441, 999 N.E.2d 674 (2013). Recusal for bias against counsel is constitutionally required whenever "a judge so manifests an attitude of hostility or ill will toward an attorney that the judge's impartiality in the case can reasonably be questioned." *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988).

Here, the Superior Court itself threatened legal action against the mother's attorney. CP 10714-10715. The Court's threat was based on counsel's actions in this case. CP 10714-10715. This threat of legal action, made on behalf of the Superior Court, provided evidence of bias and disqualified Judge Farris from entering the termination order. *Rippo*, --- U.S. at ___; *Williams*, --- U.S. at ___; *Caperton*, 556 U.S. at 886.

The Superior Court's threat "so manifests an attitude of hostility or ill will toward an attorney that the judge's impartiality in the case can reasonably be questioned." *S.S.*, 764 P.2d at 73. When she threatened legal action on behalf of the Superior Court, DiVittorio pitted Judge Farris directly against the ABC Law Group.

The decisions Judge Farris made after this threat—including her decision to sign the termination order—were impermissibly tainted. A judge may impose sanctions on counsel without creating grounds for disqualification, because "[j]udicial rulings alone 'almost never constitute a valid showing of bias.'" *West v. Washington State Ass'n of Dist. & Mun. Court Judges*, 190 Wn. App. 931, 943, 361 P.3d 210 (2015) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)).

But a threat to sue is not a judicial ruling. As an objective matter, "the average judge" contemplating a lawsuit based on counsel's actions in the case *sub judice* is not "likely to be neutral" in deciding that case. *Caperton*, 556 U.S. at 881 (internal quotation marks omitted). Instead, "there is an unconstitutional potential for bias." *Id.*

Judge Farris should not have signed the termination order. The order must be vacated and the case remanded for a new trial. *Rippo*, --- U.S. at ___; *Williams*, --- U.S. at ___.

II. EVEN ABSENT A CONSTITUTIONAL VIOLATION, THE TERMINATION ORDER MUST BE REVERSED UNDER THE APPEARANCE OF FAIRNESS DOCTRINE.

The Superior Court actively opposed reunification throughout the dependency and termination proceedings. The Superior Court threatened legal action against the mother's attorneys. When the Superior Court asked the Superior Court to terminate the mother's rights, the parents looked on while Judge Farris complied. This violated the appearance-of-fairness doctrine.

A. This Court should review the mother's appearance of fairness claim *de novo*.

Appearance of fairness claims are reviewed *de novo. In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010) (*King* I). Such claims are distinct from arguments made under the due process clause. *Tatham*, 170 Wn. App. at 92.

B. The Superior Court's participation in the litigation requires reversal under the appearance-of-fairness doctrine.

A judicial proceeding violates the appearance of fairness unless "a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The doctrine is violated upon a showing of "potential bias." *Id.* The test is an objective one, which

contemplates "a reasonable observer [who] knows and understands all the relevant facts." *Id.*

The proceedings in this case violated the appearance of fairness. *Id.* No one who reviewed and understood this record could conclude that proceedings were fair, impartial, and neutral. *Id.* The Superior Court acted as both advocate and adjudicator, urged itself to enter a termination order, opposed reunification throughout dependency and termination proceedings, and threatened the mother's attorneys for their advocacy on the mother's behalf.

These "relevant facts" compel reversal. *Id.* The mother sat in court and learned that the Superior Court itself was her opponent. No parent (and no reasonable observer) would ever conclude that she had a fair trial. *Id.*

But the "relevant facts" include more than just the substantive facts uncovered; also relevant is the "fact" that Judge Farris concluded she had a conflict that spanned the length of the case. CP 12387-12408. In making her decision, Judge Farris made pronouncements that necessarily disqualified her under the appearance of fairness doctrine. *Id.* Despite her many declarations showing that she could not be fair, Judge Farris entered a termination order. RP (11/18/16) 1850-1912; CP 12374-12408.

Specifically, Judge Farris pointed out that "paid court employees

[became] the litigants and attorneys in cases before their employer, the court, with no firewall or boundary protocol to keep the court and judges separate from the litigation." CP 12392. She observed that "court employees were carrying out virtually every aspect of the dependency and termination litigation for one side." CP 12395. Predictably, the situation "devolved into the court and judges actually becoming embroiled in dependency litigation disputes in clearly partial ways." CP 12403.

Judge Farris concluded that the absence of an ethical firewall "violated the parties' rights to an impartial judge." CP 12395. She noted that some judges, through direction to their agents, got "involved in the litigation of motions in this specific case." CP 12398. The Superior Court's "own separate lawyers and its own direct staff" helped and directed the GAL's attorney in this case, "as part of their duties representing the Superior Court Judges." CP 12398. In fact,

> The Superior Court, its direct agents, and its own attorneys, all under the supervision of the judges repeatedly aligned with and literally became a party litigating this case against the parents. This was not limited to this last sanctions motion; it went on throughout the case.
> CP 12399.

Judge Farris observed that the "court itself" appeared as a litigant, represented by the court's lawyer "arguing the court's positions and interests to a judge of the same court." CP 12392.

She pointed out that the involvement of judges, their "direct employees," and their lawyers raised questions "as to whether that may influence any judge from the same bench," including herself. CP 12402.

Finally, in recusing herself, Judge Farris opined that "no Snohomish County Superior Court Judge ever should have ruled on anything in this case." CP 12403. Judge Farris found that her involvement meant the parties were "denied their due process constitutional right to an impartial judge." CP 12391.

Judge Farris's oral rulings, memorandum opinions, and orders are "relevant facts" prohibiting any "reasonably prudent, disinterested observer" from concluding "that the parties received a fair, impartial, and neutral hearing." *Solis-Diaz,* 187 Wn.2d at 540. Reversal is required even if Judge Farris misunderstood the evidence or reached unsupported conclusions.

The "fact" that she reached those conclusions is a "relevant fact[ ]" requiring recusal. *Solis-Diaz,* 187 Wn.2d at 540. The findings and conclusions she outlined show a "potential bias." *Id.* A "reasonably prudent, disinterested observer" who knew and understood "all the relevant facts" would not conclude "that the parties received a fair, impartial, and neutral hearing." *Id.*

The parents were present for all the hearings in this case. They

heard testimony revealing the Court/Program's bias. They learned that the forces aligned against them throughout the dependency and the termination proceedings included judges and court administration. They heard Judge Farris outline the misconduct she'd discovered. They also heard her describe the conflict that required her to recuse herself.

By the end of the proceedings, they knew that the very judge who had presided over the termination trial believed that no Snohomish County judge should have made any decisions in this case. They also knew that the judge who'd entered the dependency order appeared in court to advocate against them. Any parent who knew all these "relevant facts" would be certain that termination proceedings were fundamentally unfair. *Id.*

The termination order must be reversed.[162] *Id.*

III. IT WAS IMPROPER FOR JUDGE FARRIS TO ENTER A TERMINATION ORDER AFTER SHE HAD RECUSED HERSELF.

A recusal announcement limits a judge's authority to ministerial acts necessary to transfer the case to another judge. Six months after Judge Farris announced that she was recusing herself, she entered an order terminating the mother's relationship with her daughter. Because she had

[162] Furthermore, because "review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge." *Id.* Only an out-of-county judicial officer may preside. *Id.* While the court did eventually assign a visiting judge, that judge did not inform himself about the case and the termination order entered by Judge Farris after her recusal was allowed to stand.

recused herself, Judge Farris had no authority to enter the order.

A. Judge Farris's recusal announcement barred her from taking action unrelated to transfer of the case to another judge.

Judge Farris announced that she was recusing herself on November 18, 2016. RP (11/18/16) 1850-1912. Once a recusal announcement is made, the judge "should take no other action in the case." *Skagit Cty. v. Waldal*, 163 Wn. App. 284, 288, 261 P.3d 164 (2011).[163] The sole exception is for "the necessary ministerial acts *to have the case transferred to another judge*." *Id.* (emphasis added); *see also United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997).

After announcing her recusal, Judge Farris's role was limited to taking "the necessary ministerial acts to have the case transferred." *Waldal*, 163 Wn. App. at 288. Entering an order terminating parental rights does not relate to "hav[ing] the case transferred to another judge." *Id.* This "bright line rule" serves an important purpose: whenever "a judge announces that he or she must refrain from judging a case, any rulings by that judge in that case will appear to a disinterested person as being potentially tainted by bias." *Id.*

Judge Farris herself recognized that she should not have presided

[163] *See also Moody v. Simmons*, 858 F.2d 137, 138 (3d Cir. 1988) (appellate court was obliged to vacate "all other orders entered after the date of the judge's recusal declaration, made at a hearing…")

over the case. CP 12387-12408. Following the recusal announcement, she should not have made any decisions unrelated to the transfer. *Id.* This includes her decision to enter a termination order. *Id*. *See Moody*, 858 F.2d at 138 ("Deferring to the judge's own repeated acknowledgements at the hearing that his impartiality could reasonably be questioned, we conclude that the judge should have recused at that time and that he was not empowered to perform judicial actions thereafter.") The order must be vacated, and the case remanded for trial. *Id.*

B. After her recusal announcement, Judge Farris should not have entered a termination order; entering the order was not a "ministerial act."

A trial judge's oral decision is "no more than a verbal expression of [the judge's] informal opinion at that time." *Ferree*, 62 Wn.2d at 566–567. An oral decision is "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Id.* It "has no final or binding effect." *Id.*

Judge Farris's oral ruling, like all oral pronouncements, was a "verbal expression of [her] informal opinion." *Id.* Prosecutor DiVittorio acknowledged this when she described Judge Farris's ruling as a "tentative resolution" of the termination. RP (11/4/16) 398.

Indeed, the parties did not treat the oral ruling as a final decision: the mother continued to visit Apple H. and participate in services for more

than a year after the oral ruling. CP 22413, 9159-9160, 22286-22287.

Entry of the termination order cannot be justified as a "ministerial act." CP 12387-12408. An act is "merely ministerial [rather than] judicial…where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *State ex rel. Clark v. City of Seattle,* 137 Wash. 455, 461, 242 P. 966 (1926) (internal quotation marks and citation omitted). By contrast, an act is not ministerial where it "involves the exercise of discretion or judgment." *Id.* (internal quotation marks and citation omitted).

Judge Farris exercised "discretion or judgment" by entering a termination order. *Id; Ferree,* 62 Wn.2d at 566; *see also DGHI,*137 Wn.2d at 944. Her decision was not "merely ministerial." *Clark,* 137 Wash. at 461.[164]

Contrary to Judge Farris's assertion, her initial satisfaction with a draft order—expressed orally—does not transform her "exercise of discretion or judgment"[165] into a ministerial act. RP (6/10/16) 149; CP 12387-

[164] *Cf. State v. Ward,* 182 Wn. App. 574, 586, 330 P.3d 203 (2014). The *Ward* court held "that a substitute judge may sign findings of fact and conclusions of law based on another judge's ruling, when the parties do not object, after knowledge of the signature by the substitute judge." *Id.* Although the *Ward* court described this in passing as a ministerial act, its fleeting use of this phrase was *dicta.* The court did not purport to redefine the word "ministerial." *Id.*

[165] *Clark,* 137 Wash. at 461.

12408. A judge's "expressed intention to perform a future act is not the same as performing the act itself." *DGHI,* 137 Wn.2d at 944.[166] This is especially true here.

Furthermore, once evidence of misconduct surfaced, Judge Farris put the case on hold. RP (12/3/15) 10. RP (3/29/16) 1813-1814; RP (2/17/17) 191-192. She expressed her opinion that "this case cannot go forward… until the issue of appropriate guardian ad litem is done…there are issues here well beyond whether somebody did or didn't do something wrong in terms of the potential impact on the judgment." RP (12/3/15) 10; *see also* CP 10553.

While the case remained on hold, the mother continued to visit her daughter and participate in services. CP 22413, 9159-9160, 22286-22287.

Judge Farris's oral ruling and her oral comments about the proposed order were nothing more than her "informal opinions" with "no final or binding effect." *Ferree,* 62 Wn.2d at 566-567. Following her recusal announcement, she had no authority to enter the termination order. *Waldal,* 163 Wn. App. at 288. Doing so involved the exercise of

[166] In *DGHI,* the trial judge indicated that proposed findings "were 'substantially correct' and that it was his intention to adopt them.'" *Id.* However, he "neither signed nor otherwise 'adopted' them prior to his death." *Id.* This required the case to be retried. *Id.*

discretion; it was not a ministerial act.[167] *Id.*

C. The case was not "bifurcated;" the conflict requiring recusal arose before the termination trial.

Judge Farris expressed her concern about an apparent conflict: "I believe no Snohomish County Superior Court Judge ever should have ruled on anything in this case." CP 12403. This came after prosecutor DiVittorio argued that the case had been "bifurcated." RP (11/4/16) 398. She suggested that Judge Farris's "tentative resolution" of the termination could stand, but that recusal was required for the sanctions motion. RP (11/4/16) 398. The prosecutor did not provide any authority supporting her position. RP (11/4/16) 398.

The conflict requiring recusal in this case stemmed from the Court/Program's participation as a party. It predated the mother's sanctions motion. CP 13691-13713. It also predated Judge Farris's announcement that she planned to impose sanctions. RP (3/29/16) 1649-1825. Recusal was required because the Court/Program is a single indivisible entity, with no firewall screening judges and their agents from active cases CP 12387-12408.

A disqualifying conflict applies to all aspects of a case. *See Moody*,

[167] Furthermore, it was not a ministerial act "to have the case transferred." *Waldal*, 163 Wn. App. at 288.

858 F.2d at 138. In *Moody*, the judge presiding over a bankruptcy proceeding announced that he would recuse himself after he entered an order converting the proceedings from Chapter 11 to Chapter 7. *Id.* The conversion order was not challenged on appeal. *Id.* Despite this, the appellate court held it could not stand: "[u]nfortunately, although no one is challenging the substance of the conversion order, we will be obliged to vacate it." *Id.* Here, Judge Farris's eventual recusal likewise failed to address the underlying problem.

Similarly, in *Waldal*, a motion for reconsideration had been argued prior to recusal. *Waldal*, 163 Wn. App. at 286-288. *Id.* Following the recusal announcement, the judge issued a letter denying reconsideration. *Id.* The Court of Appeals reversed because the reconsideration motion was not a ministerial act necessary to transfer the case to another judge. *Id.*, at 288; *see also O'Keefe*, 128 F.3d at 891 (declining to create a reconsideration exception to the bright line rule on recusal.)

The conflict requiring recusal arose when the court appointed the VGAL Program as a second GAL. The case cannot be "bifurcated." RP (11/4/16) 398. The "informal opinion" expressed in Judge Farris's oral termination ruling was "necessarily subject to further study and consideration;" it had "no final or binding effect." *Ferree*, 62 Wn.2d at 566–567.

The termination order must be vacated, and the case remanded for

trial. *Waldal*, 163 Wn. App. at 286-288.

IV. THE TERMINATION VIOLATED THE FAMILY'S RIGHT TO DUE PROCESS BECAUSE THE CHILD'S INTERESTS WERE NOT PROTECTED BY AN ATTORNEY, A GAL, OR A CASA VOLUNTEER.

In termination proceedings, due process requires the government to protect the rights of the child. Here, the child was not appointed counsel, and no one represented her best interests. Instead, the people charged with doing so pursued their own agenda; they protected their own interests first, the foster mother's second, and the child's not at all. Because no one advocated for Apple H., the termination order violated the family's due process rights.

A. The mother can argue a due process violation affecting her rights and her child's rights for the first time on appeal.

Under the Fourteenth Amendment, children have fundamental liberty interests at stake in termination proceedings. *M.S.R.*, 174 Wn.2d at 14-23. Generally, parents may assert their children's constitutional rights on appeal. *See M.S.R.*, 174 Wn.2d at 11; *Engel v. Vitale*, 370 U.S. 421, 423, 82 S. Ct. 1261, 1263, 8 L. Ed. 2d 601 (1962).[168] Consistent with

[168] *See also Rivers v. McLeod*, 252 F.3d 99, 102 (2d Cir. 2001) ("[P]arents ordinarily have standing to assert the claims of their minor children); *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 841 n. 44, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (*Smith* I) (allowing parents, foster parents, and the State to argue on behalf of child because all "share some portion of the responsibility for guardianship of the child…[and] are parties, and all

M.S.R., the mother has standing to assert her child's right to due process in this appeal. *M.S.R.*, 174 Wn.2d at 11.

Alleged constitutional errors are reviewed *de novo. Cornwell*, --- Wn.2d at ___; *Blomstrom*, 189 Wn.2d at 389. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). The showing required under RAP 2.5 (a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the due process violation can be raised for the first time on appeal under RAP 2.5(a)(3). Judge Farris knew that Apple H. was not represented by counsel. She also specifically found that the Court/Program had acted in its own interests and harmed the child, rather than protecting Apple H.'s best interests. RP (12/3/15) 160; RP (2/10/16) 39; RP (2/28/16)

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contend that the position they advocate is most in accord with the rights and interests of the children.")

1213; RP (3/24/16) 1477-1478; RP (6/10/16) 39, 127-128; CP 209-526, 11611-11612, 12374-12386.

A new trial with the child's rights protected would correct the error. Based on "what the trial court knew," Judge Farris "could have corrected" the violation of the family's due process rights. *Id.*

She "could have corrected the error" by refusing to enter a termination order and granting a new trial. *Id.* Accordingly, the due process violations qualify as manifest errors affecting a constitutional right. *Id.*; RAP 2.5(a)(3).

B. The termination order must be reversed because mother and child were both denied due process under the Fourteenth Amendment.

Parents and children have fundamental liberty interests at stake in dependency and termination cases. *M.S.R.*, 174 Wn.2d at 15; *S.K-P.*, 200 Wn. App. at 97. A child's interests in termination proceedings are "at least as great" as the parents' interests. *M.S.R.*, 174 Wn.2d at 17.[169] A child's due process rights in termination proceedings "may be protected by

[169] Termination severs the child's relationship with parents, "sibling[s], grandparents, aunts, uncles, and other extended family." *Id.*, at 15. Termination may also deprive a child of physical liberty: a child may end up in State custody as "a foster child, powerless and voiceless," facing the possibility of multiple displacements that carry the risk of "significant harm." *Id.*, at 16. Similarly, "the State has a compelling interest in both the welfare of the child and in 'an accurate and just decision' in the dependency and termination proceedings." *Id.* at 18 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)). The court described this interest as "very strong." *Id.*

appellate review" on a case by case basis. *See M.S.R.*, 174 Wn.2d at 5, 21 (addressing child's limited due process right to counsel under the federal constitution).

1. When the State seeks to terminate family relationships, parent and child have a due process right to have the child's interests protected by an attorney, a GAL, or a CASA.

In *M.S.R.,* the Supreme Court examined whether children have a categorical due process right to counsel in termination proceedings. *Id.* The court resolved the issue by balancing three factors: (1) the private interests at stake, (2) the risk that current procedures would lead to erroneous decisions, and (3) the State's interests. *Id.,* at 14 (citing *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The court concluded that children have a limited right to counsel in termination proceedings. *Id.*, at 22. The right is not universal; instead, a child's right to counsel attaches when required under a case-by-case balance of the interests under *Mathews. Id.,* at 22.

Critical to the court's decision that children do not have a universal right to counsel was its analysis of "the risk of erroneous deprivation and the value of the additional procedures sought." *Id.,* at 18. The court's analysis of this factor focused in part on the "invaluable" role played by Guardians ad Litem and CASAs. *Id.,* at 20.

GALs and CASAs "are often the eyes and ears of the court and

provide critical information about the child and the child's circumstances." *Id.,* at 21. They "increase the volume of a child's voice in the court and the legal process." Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of A Guardian Ad Litem*, 66 N.D.L. Rev. 633 (1990). They also provide "direction and focus… with the child as the polestar." Muhlhauser, 66 N.D.L. Rev. at 647.

Snohomish County puts it this way: "CASAs are often the one consistent adult in the child's life, speaking up for them throughout the dependency process and making recommendations as to what is in the child's best interest." *Casa Program,* Snohomish County (2018).[170] CASAs are appointed "to watch over and advocate for abused and neglected children, to make sure they don't get lost in the overburdened legal and social service system." *How do CASA/GAL Volunteers Help Children?,* CASA for Children (2018).[171]

Congress has also recognized the importance of advocates for the best interest of children in judicial proceedings. To obtain federal funds, states must enact "provisions and procedures" requiring appointment of a Guardian ad Litem in every case involving abuse or neglect. 42 U.S.C.

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[170] Available at https://snohomishcountywa.gov/881/CASA-Program (accessed 6/4/2018).

[171] Available at http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm, accessed 6/4/18.

§5106a. State laws must require the GAL "to obtain first-hand, a clear understanding of the situation and needs of the child; and…to make recommendations to the court concerning the best interests of the child." 42 U.S.C. §5106a; *see also M.S.R.,* 174 Wn.2d at 15 n. 7.

In assessing the risk of erroneous deprivation, the *M.S.R.* court considered the "invaluable" role played by GALs. *Id.* at 21. The court explicitly noted the connection between the risk of error and the presence of an advocate for the child, noting that the constitutional significance of any risk "may… turn on whether there is someone in the case who is able to represent the child's interests or whose interests align with the child's." *Id.,* at 18.

The court concluded that the participation of a GAL or CASA helps mitigate the risk of erroneous deprivation. *Id.* at 18-22. Such participation, along with "case by case appellate review," allowed the Supreme Court to deny children a universal right to counsel. *Id.* at 21.

The court rejected arguments that "GAL and CASA volunteers inadequately protect the children's interests." *Id.,* at 19. Instead, the court recognized the "different, important, and valuable roles of GALs, CASAs, and counsel to children in dependency and parental termination proceedings." *Id.,* at 21. This allowed the court to assign the trial court the duty to determine if counsel must be appointed in individual cases. *Id.,* at 22.

Similar reasoning underpins the Court of Appeals' decision in *S.K-P.* In that case, the Court of Appeals found that neither the Washington Constitution nor the Fourteenth Amendment provide "a categorical right to the appointment of counsel for children in dependency proceedings." *S.K-P.*, 200 Wn. App. at 111, 112-118. The *S.K-P.* decision rested on the "significant procedural safeguards [that] have been built into dependency proceedings to protect a child's liberty interests." *Id.*, at 110, 114-118.

As in *M.S.R.*, these "significant procedural safeguards" include the participation of a GAL or CASA. *Id.*, at 110 (citing RCW 13.34.100(1) and RCW 13.34.105(1)(b), (f)), 114-118. Indeed, the CASA system had its start because "'there was no one in the courtroom whose only job was to provide a voice for those children.'" *M.S.R.*, 174 Wn.2d at 8 n. 2 (quoting David W. Soukup, *Thanks for 30 Years of Volunteering,* The Connection: News and Information from the National Court Appointed Special Advocate Association (Spring 2007)).

The absence of a CASA, GAL, or attorney representing the child's interests leaves the child without a person "'in the courtroom whose only job is to provide'" them such a voice. *Id.* It magnifies the risk of erroneous deprivation; this, in turn, affects the balance examined by the court in *M.S.R.* and *S.K-P.*.

The logical underpinnings of *M.S.R.* and *S.K-P.* disintegrate where

the child has neither an attorney nor a GAL. Here, Apple H. did not have an attorney, and she also lacked a functional GAL.

2. The Court/Program violated numerous GALR and did not qualify as a GAL in this case.

Judge Farris made numerous findings showing that the Court/Program did not act like a GAL. Critically, Judge Farris found that the Court/Program violated its duty to represent the child's best interests. RP (6/10/16) 7, 28, 63, 120. She criticized the Court/Program for its failure to advocate on behalf of the child.[172] RP (2/28/16) 1213; RP (3/24/16) 1477-1478; CP 209-526, 11611-11612, 12374-12408.

She concluded that the Court/Program had endangered the child physically[173] and had caused harm by destroying any chance of achieving permanency.[174] RP (12/3/15) 160; RP (2/10/16) 39; RP (2/28/16) 1213; RP (3/24/16) 1477-1478; RP (6/10/16) 39, 127-128; CP 12374-12386, 11611-11612.

The child's best interests were left unprotected during dependency

[172] She also found program coordinator Walker unqualified to address the child's best interests. RP (9/1/15) 746-748; CP 11617-11622, 11644-11645.

[173] For example, the VGAL program insisted the parents adhere to a food list that did not warn against feeding the child tree nuts, which turned out to be the only food the child was allergic to. RP (3/24/16) 1639; RP (6/10/16) 38-39.

[174] Even Walker believed the misconduct had harmed the child. RP (3/24/16) 1478.

proceedings and at the termination trial.[175] Those who were supposed to represent Apple H.'s best interests—Brook, Walker, and the Court/Program—committed egregious misconduct showing bias throughout their involvement in the case. CP 12374-12386. In addition, Walker failed to undertake the minimum steps necessary to give a credible report to the court or a trustworthy recommendation at trial. CP 12374-12386.

Judge Farris found numerous violations of the Guardian ad Litem Rules. She found numerous violations of GALR 2(a), which requires a GAL to represent a child's best interests. RP (6/10/16) 7, 28, 63, 120. Indeed, as noted she found that the VGAL Program actually endangered Apple H. RP (2/10/16) 39.

Judge Farris also found multiple violations of the duty to "maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom." GALR 2(b); RP (6/10/16) 8, 13, 20, 21, 25, 26, 27, 28, 29, 31, 32, 37, 54, 61, 63, 133. She determined that Brook, Walker, and the Court/Program failed to "maintain the ethical principles of the rules of conduct set forth" in the GALR. GALR 2(c); RP (6/10/16) 43, 61

GALR 2(e) requires a GAL to "avoid any actual or apparent

[175] Judge Farris later claimed that the child's best interests had been protected. RP (6/10/16) 144; CP 11537-11616.

conflict of interest or impropriety in the performance of guardian ad litem responsibilities," to "take action immediately to resolve any potential conflict or impropriety," to "advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety," and to avoid cases in which "the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests." GALR 2(e).

Judge Farris found numerous violations of this rule. RP (6/10/16) 13, 16, 18, 20, 28, 29, 31, 32, 43, 54, 61 134. Among other things, she noted the Court/Program's extreme bias, its improper dissemination of confidential information, its attempts to cover the misconduct, and its failure to resolve any of the potential improprieties or report them to the court. RP (6/10/16) 13, 16, 18, 20, 28-32, 43, 54, 61 134.

The record makes clear that VGAL Brook, program coordinator Walker, and the Court/Program failed to "treat the parties with respect, courtesy, fairness and good faith." GALR 2(f). They repeatedly breached confidentiality, concealed and destroyed evidence, and decided from the beginning that the case should proceed to termination. RP (8/31/15) 489; RP (9/1/15) 670-671, 728-734, 753; RP (9/2/15) 873-877; RP (12/3/15) 76-79, 155-156; RP (2/25/16) 1136, 1138, 1139; RP (3/24/16) 1464-1465,

1471-1473, 1481, 1589; RP (3/25/16) 152-157, 178-179; RP (3/29/16) 1814; RP (6/10/16) 5, 14-15, 17, 20, 21, 86-90, 127-128; CP 3983-4018, 10182-10268, 11545-11554, 11554-11565, 11566-11569, 11573-11577, 22300-22336.

Judge Farris also found that Brook, Walker, and the Court/Program failed to "make reasonable efforts to become informed about the facts of the case[,]to contact all parties[, and to] examine material information and sources of information, taking into account the positions of the parties." GALR 2(g). RP (6/10/16) 61; CP 12374-12386. In fact, Walker never even spoke with the parents. RP (9/1/15) 753; RP (3/24/16) 1589; RP (3/29/16) 1814.

They did not "timely inform the court of relevant information." GALR 2(i); RP (6/10/16) 53. This included the Court/Program's failure to notify the court about Apple H.'s lack of food allergies. RP (9/1/15) 728-734; RP (9/2/15) 873-877; RP (3/25/16) 177-179; RP (6/10/16) 37. The parents continued to face termination of visits, based on a food list that had no foundation. RP (3/24/16) 1639; Trial Ex 38, 40.

The Court/Program did not limit their activity to those ordered by the court; instead they provided additional services beyond the scope of the order, in violation of GALR 2(j). They helped the foster mother obtain a social security number for the child, they helped her obtain the necessary

approvals to take Apple H. on vacation, and they emailed the department to help get payment for the foster mother's two nannies. RP (9/1/15) 668; RP (6/10/16) 24, 25, 27; CP 11596-11605, 1686-1700, 1831-1875, 4822-4831.

They implied to the foster mother that they could keep information, including medical records, confidential; this violated GALR 2(k), which requires a GAL to "advise information sources that the documents and information obtained may become part of court proceedings." RP (6/10/16) 25, 26. They repeatedly breached the parents' confidentiality, in violation of GALR 2(n). RP (12/3/15) 76-78, 155-156; RP (6/10/16) 14-15, 17, 20, 21; CP 3983-4018, 10269-10331.

Judge Farris also found violations of GALR 2(p). The Court/Program failed in their basic duty to "maintain documentation to substantiate recommendations and conclusions," to "keep records of actions taken by the guardian ad litem," and to make this information "available for review on written request of a party or the court on request." GALR 2(p); RP (6/10/16) 29, 31, 32, 35, 54.

Instead, the Court/Program and its volunteers kept minimal information, spoke via phone to avoid a paper trail, concealed correspondence by using private email accounts, destroyed records (including the box missing from Walker's office), withheld discovery, and resisted multiple

court orders to disclose information. RP (9/2/15) 806; RP (12/3/15) 14-16, 17, 137-138; RP (1/13/16) 1052-1055; RP (1/29/16) 1091, 1104, 1109; RP (3/23/16) 1238-1248, 1281, 1291; RP (3/25/16) 145-148, 206, 245, 246-247, 258-259, 274-275, 278-281; RP (6/10/16) 21-24, 64-68, 90-92; RP (11/4/16) 463-464; CP 10567-10571, 11669-11683, 11573-11577, 11580-11596, 22300-22336.

As these findings show, the Court/Program failed in its most fundamental obligation: it did not advocate for Apple H.'s best interests. It also violated numerous other basic requirements imposed by the GALR. It did not act like a functional GAL, leaving Apple H. with "no one in the courtroom whose only job was to provide a voice for [her]." *M.S.R.*, 174 Wn.2d at 8 n. 2 (internal quotation marks omitted).

3. The *Mathews* framework adopted by the *M.S.R.* court requires reversal of the termination order in this case.

Washington requires appointment of a GAL or CASA in all cases, "unless 'for good cause' shown the judge concludes it is not necessary." *M.S.R.*, 174 Wn.2d at 19-20 (quoting RCW 13.34.100(1)). In this case, the court did not find "good cause" to dispense with the requirement of a CASA or GAL.

Instead, Judge Farris lamented the absence of any party to advocate on behalf of the child and noted that the child had been harmed by the

Court/Program's actions. RP (12/3/15) 160; RP (2/10/16) 39; RP (2/28/16) 1213; RP (3/24/16) 1477-1478; RP (6/10/16) 39, 127-128; CP 209-526, 11611-11612, 12374-12386. Following trial, the independent Attorney GAL appointed to represent Apple H.'s best interests joined the parents' attorneys in asking the court not to sign a termination order, to avoid a meritorious but lengthy appeal. [176] CP 9716-9733, 12619-12621, 22406.

Throughout the dependency proceeding, no one made a neutral assessment of the child's best interests with complete information. VGAL Brook, program coordinator Walker, and the Court/Program aligned themselves with the foster mother; however, their primary motivation was to protect themselves. RP (12/3/15) 160; RP (2/10/16) 39; RP (2/28/16) 1213; RP (3/24/16) 1450-1451, 1477-1478, 1481; RP (6/10/16) 21, 23, 26, 39, 127-128; CP 209-526, 11611-11612, 12374-12386. The Court/Program brought more motions and filed more pleadings to protect itself than it did on the child's behalf. *See, e.g.*, CP 9513-9518, 10547-10552, 10716-10727, 10803-10809, 12993-12888, 13663-13670.

At the termination trial, nobody spoke on behalf of the child. Judge Farris found Walker wholly unqualified to offer an opinion on best

[176] Only after entry of the termination order and more than a year of additional litigation did AGAL Buurstra ask Judge Small to deny the parents' motions to set aside the termination. CP 665-684, 12374-12386.

interests. RP (9/1/15) 746-748; CP 11617-11622, 11644-11645. She considered Walker's testimony uninformed and lacking in credibility. CP 11617-11622, 12374-12386. In the end, she disregarded everything Walker had to say. RP (9/11/15) 10; CP 12374-12386. The only social worker who was asked could not say that termination was in the child's best interests. RP (8/31/15) 592.

Under these circumstances, the premise that underpins *M.S.R.* and *S.K-P*. falls away. The absence of a neutral CASA or GAL left the child's best interests unprotected. Applying the *Mathews* framework adopted in *M.S.R.*, the termination order here violated both the child's and the mother's right to due process.

Under the first *Mathews* factor,[177] both Apple H. and her mother had fundamental liberty interests at stake. *M.S.R.*, 174 Wn.2d at 15, 20; *S.K-P.*, 200 Wn. App. at 97, 108-109). Under the third *Mathews* factor,[178] the State had "a compelling interest in both the welfare of the child and in 'an accurate and just decision' in the dependency and termination proceedings." *M.S.R.*, 174 Wn.2d at 18 (quoting *Lassiter*, 452 U.S. at 27). As in all termination cases, two of the three *Mathews* factors weigh heavily in

[177] *See Mathews*, 424 U.S. at 335.

[178] *See Mathews*, 424 U.S. at 335.

favor of strong procedural protections designed to reduce (if not eliminate) the possibility of error. *Id.,* at 15, 201, 18.

The critical factor is the second *Mathews* factor:[179] "the risk of erroneous deprivation" under the current procedure, and "the value of the additional procedures sought." *Id.,* at 18. Structural issues inherent in termination proceedings combined with the specific dynamics of this case made the risk of error unacceptable here.

The risk of error is particularly high in termination cases given the prominence of the subjective "best interest" standard. As the U.S. Supreme Court found, this standard is imprecise and "leave[s] determinations unusually open to the subjective values of the judge" and serves to "magnify the risk of erroneous factfinding." *Santosky,* 455 U.S. at 762.

Further compounding the risk of erroneous deprivation is the "strong empirical evidence that [the State] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children." *Kenny A. ex rel. Winn v. Perdue,* 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005). The State inevitably encounters conflicts between its "broad programmatic needs" and "the specific needs of the individual child." *Kenny A.* at 1359 n.6. S*ee also, e.g., Braam ex rel. Braam v. State,* 150 Wn.2d 689, 704, 81

[179] *See Mathews,* 424 U.S. at 335.

P.3d 851 (2003) (finding that children's substantive due process rights violated by DSHS resulted in harm).

To fully develop the record, assist the court in arriving at a well-informed decision, and ensure that children's rights are protected, children in termination proceedings need a voice. Their best interests can be protected by an attorney, a GAL, or a special advocate. Leaving a child with no voice creates an unacceptable risk of error in all termination cases.

The risk was particularly acute in this case. Under *M.S.R.* the individualized risk/value assessment depends on "the legal and factual complexity of the situation and on the parties' ability to present their cases." *M.S.R.*, 174 Wn.2d at 18.

Here, the "legal and factual complexity" is astounding. The first VGAL—Brook— aligned herself with the foster mother at the inception of the case. She wrote off the parents and disregarded the child's right to her familial relationships. RP (3/24/16) 1464-1465. She died, apparently without leaving any documentation regarding the case, and her death was kept from the parties and the court. CP 10902. Walker, who took over following Brook's death, did not meet with the parents or even notify them she was the new GAL assigned to the case. RP (9/1/15) 753; RP (3/24/16) 1589; RP (3/29/16) 1814. She, too, aligned herself with the foster mother, and refused to see any hope for the family unit, long before the start of the

termination trial. RP (9/1/15) 753, 833; RP (3/24/16) 1464-1465, 1589; RP (3/29/16) 1814; RP (6/10/16) 36-37; CP 11697-11704.

Throughout the dependency and the termination, Brook, Walker, and the Court/Program repeatedly engaged in conduct that violated the GALR. Rather than advocating for the child's best interests, they advanced their own interests and those of the foster mother.

For reasons unrelated to the child's safety, they rejected the department's proposals to liberalize visitation (and later admitted that such steps would have been a significant measure of overall progress). RP (9/1/15) 734-737, 767, 783-786, 795; RP (3/24/16) 1463-1464. They deceived the court regarding the child's medical condition (and tied that deception to the parents' visitation). RP (8/27/15) 285, 292-293; RP (8/31/15) 521-523; RP (9/2/15) 854. They breached the parents' confidentiality by sharing materials with the foster mother and her adoption social worker. CP 3983-4018. They helped the foster mother in numerous ways that went beyond their role. RP (9/1/15) 668. And they withheld discovery, concealed evidence, and deleted emails to hide proof of their bias and misconduct. CP 209-526. Furthermore, because the case went through multiple social workers, there was no one balancing or mitigating the effects of the misconduct; thus, Brook, Walker, and the Court/Program were able to have an enormous impact on the case.

As this summary shows, the "the legal and factual complexity of [this] situation"[180] added to the already high risk of error. The Court/Program's interference derailed attempts at reunification during the dependency and while the termination was pending. Their malfeasance in and out of court, including the destruction and concealment of records, resulted in a termination trial based on partial information.

Apple H. is an infant; she was not a "party," and had no "ability to present [her] case[]." *M.S.R.,* 174 Wn.2d at 18. She could not formulate and assert her own interests. *See In re Dependency of Lee*, 200 Wn. App. 414, 445, 404 P.3d 575 (2017) (finding that the child was "unable to act as a pro se litigant.") Without an attorney, GAL, or special advocate, she had no one to investigate and advocate on her behalf, and the court was left to decide the case without the full picture.[181] Judge Farris "disregarded" Walker's trial testimony because it was "uninformed", "inconsistent and dishonest". CP 12374-12386.

The *Mathews* factors establish a due process violation here. The

[180] *M.S.R.,* 174 Wn.2d at 18.

[181] The State's representatives did not provide a substitute. Although numerous social workers testified at the termination trial, none had ongoing contact with the case, and none could claim real familiarity with the family. RP (8/26/15) 95, 96; RP (8/27/15) 262-263, 450, 451, 547; RP (8/31/15) 547, 598-599; RP (9/1/15) 693-694. Indeed, no departmental social worker could state that termination was in Apple H.'s best interests.

strength of the interests involved and the risk of error weigh overwhelmingly in favor of reversal. The child should have had an attorney, a GAL, or a special advocate. By terminating the family's relationships without hearing from anyone properly representing the child's interests, the court violated the child's right to due process.[182]

Likewise, the error violated the mother's right to due process. The mother had a right to have her child's interests protected in this termination proceeding. As things stand, she knows that her child went through the ordeal of dependency and termination proceedings with no one looking out for her.

Under *Mathews*, the termination order must be reversed. *Mathews*, 424 U.S. at 335. The case must be remanded for a new trial with instructions to appoint an independent GAL to investigate and report on the child's best interests.[183] *Id.; see also M.S.R.,* 174 Wn.2d at 15, 18, 20.

C. The termination order must be reversed because mother and child were both denied due process under the state constitution.

In addition to violating the family's federal constitutional rights,

[182] As noted above, parents have standing to advance their children's constitutional rights. *See M.S.R.*, 174 Wn.2d at 11; *Engel*, 370 U.S. at 423.

[183] Buurstra, the Attorney GAL assigned previously, has withdrawn from the case. CP 22275-22276.

the termination order violated due process under the state constitution. Wash. Const. art. I, §3. Washington's due process clause provides broader protection than its federal counterpart when it comes to the appointment of counsel.[184]

Art. I, §3 requires the appointment of counsel whenever any fundamental liberty interest is at stake. *S.K-P.*, 200 Wn. App. at 97-98.[185] By contrast, the Fourteenth Amendment mandates counsel only where *physical* liberty interests are at stake. *Lassiter*, 452 U.S.

A child's fundamental liberty interests are at stake in termination proceedings. *M.S.R.*, 174 Wn.2d at 14-23. Because the state constitution requires the appointment of counsel whenever fundamental liberty interests are at stake, children have a categorical right to appointed counsel in termination proceedings. *Id.*; Wash. Const art. I, §3; *Grove*, 127 Wn.2d at 237 (citing *Luscier* and *Myricks*). The court deferred ruling on the issue in

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[184] It may be "unnecessary to provide a threshold *Gunwall* analysis," because the Supreme Court has already determined that the state constitution requires appointment of counsel in cases involving a fundamental liberty interest. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). Instead of adding a *Gunwall* section to this overlength brief, counsel relies on the likelihood that the Supreme Court will address the issue in *S-K.P.*II.

[185] *See also In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995); *King v. King*, 162 Wn.2d 378, 386, 394, 174 P.3d 659 (2007) (*King* II); *In re Welfare of Myricks*, 85 Wn.2d 252, 253-255, 533 P.2d 841 (1975); *In re the Welfare of Luscier*, 84 Wn.2d 135, 138, 542 P.2d 906 (1974).

M.S.R. See M.S.R., 174 Wn.2d at 20 n. 11.

In this case, Apple H. had a fundamental liberty interest at stake. *M.S.R.*, 174 Wn.2d at 14-23. This fundamental liberty interest gave rise to a state constitutional right to counsel under Wash. Const. art. I, §3. *Grove*, 127 Wn.2d at 237 (citing *Luscier* and *Myricks*). She was not represented by counsel. Accordingly, the termination order violated her state constitutional right to due process.[186] *Id.* The order must be reversed, and the case remanded with instructions to appoint counsel for the child. *Id.*

D. This case is unlike those in which a court erroneously failed to appoint a GAL.

1. Because the Court/Program's misconduct derailed reunification, Judge Farris did not solve the problem by disregarding Walker's testimony.

The Court/Program engaged in misconduct aimed at thwarting reunification. It successfully blocked efforts to expand visitation.[187] RP (8/27/15) 307; RP (3/24/16) 1450, 1463. This was despite departmental support for liberalized contact. RP (8/27/15) 280-281, 306-307; RP (8/31/15) 458, 488-489; RP (9/1/15) 736-737, 783-786, 795; RP (9/2/15)

[186] As noted, the state constitutional argument was not addressed by the *M.S.R.* court. *M.S.R.*, 174 Wn.2d at 20 n. 11. The issue is pending in *S.K-P.*. *See S.K-P.*, 189 Wn.2d 1030 (granting review).

[187] They were not motivated by safety concerns or the child's best interests. RP (9/1/15) 734-737, 767, 783-786, 795; RP (3/24/16) 1463-1464.

902; RP (3/24/16) 1453, 1463-1467, 1640-1641; RP (3/25/16) 157-158; CP 4233-4240, 12374-12386. As experienced players in the system, VGAL Brook and program coordinator Walker knew that progress in visitation could lead to reunification. RP (12/1/15) 1034-1035; RP (3/24/16) 1464. Their misconduct significantly changed the direction of the case.[188]

Brook and Walker were not rogue actors. Systemic misconduct and Superior Court involvement infects the entire Court/Program. At the Superior Court's direction, staff attorneys refused to provide discovery and negotiated concessions that left parents' attorneys without materials necessary to contest termination at trial. The Court/Program handled discovery in a way that permits staff attorneys and program coordinators to conceal, withhold, and destroy evidence. RP (3/23/16) 1238-1248, 1281, 1291; RP (3/25/16) 245; RP (6/10/16) 64-68; RP (11/4/16) 463-464.

Volunteers are instructed to make phone calls rather than use email, to ensure that sensitive information isn't available for discovery. RP (9/2/15) 806. One VGAL (Bemis) infiltrated a confidential listserv; she stole documents that staff attorney Haugen used during discovery

[188] Community visits, in-home visits, monitored visits, unsupervised visits, and overnight visits are all steps on the path to reunification. Visitation progress provides a benchmark for assessing a parent's ability to care for a child. RP (8/31/15) 489; RP (3/24/16) 1464, 1471, 1640-1641.

negotiations in this case. The program knew of and concealed this misconduct.[189] RP (2/10/16) 149-150, 158; RP (2/11/16) 315316; RP (2/12/16) 45, 48-52.

The Court/Program's complaint system was used to cover misconduct and discourage complaints. RP (2/25/16) 1142, 1152; RP (6/10/16) 5, 86-90, 107-108, 127-128. Under the Court/Program's interpretation, the grievance procedure protects volunteers, and prohibits complainants from discussing misconduct in court, with other parents' attorneys, or with the public. RP (12/1/15) 991-995; RP (2/10/16) 16, 27, 28, 30-31, 37, 38, 46-50; RP (2/11/16) 325; RP (6/10/16) 86-90; CP 9524-9528. The Court/Program told volunteers about complaints that were supposed to be confidential, allowing retaliation against foster parents, attorneys, and parents. RP (12/3/15) 35-37; RP (1/29/16) 22; RP (2/10/16) 3-5, 11-12, 15-17, 22, 69-70, 91-93; RP (2/11/16) 319-320; RP (2/25/16) 1140-1142, 1149; RP (3/23/16) 1292-1295, 1394; RP (3/25/16) 211-219, 238-239, 260, 264, 266; RP (3/29/16) 1672-1687; RP (6/10/16) 5, 106-108, 109-113, 127-128; CP 10517-10519, 12947.

In short, with the Superior Court's approval, the Court/Program occupied a "sweet spot" that permitted abuse without consequence. The

[189] This is detailed later elsewhere in this brief.

Court/Program appeared in each case as a second GAL; it had all the rights of a party and exerted tremendous influence over dependency and termination cases. RP (8/26/15) 47; RP (9/2/15) 950-954; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275, 1300-1301, 1508-1509; RP (3/25/16) 234; RP (9/23/16) 157; CP 10908; *see also, e.g.,* CP 10803-10809; 10551-10552, 12387-12408; Trial Ex 12, 38, 39, 40. However, according to its attorney, the Court/Program could not be held accountable for its misdeeds. The Court/Program argued that it was not bound by the GALR, was not required to comply with discovery rules, could not be ordered to produce information, was not subject to the public disclosure act, and could not be sanctioned even when its volunteers and staff lied to the court, concealed or destroyed evidence, engaged in abusive litigation tactics, and disregarded court orders. RP (2/12/16) 90-91, 112-113; RP (3/23/16) 1249-1250; RP (3/24/16) 1542, 1612; RP (9/23/16) 163-164, 173; CP 13640-13641.

In this case, the Court/Program committed egregious misconduct that thwarted the parents' efforts to reunify with their daughter. RP (8/27/15) 307; RP (8/31/15) 489; RP (12/1/15) 1034-1035; RP (3/24/16) 1450, 1463-1464; RP (3/29/16) 1724-1730. This problem was not solved by disregarding Walker's testimony. By the time Walker testified, the damage had been done.

For example, without the Court/Program's involvement, the mother would have made progress in visitation.[190] The department supported monitored in-home visits. RP (8/27/15) 280-281; RP (8/31/15) 458, 488-489; RP (9/1/15) 736-737; RP (9/2/15) 902; RP (3/24/16) 1453, 1463-1464, 1640-1641; RP (3/25/16) 157-158; CP 2399, 4233-4240, 12374-12386. By blocking expanded visits for reasons unrelated to the child's best interests, the Court/Program made it impossible for the mother to move toward unsupervised visits, overnight visits, and ultimately, reunification. RP (8/27/15) 307; RP (8/31/15) 489; RP (12/1/15) 1034-1035; RP (3/24/16) 1450, 1463-1464; RP (3/29/16) 1724-1730.

Undisputed testimony established that visitation progress is essential to reunification. RP (8/31/15) 489; RP (3/24/16) 1464. Visitation status also provides an important benchmark: parents who are limited to supervised visits at the DSHS office are less likely to reunify than those who have unsupervised visitation in the family home. RP (8/31/15) 489.

Furthermore, the department must "encourage the maximum parent and child… contact." RCW 13.34.136(1)(b)(ii). The legislature has found that "[e]arly, consistent, and frequent visitation is crucial for maintaining

[190] In addition, she would have been able to attend the child's medical appointments. RP (8/27/15) 298-299; RP (8/31/15) 482, 552; RP (9/1/15) 762; RP (9/2/15) 872; CP 7715, 11605-11609. This, too, would have helped with reunification. RP (8/31/15) 478-479.

parent-child relationships and making it possible for parents and children to safely reunify." *Id.* Numerous studies support that finding and have demonstrated that:

> Regular frequent visitation increases the likelihood of successful reunification, reduces time in out-of-home care, promotes healthy attachment, and reduces the negative effects of separation for the child and the parent.

Smariga, Margaret, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*, American Bar Association Center on Children and the Law (July 2007); *see also* Weintraub, Amber, *Information Packet: Parent-Child Visiting*, National Resource Center for Family-Centered Practice and Permanency Planning (April 2008) (collecting studies showing that frequent visits are associated with shorter out-of-home placements, more successful reunifications, and better adjustment for children).

The department could not provide an effective counterweight to the Court/Program.[191] Caseworkers deferred to VGAL Brook and program

[191] Nor could the department act as the child's GAL. In termination cases, "there are many reasons why there might be a conflict between the Department and a child…[T]he complexity of the activities and operation of the Department creates the potential for numerous conflicts with the best interests of the involved child." *In re M.N.*, 171 P.3d 1077, 1081 (Wyo. 2007). In *M.N.*, the court reversed because the trial judge failed to either appoint a GAL or make a finding that no GAL was needed. *Id.*

coordinator Walker, who had more experience with the case.[192] RP (3/24/16) 1471. In addition, the Court/Program used its veto power to block the department's efforts toward reunification. RP (9/1/15) 766-767. As social worker Green testified, the Court/Program was a major barrier to reunification. RP (8/31/15) 450.

The Court/Program's misconduct and its active role in fighting reunification makes this case unlike those in which the trial court failed to appoint a GAL. *See In re Dependency of A.G.,* 93 Wn. App. 268, 280–281, 968 P.2d 424 (1998), *as amended on reconsideration* (Feb. 1, 1999); *In re Dependency of O.J.*, 88 Wn. App. 690, 696–697, 947 P.2d 252 (1997). In *A.G.,* the absence of a GAL prompted a remand for a hearing on the issue of prejudice. *A.G.*, 93 Wn. App. at 280. In *O.J.*, the testimony favoring termination was "so strong" that the Court of Appeals felt "confident that a guardian ad litem would have reached the same conclusion." *O.J.*, 88 Wn. App. at 696. Neither case should control.

By striking Walker's testimony, Judge Farris did not remove the Court/Program's influence. It did not transform Apple H.'s case into one where the GAL was absent. *Cf. A.G.* 93 Wn. App. at 280*; O.J.*, 88 Wn.

[192] The department assigned seven different social workers (and numerous supervisors) to work on Apple H.'s case. RP (8/26/15) 95; RP (8/27/15) 262-263. By contrast, VGAL Brook and her program coordinator participated from the start. RP (9/1/15) 769; RP (3/25/16) 285.

App. at 696.

VGAL Brook, program coordinator Walker, and the Court/Program committed misconduct that had an enormous impact on the case. With Walker's support, Brook decided to pursue termination from the start of the case. RP (3/24/16) 1464-1465. The Court/Program derailed progress toward reunification long before Walker testified.

Merely striking her testimony did not remove the impact of the misconduct. The termination order must be reversed and the case remanded for a new trial.

2. By striking Walker's testimony, Judge Farris excluded evidence of misconduct that should have prevented termination.

Judge Farris's decision to strike program coordinator Walker's testimony prejudiced the mother. Through Walker's testimony, the mother exposed some of the Court/Program's misconduct. Walker also outlined actions undertaken to derail reunification without considering the child's best interests.

A parent's fundamental liberty interests are at stake in termination cases. *Santosky*, 455 U.S. at 753. Due process requires "fundamentally fair" procedures. *Id.*, at 753-754.

This gives parents a constitutional right "to present all relevant evidence for the [court] to consider prior to terminating." *In re Welfare of*

R.H., 176 Wn. App. 419, 426, 309 P.3d 620 (2013). Parents also have a statutory right "to introduce evidence." RCW 13.34.090(1).

By striking Walker's testimony, Judge Farris deprived the mother of her right to introduce relevant evidence. Judge Farris also deprived herself of the opportunity to consider the way Brook, Walker, and the Court/Program steered the case toward termination.

Walker testified to facts that undermined the elements required for termination. *See* RCW 13.34.180(1). Excluding her testimony is akin to barring testimony from the assigned social worker and then prohibiting the parents from calling the social worker as a witness. Walker, like each of the social workers who testified, provided testimony supporting the mother's arguments.

Walker's trial testimony showed that she and VGAL Brook intentionally created obstacles to reunification. For example, Walker's testimony allowed Judge Farris to conclude that the Court/Program tried "to manufacture evidence" against the parents. [193] RP (9/11/15) 9.

Walker also testified that the Court/Program prevented the department from expanding visits. RP (8/27/15) 280-281; RP (9/1/15) 736-737,

[193] She provided evidence that the foster mother directly communicated with visit supervisors and the parents' service providers. RP (8/31/15) 548-550; RP (9/1/15) 660-661, 664; RP (9/2/15) 867. This may have caused the parents to distrust the department, as Dr. O'Leary suggested. RP (9/1/15) 628.

766-767; RP (9/2/15) 902. She admitted that the Court/Program blocked visitation progress for reasons unrelated to the child's safety or best interests. RP (9/1/15) 734-737, 783-786, 795; RP (3/24/16) 1464-1465.

This testimony called into question the department's proof under RCW 13.34.180(1)(e). Without interference from the Court/Program, the family would have had monitored in-home visits rather than supervised visits in an office setting. CP 2399.

This would have made it possible for Apple H. to return home "in the near future." RCW 13.34.180(1)(e). It also would have improved her "prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f). Indeed, with the Court/Program out of the picture, the mother retained custody of a newborn.

Furthermore, striking Walker's testimony also did nothing to solve the Court/Program's misconduct in discovery. If the Court/Program had provided complete discovery prior to trial, the parents could have elicited additional substantive facts supporting denial of the petition. The parents could have introduced this testimony through cross-examination of Walker. Judge Farris left the parents with no remedy for the discovery violations, and no opportunity to oppose the termination using facts that had been unlawfully withheld.

Walker provided facts supporting the mother's position. Striking

her testimony deprived the mother of evidence that should have prevented termination.

This violated her due process and statutory right to introduce all relevant evidence and resulted in a proceeding that was not "fundamentally fair." *Santosky*, 455 U.S. at 753-754; *R.H.*, 176 Wn. App. at 426; RCW 13.34.090(1). The termination order must be reversed, and the case remanded for a new trial. *R.H.*, 176 Wn. App. at 426-429.

3. Reversal is required even if the case is treated as one involving failure to appoint a GAL.

In *O.J.*, the court noted that "there might well be reversible error" if the mother had raised a proper objection. *O.J.*, 88 Wn. App. at 696. Here, the mother objected to the termination and argued that the child was left without a GAL at trial. CP 9550-9551. Thus, even under *O.J.*, "there might well be reversible error." *Id.*

Other jurisdictions have concluded that the absence of a GAL (or a good cause finding) renders termination proceedings "fatally defective." *Matter of Child X*, 617 P.2d 1078, 1078–1079 (Wyo. 1980).[194] In Indiana, for example, "the failure to appoint a guardian ad litem in parental termination proceedings is not harmless error." *Jolley v. Posey Cty. Dep't of*

[194] *See also Matter of T.R.*, 726 P.2d 500, 500 (Wyo. 1986); *M.N.*, 171 P.3d at 1081. Because no GAL was appointed, termination orders were reversed in *Child X* , *T.R.* and *M.N.*

Pub. Welfare, 624 N.E.2d 23, 23 (Ind. Ct. App. 1993).

Courts in North Carolina "must presume prejudice where… a child was not represented by a guardian ad litem at a critical stage of the termination proceedings." *In re R.A.H.*, 171 N.C. App. 427, 431, 614 S.E.2d 382 (2005).[195] As one appellate court put it, "[t]he participation of a Law Guardian is… essential to the best interests of the allegedly neglected child." *Matter of Audrey PP*, 144 A.D.2d 723, 535 N.Y.S.2d 136, 136–137 (N.Y. App. Div. 1988).[196]

Apple H. was left without a GAL to protect her best interests in this case. The parents raised a proper objection, allowing the Court of Appeals to find the "reversible error" missing in the *O.J.* case. *O.J.*, 88 Wn. App. at 696. The termination order must be reversed and the case remanded for a new trial.

V. JUDGE SMALL SHOULD HAVE SET ASIDE THE TERMINATION ORDER.

Judge Small did not hear any testimony in this case. Nor did he

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[195] The *R.A.H.* court reversed even though the child was represented by counsel, and even though the court appointed a GAL four days into the termination trial. *R.A.H.*, 171 N.C. App. at 431.

[196] Other jurisdictions have applied a similar rule in adoption cases that do not involve the government. In New Mexico, for example, "[a]bsent the appointment of a guardian ad litem for the child, [a termination order] has no binding effect." *Matter of Adoption of Doe*, 677 P.2d 643, 644 (N.M. Ct. App. 1984); *see also Heffner v. Rensink*, 938 So. 2d 917, 919–20 (Miss. Ct. App. 2006); *Vestal v. Vestal*, 731 So. 2d 828, 829 (Fla. Dist. Ct. App. 1999); *Chapman v. Chapman*, 852 S.W.2d 101, 102 (Tex. App. 1993).

review transcripts from any hearings. He did not consider Judge Farris's detailed summaries of the testimony and argument. He made comments showing he was unfamiliar with the voluminous record.

In addition, Judge Small denied the mother's motion to vacate based on his misreading of a statute that does not control. He implied that the State's sole interest at termination is "winning" rather than achieving an accurate and just decision. For all these reasons, the Court of Appeals should disregard his ruling on the mother's motion to vacate. Judge Small should have granted the mother's motion.

A. This court should review Judge Small's ruling *de novo*.

Review is *de novo* for four reasons. First, appellate courts review *de novo* a trial court decision that relies exclusively on affidavits, declarations, and other documents. *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013).[197] Appellate courts reviewing a documentary record stand "in the same position as the trial court." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

Here, Judge Small's refusal to set aside the termination order

[197] *See also, e.g., Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) (*Smith* II); *Carlson v. City of Bellevue*, 73 Wn.2d 40, 435 P.2d 957 (1968); *Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966).

rested entirely on documentary evidence. Accordingly, the appellate court stands in the same position as Judge Small. *Id.* Review is *de novo*. *Id.*

Second, in addition to her other arguments, the mother asked Judge Small to set aside the termination order for due process violations. CP 12297-12373. Alleged violations of a constitutional right are reviewed *de novo*. *Cornwell*, --- Wn.2d at ___; *Blomstrom,* 189 Wn.2d at 389.

Third, a trial court's decision denying a motion for a new trial or for relief from judgment is reviewed *de novo* "when...the denial of a new trial is challenged based on an error of law."[198] *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 565, 333 P.3d 566, 570 (2014); *see also Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018) (Supreme Court reviews questions of law *de novo*); *State v. Smith*, 189 Wn.2d 655, 661, 405 P.3d 997 (2017) (*Smith* III) (same). Here, Judge Small denied the mother's motions based on an error of law. Review is *de novo* for that reason as well. *Flyte*, 183 Wn. App. at 565.

Fourth, Judge Small did not preside over any of the testimony or evidence that provided the factual basis for the mother's motions. RP

[198] Ordinarily, an appellate court will review a decision under CR 59 or CR 60 for an abuse of discretion. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 121, 904 P.2d 1150 (1995) (CR 60); *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 324, 284 P.3d 749 (2012) (CR 59).

(6/28/17) 523-585; RP (10/6/17) 1-98. Nor did he review any transcripts of that testimony. RP (10/6/17) 5-6. These factors also support *de novo* review of his decision. *Cf. In re Marriage of Irwin*, 64 Wn. App. 38, 62, 822 P.2d 797 (1992). [199]

B. Judge Small applied the wrong legal standard when he refused to grant the mother's motions.

1. Judge Small did not realize that the Court/Program had been appointed as GAL.

The Court/Program was appointed as a second GAL. CP 10908. It appeared in the case, represented by counsel, filing motions, raising objections, presenting argument and adding language to court orders. RP (8/26/15) 47; RP (9/2/15) 950-954; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275, 1300-1301, 1508-1509; RP (3/25/16) 234; RP (9/23/16) 157; CP10551-10552, 10803-10809, 12387-12408; Trial Ex 12, 38, 39, 40.

According to Judge Small, the Court/Program was not a party to the case. RP (10/6/17) 38-42; CP 11265-11267. He based this conclusion on RCW 13.34.030(11) and (12).[200] Judge Small incorrectly believed that

[199] In *Irwin*, the court noted that "[t]he trial judge below was the same judge who heard the entire dissolution case. He was well versed in the parties' financial circumstances. He did not need oral testimony to help him judge credibility." *Irwin*, 64 Wn. App. at 62.

[200] The statute has since been amended in ways that are not relevant here.

the statute prohibited the Court/Program from participating in the case as a party.[201] RP (6/28/17) 20; RP (10/6/17) 38-39; CP 11265-11267.

The statute does not impose this limitation. RCW 13.34.030(11) and (12). Instead, it describes court programs that are established "to manage *all aspects* of volunteer guardian ad litem representation." RCW 13.34.030(12) (emphasis added). The provision goes on to state that "[s]uch management shall include *but is not limited to*: Recruitment, screening, training, supervision, assignment, and discharge of volunteers." RCW 13.34.030(12) (emphasis added).

The statute did not prohibit the Court/Program from appearing as a party alongside the individual volunteer. RCW 13.34.030(12). In this case, the Court/Program was appointed as a second GAL, along with VGAL Brook (and later program coordinator Walker). CP 10901, 10908. Staff attorneys appeared representing the Court/Program, the individual VGAL, and the assigned program coordinator.[202] RP (8/26/15) 47; RP (9/2/15) 950-954; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275, 1300-1301, 1508-1509; RP (3/25/16) 234; RP (9/23/16) 157; CP 10551-10552,

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[201] This is an issue of law, reviewable *de novo*. *Flyte*, 183 Wn. App. at 565; *Phelps*, --- Wn.2d at ___.

[202] The bar association concluded this violated the attorneys' ethical duty to avoid conflicts of interest, forcing staff attorney Haugen and her colleague to withdraw from this case. CP 22410-22411.

10803-10809, 12387-12408; Trial Ex 12, 38, 39, 40.

Furthermore, the program's own manual indicates that appointment as a VGAL confers party status. CP 13524-13573. As noted, the Court/Program acted like a party throughout the dependency and termination proceedings: it filed motions, raised objections, cross-examined witnesses, presented argument, and added language to court orders. RP (8/26/15) 47; RP (9/2/15) 950-954; RP (2/12/16) 63-64; RP (3/23/16) 1236-1237, 1269-1275, 1300-1301, 1508-1509; RP (3/25/16) 234; RP (9/23/16) 157; CP 10551-10552, 10803-10809, 12387-12408; Trial Ex 12, 38, 39, 40.

Judge Small did not address any of these facts.[203] RP (6/28/17) 523-585; RP (10/6/17) 1-98; CP 11265-11267. Instead, he relied solely on the statute to distinguish between the individual volunteer (which he recognized as a party) and the Court/Program (which he concluded was not a party). RP (6/28/17) 523-585; RP (10/6/17) 1-98; CP 11265-11267.

Moreover, in this case, the Court/Program acted like a party, and its actions impacted the very direction of the case. RP (8/27/15) 307; RP (8/31/15) 489; RP (12/1/15) 1034-1035; RP (3/24/16) 1450, 1463-1464; RP (3/29/16) 1724-1730. For example, the Court/Program insisted on

[203] He was either unaware of local practice or he considered the VGAL Program's actions irrelevant, given his interpretation of the statute.

adding language to court orders that allowed the VGAL and program staff to block liberalization of visits in this case. Trial Ex 38, 40. As noted by both social workers for the department and program coordinator Walker, progress in visitation is essential to reunification. RP (8/31/15) 489; RP (9/1/15) 670-671; RP (3/24/16) 1464. By acting as a party, the Court/Program changed the direction of the case and thwarted the parents' efforts at reunification with their daughter. RP (9/1/15) 766, 767.

Thus, even if the Court/Program could not qualify as a party for technical reasons, it should have been treated as a party. It behaved like a party and its participation significantly impacted the case.

2. The Court/Program's party status does not control the issues.

The mother's motions did not turn on the Court/Program's status as a party. CP 584-664, 12297-12373, 22277-22283; As the mother's attorneys pointed out, Superior Court judges and their immediate staff participated in the case, created secret policies adverse to the parents, and acted without any screen or ethical separation ensuring that members of the bench had no contact with active cases.[204] CP 584-664, 685-691, 12297-12373. Whether the Court/Program was a party or not, the Superior

[204] Indeed, Judge Krese, who presided over the dependency trial and signed multiple orders, including the order appointing the VGAL Program and the dependency order itself, had contact with this case, both in and out of the courtroom. CP 12314-12341.

Court's participation in the litigation violated the appearance of fairness doctrine and the parents' right to due process, as outlined elsewhere in this brief. CP 584-664, 685-691, 12297-12373. In addition, volunteers and staff committed misconduct and blocked reunification for reasons that had nothing to do with the welfare of the child. CP 584-664, 685-691, 12297-12373. They also concealed and destroyed evidence. CP 22277-22283, 584-664.

Judge Small failed to recognize the due process violation, the appearance-of-fairness problem, or the impact of Court/Program misconduct. RP (6/28/17) 523-585; RP (10/6/17) 1-98; CP 11265-11267. Whether the Court/Program was a party or not, Superior Court judges and their agents and employees committed misconduct and participated in the litigation. This violated due process and the appearance of fairness, as outlined in the mother's Motion to Vacate. CP 12297-12373.

Judge Small applied the wrong legal standard. He denied the mother's motions based on an erroneous interpretation of RCW 13.34.030. Contrary to his interpretation, the statute does not create a bar prohibiting court programs and their employees from appearing in litigation as a party.

Furthermore, Judge Small failed to recognize that the VGAL Program acted like a party. It appeared through counsel, brought motions, raised objections, presented arguments, and added language to court

orders. It had the impact of a party, steering this case toward termination so that the foster mother could adopt the child.

Finally, by focusing on the Court/Program's party status, Judge Small ignored the overall problem: the Superior Court appeared before the Superior Court, committed misconduct, blocked reunification, and asked Judge Farris to terminate the mother's rights. Superior Court judges and their agents became involved in the litigation against the mother.

3. The mother is entitled to relief under CR 59 and CR 60.

As spelled out in the mother's pleadings to the trial court, the VGAL's misconduct,[205] the due process violation, and the appearance-of-fairness problem all provided grounds for relief from judgment under CR 60(b)(4), (5), and (11). CP 584-664, 685-691, 12297-12373.

Those provisions allow for a new trial because of "[f]raud…misrepresentation, or other misconduct of an adverse party;" because "[t]he judgment is void;" or for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(4), (5), (11). Here, the Court/Program failed to disclose the involvement of judges and senior administrators until late in the proceedings. It committed and covered up egregious misconduct, it destroyed evidence, it violated discovery rules, and it created

[205] Including the destruction of evidence such as the missing box. CP 584-664.

policies that kept the parents from learning what went on behind the scenes. Nichelle A. is entitled to a new trial under CR 60(b)(4), (5), and (11).

As the mother argued to Judge Small, CR 59(a)(1) and (9) provide a basis to grant a new trial. CP 584-664, 685-691, 12297-12373. Misconduct, due process violation, and appearance-of-fairness problem all contribute to this error. Under the rule, a new trial may be granted based on "[i]rregularity in the proceedings of the court… or adverse party…" or when "substantial justice has not been done." CR 59(a)(1), (9).

The Superior Court's covert participation in the case, the Court/Program's misconduct, the destruction and concealment of evidence, and the discovery violations all show irregularity in the proceedings and a denial of substantial justice. CR 59(a)(1), (9).

Judge Small erred as a matter of law when he denied the mother's motions for a new trial and for relief from judgment. *Flyte*, 183 Wn. App. at 565. The Court of Appeals must reverse the Order Denying Parents' Motion to Vacate Judgment.[206] *Id.* The termination order must be set aside, and the case remanded for a new trial. *Id.*

C. Judge Small failed to recognize the State's compelling interest in

[206] CP 11265-11267.

"an accurate and just decision."

In termination proceedings, the State has a "compelling interest… in 'an accurate and just decision.'" *M.S.R.*, 174 Wn.2d at 18 (quoting *Lassiter*, 452 U.S. at 27).

Judge Small failed to recognize this compelling interest. RP (10/6/17) 37. He declined to vacate the judgment, in part he said because the State "would basically pay the price." RP (10/6/17) 37. He found this unfair because "[t]he State did absolutely nothing wrong." RP (10/6/17) 37.

Judge Small's approach makes everyone "pay the price." RP (10/6/17) 37. Justice is not served when victory is achieved through misconduct, deceit, and the improper involvement of Superior Court judges and their agents.

Furthermore, Judge Small's concern about making the State "pay the price" stemmed from his view that the State was "the prevailing party at trial." RP (10/6/17) 37. This view is incomplete.

The Court/Program is the only party that truly prevailed at trial. Although Judge Farris granted the State's petition, the State suffered a greater loss. The Court/Program's misconduct precluded any possibility of "'an accurate and just decision.'" *M.S.R.*, 174 Wn.2d at 18 (quoting *Lassiter*). It also certainly precluded any timely finality of the case itself.

By contrast, the Court/Program had an unequivocal "victory." From the beginning of the case, the Court/Program worked to ensure termination. RP (3/24/16) 1464-1465. Prior to the termination trial, VGAL Brook and program coordinator Walker took steps (and committed misconduct) to block reunification and admitted the goal from the very start was to facilitate the foster mother's adoption of Apple H. RP (8/31/15) 489; RP (9/1/15) 670-671; RP (3/24/16) 1464-1465, 1471-1473. At the termination trial, the Court/Program argued in favor of termination. RP (9/2/15) 950-954. Later in the case, the Court/Program asked Judge Farris to "resolve this case by entering a termination order," and to immediately conclude the proceedings by entering "a final termination order… to serve the best interests of this child." RP (9/23/16) 150; CP 13663-13670. The Court/Program prevailed at trial: Judge Farris ultimately entered a termination order. CP 12374-12386.

The department's "victory" cannot stand. It was unfairly achieved through the Court/Program's misconduct.

Unfortunately, the three players who will actually "pay the price" are Apple H. and her parents. RP (10/6/17) 37. Their relationship was temporarily severed, starting when the department discontinued visitation, more than a year after Judge Farris's oral ruling. CP 9159-9160, 22286-22287.

After the termination order is reversed and the case remanded, the three of them will have to reconnect. The process of reconnection will undoubtedly prove difficult for all. *See, e.g., Matter of K.M.M.,* 186 Wn.2d 466, 484, 379 P.3d 75 (2016) ("While it is possible that attachment and bonding services might have prevented K.M.M.'s detachment from her father had they been previously provided, we cannot go back in time to prevent the damage from occurring.")

This case will present future difficulties for Apple H., her parents, and the professionals who will work to undo the harm caused by the Court/Program's misconduct. But these future difficulties are not a basis for affirming the wrongful termination of family relationships.

Judge Small should have vacated the termination order. He failed to recognize the "price" payed by the child, the parents, and the State. The decision here was not "'accurate and just.'" *M.S.R.,* 174 Wn.2d at 18 (quoting *Lassiter*). It cannot stand. *Flyte,* 183 Wn. App. at 565.

D. Judge Small's order should not be granted deference because he did not consider relevant portions of the record.

Judge Small did not consider those parts of the record upon which the mother's motions were based. RP (6/28/17) 5, 7; RP (10/6/17) 5-6.[207]

[207] *See also* CP 11244-11246, 11268-11280.

As he remarked, he "obviously ha[d]n't read everything," and didn't know "how many weeks that would actually take." RP (6/28/17) 5.

He didn't see "much relevance" to Judge Farris's extensive summaries of the evidence "because she's recused." RP (6/28/17) 7. He also didn't give "a whole lot of weight" to the oral rulings in which she outlined facts drawn from the testimony and argument she'd heard. RP (6/28/17) 10.

Although the court file contained many transcripts from the testimony,[208] it does not appear that Judge Small reviewed them. RP (6/28/17) 5, 7; RP (10/6/17) 5-6.[209] Nor is there any indication that he examined any exhibits. RP (6/28/17) 5, 7; RP (10/6/17) 5-6.

Because of this, Judge Small lacked familiarity with the facts. This is evident in his conclusion that the Superior Court and the VGAL Program were separate entities. RP (6/28/17) 20; RP (10/6/17) 38-39; CP 11265-11267. He also did not appear to know that the Court/Program had been appointed as a second GAL, that it had appeared in court represented by counsel, and that it had fought for termination from the start of the

[208] The transcript copies filed in the court file are at Sub Nos. 79, 219-223, 243, 248, 249, 251-254, 272, 302, 304, 317, 321, 327-330. Because the complete VRP has been filed with the Court of Appeals, these transcripts have not been designated, except where they are attachments to other documents necessary to the appeal.

[209] *See also* CP 11244-11246, 11268-11280.

dependency. RP (6/28/17) 20; RP (10/6/17) 38-39; CP 11265-11267.

Because he reviewed and considered only a small fraction of the record, Judge Small's decision should not be granted any deference. *See, e.g., Hollins v. Zbaraschuk*, 200 Wn. App. 578, 583, 402 P.3d 907, 910 (2017), *review denied,* 189 Wn.2d 1042, 409 P.3d 1061 (2018) ("[T]he trial judge, who had the benefit of a fully developed trial record, was best informed on the relevant question…[T]he motion judge, who had a much more limited record than that developed at trial, was far less informed.")

Judge Small's ruling denying the mother's motion to vacate must be set aside. *Id.; Flyte*, 183 Wn. App. at 565. The termination order must be reversed, and the case remanded for trial. *Flyte*, 183 Wn. App. at 565.

VI. THE DEPARTMENT FAILED TO NOTIFY THE MOTHER OF THE PARENTAL DEFICIENCIES ON WHICH TERMINATION COULD BE BASED.

No one told Nichelle A. that her relationship with Apple H. could be severed because she (a) participated in a medically supervised methadone program, and (b) maintained contact with the father. According to Judge Farris, these two factors justified termination. Because the mother received no notice of her alleged parenting deficiencies, the termination order violated her right to due process.

Parents facing termination must be afforded "'strict due process protections.'" *In re Dependency of A.M.M.*, 182 Wn. App. 776, 791, 332

P.3d 500 (2014) (quoting *In Interest of Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858 (1982)). Proper notice is fundamental to this requirement. *Id.*

In termination proceedings, due process requires "that parents receive notice of the specific issues to be considered." *A.M.M.*, 182 Wn. App. at 791. A termination order violates due process if the parent "is held accountable for a parenting deficiency about which she was never notified." *Matter of Welfare of F.M.O.*, 194 Wn. App. 226, 230, 374 P.3d 273 (2016). In the absence of proper notice, a case must be remanded for the trial court to determine "whether termination is appropriate on the basis of the parental deficiencies of which [the parent] was given adequate notice." *Id.*, at 793.

The parent must receive more than just notice of a problem to be addressed. *Id.*, at 791-793. Instead, the department must notify the parent that failure to address the identified problem could result in termination of the parent-child relationship. *Id*. Here, the termination was based on the perception that Nichelle A. continued in a relationship characterized by domestic violence. There are a multitude of reasons a person would not want to discontinue a relationship: fear, affection, history, family connection, the list goes on. Expecting a person in Nichelle A.'s position to know that the department (and court) think she must discontinue her relationship with the father in order to maintain a relationship with her daughter is

unrealistic. Failure to notify the mother of the parental deficiency also violates due process.

In *A.M.M.*, the trial court terminated in part based on the mother's ignorance of her children's developmental needs. *Id.,* at 791-792. Neither the dependency petition nor the termination petition notified her that this lack of knowledge constituted a parental deficiency. *Id.* Even an order requiring the mother to attend age-appropriate parenting classes was insufficient to inform her "that she could lose her parental rights if she did not adequately familiarize herself with her children's developmental needs." *Id.,* at 792.

Although the mother in *A.M.M.* also had substance abuse problems, the court's extensive findings on the subject were insufficient to sustain the termination order. *Id.* The Court of Appeals noted that "there was no finding that [the mother's] substance abuse *alone* provided a basis for terminating her parental rights." *Id.* (emphasis in original). Because of this, the court reversed the termination ruling and remanded for further hearings. *Id.,* at 792-793.

Similarly, in *F.M.O.,* the mother was never notified that "her recurring incarceration was itself a parenting deficiency that she needed to defend against." *F.M.O.,* 194 Wn. App. at 232. Despite this, the trial court "included incarceration in the list of proven deficiencies," and terminated

in part on that basis. *Id.*, at 233. The Court of Appeals found a due process violation and remanded for the trial court to strike the finding regarding recurring incarceration and to consider whether termination was appropriate on the basis of the remaining deficiencies. *Id.*[210]

Here, as in *A.M.M.* and *F.M.O.*, the mother never received proper notice of her parental deficiencies. Nichelle A.'s parental rights were terminated for two reasons: she maintained a relationship with the father, and she participated in a methadone program. CP 527-539.

Neither the dependency petition nor the termination petition informed her that complying with a medically-supervised methadone program put her at risk of termination. CP 577-580; Trial Ex 6 Dependency Petition; Trial Ex. 7 Amended Dependency Petition. Nor did either petition notify her that the father's domestic violence problem could result in termination of her parental rights, even if she did not live with him or maintain an intimate relationship with him. CP 577-580; Trial Ex 6, 7.

Nor does the record prove that the mother received adequate notice

[210] *See also In re H.T.*, 187 Wn. App. 1020 (2015) (unpublished). In that case, the Court of Appeals vacated a termination order and remanded based on failure to notify the mother "of all the parental deficiencies used as the basis for terminating her parental rights." *Id.*

by alternate means.[211] No witness warned the mother that complying with the methadone clinic's rules could result in termination.[212] RP (9/1/15) 752; RP (9/2/15) 815. Nor did any witness advise the mother that she would face termination because of the father's domestic violence problem unless she severed all ties with him. RP (8/31/15) 525-557; RP (9/1/15) 653-654.

Although the mother was encouraged to attend a domestic violence support group, nothing suggests she was told that her rights could be terminated if she did not cut all ties to the father.[213] RP (8/27/15) 274; RP (8/31/15) 459, 524-525; RP (9/1/15) 704. Indeed, the mother received the opposite message: the department required her to visit Apple H. with the father or face having her visit time cut in half. RP (8/26/15) 67-71; RP (8/31/15) 524-525, 535, 543, 569.

Because the department failed to provide proper notice, the termination order must be reversed, and the case remanded. Because Judge Farris has recused herself from further proceedings, the remedy employed in

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[211] The *F.M.O.* court explained that a parent could theoretically be provided adequate notice through some means other than the petition. *Id.*, at 231. However, in *F.M.O.*, the court did not find that the mother had been provided such notice.

[212] In fact, the dependency court ordered Nichelle A. to follow the recommendations of service providers, which required her to comply with the methadone program. Trial Ex. 9-12, 38-40.

[213] The mother's participation in this support group did not provide proper notice, just as the court-ordered parenting class did not provide proper notice in *A.M.M.*

A.M.M. and F.M.O. is not available. *F.M.O.*, 194 Wn. App. at 233; *A.M.M.*, 182 Wn. App. at 792-793. On remand, the case must be set for a new trial.

VII. THE TERMINATION ORDER VIOLATED THE MOTHER'S RIGHT TO DUE PROCESS BECAUSE IT WAS BASED ON HER COMPLIANCE WITH THE DEPENDENCY COURT'S ORDERS, AND BECAUSE THE EVIDENCE RELIED ON BY JUDGE FARRIS WAS INSUFFICIENT.

The mother participated in a medically supervised methadone program. The dependency court had ordered her to comply with the program. Judge Farris terminated based on the mother's court-ordered compliance with the program. This violated the mother's right to due process.

In addition, insufficient evidence supported Judge Farris's conclusion that the mother's methadone treatment justified termination. The mother's compliance with the program did not impact her parenting. Her court-ordered treatment participation did not make her "currently unfit," and did not qualify as a "condition" to be remedied.

Finally, the evidence was insufficient to prove that termination served the child's best interest. The social worker who addressed the "best interests" standard, the only one even asked, was unable to say that termination was in Apple H.'s best interests.

A. The termination order violated due process because it was based on the mother's compliance with orders issued throughout the

dependency.

In termination cases, the government is required to provide "fundamentally fair procedures." *Santosky*, 455 U.S. at 753–754. The proceedings here violated the foundations of due process, because the mother's compliance with dependency court orders resulted in termination of her parental rights. U.S. Const. Amend. XIV.

Nichelle A. was repeatedly ordered to "follow all recommendations of evaluators and service providers." *See* CP 10851-10866. No exception was made for methadone treatment. CP 10851-10866. Throughout the dependency and termination process, the mother complied with her medically supervised methadone program. RP (8/26/15) 24, 48-49, 86, 101; RP (831/15) 461. Judge Farris based her termination order in part on the mother's methadone treatment. Findings Nos. 2.32-2.34, 2.40, 2.45-2.51, CP 12380-12382.

Under these circumstances, the termination order was "fundamental[ly] unfair." *Id.* It "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. 342, 353, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (addressing introduction of evidence at a criminal trial) (internal citations omitted).

Judge Farris did not acknowledge that the mother had been ordered to comply with her methadone program; instead, she ruled that the mother had made "little to no progress" in addressing her drug addiction. RP (9/11/15) 17. The record contradicts this assertion.

Nichelle A. has not used crack cocaine in more than 15 years. RP (8/26/15) 23. She stopped abusing Percocet years before the termination trial. RP (8/26/15) 24.

The mother complied with the dependency court's order that she follow the recommendations of service providers. *See* CP 10851-10866. She maintained her sobriety through the medically supervised methadone treatment program, taking the dose prescribed by her supervising physician.[214] RP (8/26/15) 24, 48-49, 86, 101; RP (8/31/15) 498-499.

But Judge Farris saw her compliance with the program and her freedom from illegal drug usage as an attempt "to gloss over" her problems. RP (9/11/15) 17. Judge Farris noted Nichelle A.'s long-term drug addiction, describing her current program compliance as having "essentially switched the use of one narcotic for another." RP (9/11/15) 17-18.

The mother did not attempt to "gloss over" her addiction. Instead, she complied with the dependency court's orders by following the

[214] Even the State's own expert, psychologist Dr. Michael O'Leary, agreed that Nichelle A.'s methadone dose could not give her a high. RP (8/27/15) 318.

recommendations of her treatment providers. Trial Ex. 9, 10, 11, 12, 38, 39, 40; CP 10851-10866.

Furthermore, as several social workers testified, Nichelle A's methadone compliance did not impact her visits with Apple H. RP (8/27/15) 295, RP (8/31/15) 461, 522. Judge Farris gave no weight to this evidence, pointing out instead her own conclusion that methadone must be tapered. Without testimony on how and when tapering was medically warranted, Judge Farris concluded instead that she had "no recourse but to find that [the mother] has made zero progress in getting off of narcotics and becoming less addicted to them." RP (9/11/15) 18.

Judge Farris also improperly shifted the burden of proof. She indicated that the case was "at a standstill essentially because we have no recommendations and no evaluation on how to proceed in terms of weaning her off of the narcotics, nor do we have any indication if that's possible or how long it might take." RP (9/11/15) 19.

But the State bears the burden of proving that it offered "all necessary services… capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d). If the case was "at a standstill," it was because the State failed to refer the mother for an updated evaluation or another service designed to help her taper off methadone. RP (9/11/15) 19.

The termination order must be reversed, and the case remanded for a new trial. *Santosky*, 455 U.S. at 753–754. On remand, the mother's compliance with methadone treatment cannot provide a basis for termination.

B. The evidence was insufficient to terminate because the mother's participation in a medically supervised methadone program did not pose a barrier to reunification.

The termination order rested in part on the mother's participation in a medically supervised methadone program. Findings Nos. 2.32-2.34, 2.40, 2.45-2.51, CP 12380-12382. According to Judge Farris, the mother's compliance with the methadone program made her "currently unfit" to parent. Findings Nos. 2.32-2.34, 2.40, 2.45-2.51, CP 12380-12382. Judge Farris also found that her medically supervised methadone use was a "condition" to be remedied within the foreseeable future. Findings Nos. 2.31-2.34, 2.40, 2.45-2.51, CP 12380-12382.

Judge Farris was aware that the mother had stabilized on methadone: she noted that the mother had "been in a methadone program now for an extremely long period of time." Finding No. 2.46, 2.45-2.51, CP 12381-12382. Her conclusions appear to rest on her personal bias against methadone maintenance as a treatment. She made numerous findings that are unsupported by any testimony or other evidence in the record. *See* Findings Nos. 2.31-2.34, 2.40, 2.45-2.51, CP 12380-12382.

Judge Farris appeared to equate taking methadone (under a

doctor's supervision) with using heroin or unprescribed opioids. Findings Nos. 2.31-2.34, 2.40, 2.45-2.51, CP 12380-12382. She described the mother as a "permanent addict," even as she acknowledged "that there was not any testimony that substance abuse was affecting her ability to parent this child." Finding No 2.51CP 12382. Judge Farris explicitly stated that she would ignore this lack of evidence: "The fact there is no evidence of an impact on this child is not that meaningful to the Court…" Finding No 2.51, CP 12380-12382.

The mother's medically supervised methadone treatment does not make her "currently unfit." *In re Welfare of A.B.*, 168 Wn.2d 908, 918, 232 P.3d 1104 (2010), *as amended* (Sept. 16, 2010). Nor can it be considered a "condition" to be remedied, absent some proof that it impacts parenting. RCW 13.34.180(1)(d).

C. The evidence was insufficient because the social worker could not say that termination was in the child's best interests**.**

To prevail at a termination trial, the State must show by a preponderance of evidence that termination is in the child's best interests. RCW 13.34.190(2); *Matter of I.M.-M.*, 196 Wn. App. 914, 921, 385 P.3d 268 (2016); *In re Welfare of M.R.H.*, 145 Wn. App. 10, 24, 188 P.3d 510 (2008). Here, the evidence was insufficient.

Other than GAL Walker (whose testimony the judge

disregarded),[215] the only witness asked about the child's best interests was social worker Latisha Williams. RP (8/31/15) 592. Williams had been on the case for 10 weeks when she testified. RP (9/1/15) 693-694. Williams was unable to say that termination was in the child's best interests:

> Q. And in your opinion, is termination of the parental rights in the child's best interests?
> A. I don't believe I have enough time on the case to say definitively.
> RP (8/31/16) 592.

The only thing Williams was able to say was that Apple H. —like all children—needs permanence. RP (8/31/16) 592.

Because the department failed to prove that termination was in Apple's best interest, the termination order must be reversed.[216] *A.B.*, 168 Wn.2d at 918.

A termination order that is not supported by sufficient evidence must be reversed. *A.B.*, 168 Wn.2d at 918. Here, the evidence was insufficient to prove that the family relationships should be terminated based on the mother's participation in a medically supervised methadone program. Nor was there proof that termination was in Apple's best interests. Accordingly, the termination order must be reversed. *Id.*

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[215] CP 12374-12386.

[216] In addition, substantial evidence does not support Finding of Fact No. 2.53; accordingly, the finding must be vacated. *In re Welfare of C.B.*, 134 Wn. App. 942, 952, 143 P.3d 846 (2006); CP 12374-12386.

VIII. THE COURT/PROGRAM VIOLATED THE MOTHER'S DUE PROCESS RIGHT TO COUNSEL.

VGAL Cynthia Bemis infiltrated a confidential listserv and spied on parents' attorneys. She shared what she learned with Court/Program staff. Staff attorney Haugen used information supplied by Bemis to gain advantage during discovery negotiations with the mother's attorney. Because Bemis destroyed evidence, the scope and impact of her misconduct remains unknown.

Program coordinator Smith eavesdropped on the parents' attorneys during court proceedings. She persisted in recording counsel even after being asked to stop. Judge Farris found it likely that she had overheard and recorded confidential communications.

The Court/Program also threatened legal action against the mother's attorneys. It retaliated in other ways as well. These actions violated the appearance of fairness and the mother's due process right to counsel.

A. Statement of Facts Part Three: Facts regarding violation of due process right to counsel[217]

1. WDA's closed parent listserv

[217] For clarity, facts relating to this issue are provided here.

In 2011, a VGAL named Cynthia Bemis[218] added herself to a confidential listserv available only to parents' attorneys who were members of the Washington Defender Association (WDA).[219] RP (2/11/16) 257; CP 13403-13418, 13431-13449, 13457-13459.

WDA is a statewide association that supports public defenders, including attorneys who represent indigent parents in child welfare cases, with training, technical assistance and other support. See WDA website at *defensenet.org* (accessed 5/4/18). Members pay an annual fee for WDA's services CP 9609-9648. One of the amenities of membership is access to a closed private listserv for parents' attorneys to share ideas, information and questions. CP 9609-9648.

Bemis, who joined under a false name, remained on the listserv until 2015, accessing the service without ever paying the annual WDA membership fee. RP (12/3/15) 18-19; RP (2/10/16) 192; CP 10711-10712. Her use of the listserv also violated WDA eligibility rules limiting access to members representing indigent parents. CP 10711-10712. These rules were regularly communicated via the listserv. CP 10711-10712.

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[218] Bemis's pseudonym was Cynthia Grove, although she was also referred to as Cynthia Gove. RP (2/10/16) 125, 171.

[219] According to Bemis, she learned about the WDA listserv from another VGAL named Rory Hardy. RP (2/10/16) 134. Hardy, who had joined the listserv in 2008 without paying, refused to answer questions about WDA without an attorney present. CP 9701-9702, 12409-12458, 12889-12911.

In 2015, WDA determined that its listserv had been breached, and its director put out a message asking ineligible parties to remove themselves from the listserv. RP (2/25/16) 1191. VGAL Bemis did not identify herself as the interloper; instead she continued to obtain messages posted on the listserv. RP (2/25/16) 1191. This forced WDA staff to review all their membership data to determine Bemis had never joined the organization and never paid membership fees. RP (12/3/15) 18-19; CP 10711-10712.

Bemis also forwarded listserv messages, after removing "WDA" from the subject line but leaving the other text in the subject line intact. RP (2/10/16) 189-190.[220] VGAL Program policy requires volunteers to use email addresses provided by the county. RP (2/12/16) 109. This was in part so matters could be reviewed by program coordinators, and materials would be available for discovery. But Bemis created a personal email account and forwarded herself messages relating to her VGAL cases.[221] RP (2/10/16) 144-147. Instead of maintaining a record of what she received, Bemis made sure to delete messages by setting a timer to remind her to hit

[220] The Court/Program later tried to excuse Bemis's violation of its policy by claiming the WDA emails did not relate to a specific case. RP (2/12/16) 108-110. But many of the messages related to specific service providers used in local cases, specific issues including those raised in this case, and specific counties, including Snohomish. CP 13399-13515.

[221] Review of her county email account revealed more than 1,000 emails from the WDA listserv that remained after she permanently deleted many others. RP (2/25/16) 1170; CP 9714-9715.

delete every hour. RP (2/10/16) 149-150; RP (10/6/17) 10. Program staff knew this but did not investigate or urge Bemis to maintain records as required. RP (10/6/17) 10.

VGAL Bemis professed that she looked at very few of the WDA emails. RP (2/10/16) 159-163; CP 13431-13449. A quick review of her email inbox revealed that most of the WDA listserv messages were opened. RP (2/11/16) 389-390. Judge Farris later found that Bemis had opened 82% of the messages, belying Bemis's claim that she'd only opened those few messages relating to continuing education trainings.[222] RP (2/25/16) 1195.

Bemis also maintained, under oath, that she had only forwarded one WDA message to VGAL program staff during the years she'd improperly accessed the listserv.[223] CP 10638-10640. A subsequent review of emails showed that this too was not true.[224] CP 13403-13418, 13431-

[222] Another claim of Bemis's was that she had opened certain emails but hadn't read them. RP (2/10/16) 157-163 CP 13403-13418, 13431-13449, 13457-13459. A review of these emails reveals messages that were likely of great interest to her: they contained negative information about volunteers, discussions about removing volunteers, and message strings showing local parents' attorneys' frustration with the difficulty in getting volunteers removed from cases. RP (2/10/16) 157-163; CP 13403-13418, 13431-13449, 13457-13459.

[223] She later testified that she had forwarded more than one email. RP (2/10/16) 179-180, 189-190; CP 22319-22320.

[224] Through Bemis, the Court/Program and its staff and volunteers had access to attorneys' opinions about service providers (such as Dr. O'Leary, who testified in this case), draft motions relating to the VGAL Program, and at least one post seeking assistance directly addressing this case. CP 9554-9580.

13449, 13457-13459.

2. Use of Listserv Materials

During a meeting with the mother's attorney regarding ongoing discovery issues, program attorney Haugen made use of confidential material taken from the listserv. RP (2/10/16) 149-150; RP (2/11/16) 315-316. This included a draft motion prepared by ABC Law Group attorney Mindy Carr.[225] RP (2/25/16) 1207; CP 10517-10519. Carr had posted a draft motion for feedback and use in other cases, seeking to address the charges for discovery in cases involving indigent parents. RP (2/12/16) 44-48; CP 13460-13471.

Another attorney from the ABC Law Group[226] attended a meeting to discuss general discovery issues, when Haugen revealed she had a draft of the motion regarding costs. RP (2/25/16) 1207; CP 10517-10519. Haugen refused to reveal the source of the material.[227] RP (2/25/16) 1207;

[225] When Judge Farris asked if staff attorney Haugen had notified attorney Carr that she had the draft motion, Haugen claimed that "[i]t was disclosed to her immediately." RP (12/1/15) 1026; CP 22300-22336. Haugen later explained that what she meant was that when she used the draft motion during discovery negotiations with a different attorney from ABC Law Group, that effectively notified Carr that she had the draft motion. CP 22300-22336.

[226] Adam Ballout, one of Nichelle A.'s attorneys in this case.

[227] The Court/Program made other use of WDA materials as well: after viewing listserv emails showing ABC Law Group's attempt to obtain information about discovery costs in other counties, the Court/Program posted on the statewide CASA listserv to prepare their opposition to whatever the ABC Law Group discovered. RP (6/10/16) 69-71.

CP 10517-10519.

VGAL Bemis had seen the motion in the closed group. She immediately gave it to program coordinator Katherine Smith.[228] RP (2/10/16) 149-150. Smith gave it to staff attorney Haugen for use that day during her negotiations with the mother's attorney. RP (2/11/16) 315-316. The email did not relate to a case on Bemis's caseload. RP (2/12/16) 45. Smith did not ask Bemis how she got draft pleadings of an opposing party relating to a case in which she had no involvement. RP (2/12/16) 49-52.

3. ABC's Complaint

After staff attorney Haugen used the confidential information in discovery negotiations, the mother's attorney investigated the breach, determined that VGAL Bemis was the source, and lodged a complaint with the Court/Program. RP (12/1/15). As described above, the practice in Snohomish County is that the subjects of complaints are notified of the content and source of the complaint immediately. Consistent with local practice, Bemis received a call from the Court/Program, notifying her of the complaint's source and basis. RP (2/10/16) 41, 125-126.

[228] Although VGAL Bemis had provided the material to program coordinator Smith immediately upon realizing what it contained, she claimed to have no idea that there was a meeting set up that very day to address the discovery issues referred to in the stolen material. RP (2/10/16) 158; RP (2/12/16) 48. However, Bemis did admit that she knew the material she'd forwarded was work product. RP (2/11/16) 297-301.

Juvenile Court Administrator Powell resolved the complaint without ever speaking to the mother's attorney, who had specifically requested an opportunity to respond. RP (2/11/16) 334, 336, 372. Powell later admitted that she never investigated WDA policy. RP (2/11/16) 362-369. Nor did she examine Bemis's email account, even though she had access to all VGAL email accounts. RP (2/11/16) 390, 399; RP (2/12/16) 26. Instead, Powell decided the complaint was unfounded. RP (2/11/16) 362-369.

4. Staff's Attempt to Join Listserv

Once VGAL Bemis was removed from the listserv after 4 years, a Court/Program employee attempted to join the listserv. CP 9030-9032. WDA detected the attempt, rejected the application, and notified Presiding Judge Krese. CP 9030-9032.

5. Filing of Complaint Materials

ABC Law Group filed materials from their complaint in the court file for consideration. Staff attorney Haugen asked the court to seal court documents relating to VGAL Bemis's misconduct and to redact references to Bemis. According to Haugen, this was necessary to protect Bemis's "right" to privacy and confidentiality. RP (12/1/15) 989-991; CP 10803-10809. Consistent with the Court/Program's interpretation of their own right to confidentiality, Haugen maintained that the Court/Program's

determination that the complaint lacked merit meant that no one could refer to anything pertaining to the alleged misconduct. This limitation applied to court filings as well as conversations outside of court. RP (12/1/15) 994, 995; CP 9524-9528, 10803-10809.

The Court/Program argued that the statute restricting access to dependency and termination files was insufficient to protect VGAL Bemis and insisted that Bemis's identity and misconduct be kept secret from everyone, including the parties. RP (12/1/15) 989-992. According to staff attorney Haugen, Bemis's "right" to confidentiality outweighed the public's interest in the matter.[229] RP (12/1/15) 991-993.

Haugen's arguments were supplemented by a letter threatening legal action against the mother's attorney for alleged violations of confidentiality. RP (2/11/16) 325; CP 10714-10715, 12387-12408. The letter was written by DiVittorio, the deputy prosecutor who advised the Superior Court. CP 10714-10715, 12387-12408. She mentioned a possible lawsuit against the attorneys for filing materials from their own complaint. CP 10714-10715, 12387-12408.

[229] Apparently as an afterthought, the Court/Program asserted that one of Judge Farris's orders (directing Bemis to answer questions) might violate the confidentiality rights of foster parents and children and open the Court/Program to "future litigation." CP 10551-10552. The Court/Program expressed this concern even as it defended and excused Brook's confidentiality violations and Walker's associated failure to take action. RP (9/2/15) 846-847, 857, 886-887; CP 22300-22336.

According to the letter, the Court/Program can sue attorneys for such "violations," and the letter threatened further action. RP (2/11/16) 325; RP (11/4/16) 405, 430-431; CP 12387-12408. This warning came after breaches of parent confidentiality had been exposed with no action taken by the Court/Program. RP (11/4/16) 432-439, 516-517; CP 10714-10715, 12387-12408. Judge Farris entered a limited protective order which did not maintain Bemis's confidentiality.[230] CP 10557-10560.[231]

6. Confidentiality of Complaint Materials

"Court Administration" filed a motion to reconsider this part of the order. CP 10547-10550. "Court Administration" did not seek permission to intervene as a party before filing its motion for reconsideration. CP 10547-10550.[232] It would later come out that this was because the Court/Program was a single indivisible entity. RP (11/4/16) 403. Under

[230] Judge Farris pointed out that actual misconduct could not be kept confidential because "the guardian ad litem rules require the disclosure of any potential improprieties by any guardian ad litem." RP (12/3/15) 33. Judge Farris suggested that the local rule must be read in conjunction with the GALR. RP (12/3/15) 33.

[231]The Court/Program filed an additional motion, apparently seeking further redaction of records. CP 9736-9768. In a later order addressing the issue, Judge Farris reminded the Court/Program that the documents they considered confidential were the ones filed by the Court/Program. CP 10503-10514.

[232] The mother's attorney objected to the motion, arguing that the Superior Court was not a party. CP 10533-10546. The objection was based on counsel's erroneous assumption that the Superior Court and the VGAL Program were separate entities. RP (10/6/17) 10. In fact, as later became clear, the Court and the Program are a single indivisible entity. RP (11/4/16) 403.

this logic, "Court Administration" would not need to intervene, since it was already a party[233] in its incarnation as the VGAL Program, which had been appointed to the case as a second GAL. CP 10908.

According to the Court/Program, Judge Farris lacked any power to address VGAL misconduct occurring in her courtroom. CP 10547-10550. The Court/Program's position was that the grievance procedure outlined in former SCLJuCR 9.4 provided the exclusive means of addressing VGAL misconduct. CP 10547-10550. Prosecutor DiVittorio took this position even further, claiming that the court could not remove a VGAL for any reason except for misrepresentation of qualifications as determined through the administrative grievance process. CP 10547-10550.

Judge Farris disagreed. In her Order on Reconsideration, the court engaged with the Court's claims that the court could not review the Court's actions. CP 10503-10514. She noted that she was not conducting a "review" of the administrative grievance process. CP 10503-10514.

Judge Farris later found that the Court/Program's motions regarding VGAL Bemis were brought in bad faith. RP (2/25/16) 1135. She concluded that the Court/Program improperly cited confidentiality rules to protect against disclosure of its own misconduct. RP (2/25/16) 1136, 1154.

[233] DiVittorio later took the position that the Court/Program was not a party. CP 13663-13670.

7. Court/Program's Defense of Listserv Activity

Once the use of the WDA listserv was discovered, the Court/Program first responded with the claim that VGAL Bemis had accessed the listserv through a link that allowed her to participate without joining WDA. RP (12/1/15) 996-998. They also averred that Bemis joined WDA through the organization's online registration procedure. RP (12/1/15) 999; CP 10810-10828. WDA did not offer online registration at the time Bemis purportedly "joined." RP (2/25/16) 1164; CP 10711-10712.

According to Bemis's own attachments, online registration required payment of a $150 fee. RP (12/1/15) 999; CP 10810-10828. Bemis never paid this fee. RP (2/10/16) 192. Judge Farris later concluded that Bemis had stolen $750 worth of services. RP (2/25/16) 1159, 1165.

Staff attorney Haugen admitted that the declaration and attachments she filed were misleading because they suggested that VGAL Bemis had paid the fee and legitimately joined WDA.[234] RP (12/1/15) 1000. Bemis later testified that she signed the documents under oath without reviewing them. She said when she did see them, after they had been filed, she immediately notified Haugen they were not accurate. RP (2/10/16)

[234] Haugen helpfully explained that she had never asked Bemis if she ever did pay for her membership, so her claim that Bemis had paid was not meant to be "misleading". RP (12/1/15) 1014.

200-201. She also repeatedly told her program coordinator that Haugen had made false representations on her behalf. RP (2/12/16) 63.

Staff attorney Haugen told Judge Farris that VGAL Bemis had attended WDA trainings and had claimed continuing education credit. RP (12/1/15) 1001. Haugen asserted, in open court, that she had personally reviewed Bemis's file and confirmed that Bemis had claimed credit for at least two WDA sponsored trainings.[235] RP (12/1/15) 1001, 1003. When Judge Farris expressed her skepticism, Haugen reiterated that she'd personally reviewed the records to confirm that Bemis had attended multiple WDA trainings. RP (12/1//15) 1003-1005.

8. Hearing on Listserv Usage

The court heard testimony on the WDA listserv in early spring of 2016. Bemis testified under oath. She conceded that she had never paid for her WDA membership in all the years she used their services. RP (2/10/16) 139, 141; RP (2-11-16) 257. She also admitted that she had signed the documents prepared by Haugen despite their falsity. RP (2/12/16) 63, 84.

Bemis was asked about how and why she joined the WDA. She

[235] Later, under threat of sanctions, Haugen claimed that she hadn't understood Judge Farris's questions. CP 11491-11512. This was not the only time she claimed not to hear a question when her answer turned out to be demonstrably false. RP (12/3/15) 36-37.

claimed that she sought free continuing education programs. RP (2/10/16) 176-178, 181-182. She spoke about the costs normally associated with continuing education.[236] RP (2/10/16) 176-178, 181-182. She later admitted that she had not attended or claimed credits from any WDA trainings since she'd started accessing the WDA listserv in 2011.[237] RP (2/10/16) 137, 176-178, 181-182. This admission came after staff at WDA confirmed that Bemis had never attended any of their trainings. CP 10711-10712.

9. Deletion of Emails

Judge Farris, apparently concerned she would not get accurate or complete information from the Court/Program, directed that Bemis not delete any email content. This order came before and after the evidentiary hearing on the matter. RP (1/13/16) 1060-1067; RP (1/29/16) 1115; CP 10557-10560; RP (2/10/16) 154; RP (2/11/16) 402.

Staff attorney Haugen claimed in court that VGAL Bemis had deleted all WDA emails. RP (12/1/15) 1020. Haugen did not check with Bemis before asserting that the emails had been deleted. RP (12/1/15) 1020. It turned out, at the February 2016 hearings on the issue, that while Bemis

[236] In fact, the VGAL Program offered free trainings for volunteers. RP (2/25/16) 1168; RP (6/10/16) 104; CP 571.

[237] Judge Farris later criticized Haugen for lying to the court on this topic and many others. CP 22315- 22333.

had deleted many of the messages, many still remained. CP 12948-12952, 12955-13001; RP (2/10/16) 107, 155-164; RP (2/12/16) 20; RP (2/25/16) 1170, 1194. Judge Farris later found that Bemis used a multi-step process to permanently "double delete" thousands of emails from county servers.[238] RP (2/25/16) 1170. She admitted that she also forwarded WDA listserv messages to her personal email account. RP (2/10/16) 144.

VGAL Bemis conceded that she had forwarded WDA emails to program staff. RP (2/10/16/) 179-180, 189; CP 22319-22320. This was confirmed by other witnesses and by a review of the email system, which showed that many WDA messages were forwarded to staff. RP (2/12/16) 44; CP 22319-22320.

But staff attorney Haugen still claimed that she had "interviewed all staff members," and that none had ever received any forwarded emails originating on the WDA listserv. CP 10571, 22300-22336. In fact, she declared under oath that "[n]o staff person… was aware of the existence of WDA or its Listserv prior to May 5, 2015." CP 10571, 22300-22336.[239]

Haugen took her claim further, professing to have polled all

[238] Permanently deleting an email from the county's system requires multiple steps: a person must delete the email, empty the trash, restore the email, and then delete it again the next day. RP (2/12/16) 28. Unless all steps are followed, the email will remain on county servers. RP (2/121/16) 29. Where the procedure is followed, a "double-deleted" email will never be retrievable. RP (2/10/16) 113 CP 10163-10172.

[239] In fact, staff attorney Gwen Forrest-Reider may have been a member of WDA before joining the Court/Program. CP 22322, 9701.

program volunteers to ensure none were continuing to access WDA services. RP (12/1/15) 1032. In fact, this assurance was only obtained from 11 of the 100 volunteers. CP 9701, 22300-22336.

10. Court's Findings

Following several hearings on the Bemis/WDA issue, Judge Farris concluded that VGAL Bemis fraudulently joined the listserv and used it to invade the thought process of opposing counsel. RP (2/25/16) 1137. Judge Farris also found that Bemis lied to join the listserv and stole $750 worth of services from WDA. RP (2/25/16) 1159, 1165. She determined that Bemis repeatedly perjured herself in testimony and in her sworn declarations filed with the court. RP (2/25/16) 1136, 1161, 1170-1181.

Judge Farris imputed Bemis's misconduct to the entire VGAL program. RP (2/25/16) 1200-1202. She pointed out that Bemis, her program coordinator (Smith), and staff attorneys had all failed in their ethical duty to reveal Bemis's misconduct to opposing counsel.[240] RP (2/25/16) 1208-1209. She concluded that the Court/Program violated the appearance of fairness by allowing Bemis to access the confidential listserv, by concealing evidence of misconduct, and by using a deputy prosecutor to threaten

[240] To ensure that no one misunderstood her ruling, Judge Farris went on to specifically conclude "that first-degree perjury, lying in a court of law, is an impropriety under the guardian ad litem rules." RP (2/25/16) 1209.

legal action against parents' attorneys who discussed grievances they'd filed. RP (2/25/16) 1136, 1138, 1139.

11. Recording of Parents' Attorneys

At one of the hearings about the Court/Program's use of the closed listserv, program coordinator Smith attempted to record the parents' attorneys as they sat at counsel table. RP (2/25/16) 1211; RP (10/6/17) 9; CP 9539-9545. Even after the attorneys asked her to stop, Smith continued recording. RP (2/25/16) 1211; CP 9539-9545. When the court ordered her to stop, she claimed to have no idea that it was inappropriate to record people without their permission. RP (2/25/16) 1211; CP 9539-9545.

Judge Farris noted that Smith had likely recorded off-the-record comments made by the attorneys to each other. CP 9539-9545. The Court/Program never explained why it would need to record parents' attorneys' conversations with each other.

B. Argument: By threatening the mother's attorney and invading private attorney communications, the Court/Program violated the appearance of fairness and the mother's due process right to counsel.

Parents in Washington have a due process right to counsel in termination proceedings. *J.M.*, 130 Wn. App. at 921; *Luscier*, 84 Wn.2d at

138; U.S. Const. Amend. XIV; Wash. Const. art. I, §3.[241] Just as in criminal cases, parents facing termination have the right to effective assistance. *See J.M.*, 130 Wn. App. at 922; *In re V.R.R.*, 134 Wn. App. 573, 586, 141 P.3d 85 (2006).

Here, the Court/Program's actions violated the mother's right to the effective assistance of counsel. They also violated the appearance of fairness doctrine.

1. The interception of private attorney communications violated the mother's due process right to counsel.

Over many years, VGAL Bemis improperly accessed thousands of private attorney communications that were not intended for her. These included at least one email from a member of the ABC Law Group. Staff attorney Haugen improperly used this material during discovery negotiations with the mother's attorney.

The Carr memo used by staff attorney Haugen was protected from discovery by the work product doctrine. *See Kittitas Cty. v. Allphin*, --- Wn.2d ---, ___, 416 P.3d 1232 (2018). The draft memo was prepared in anticipation of litigation by the ABC Law Group against the Court/Program. *Id.* The draft memo and associated emails outlined "attorney

[241] The legislature has also created a statutory right to counsel. RCW 13.34.090(2).

opinions, thoughts, and conclusions about the litigation." *Id.* The same is true of any other emails that outlined "[t]he mental impressions" of the mother's attorney. *Id.*

Upon receipt of the draft motion, program coordinator Smith and staff attorney Haugen both had a duty to refrain from examining it, to notify Carr, and to return the document to the ABC Law Group. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) and 94–382 (1994); *see also Richards v. Jain*, 168 F. Supp. 2d 1195, 1201 (W.D. Wash. 2001); RPC 5.3. Instead of following these obligations, Smith gave the material to Haugen, who sought to use it to her advantage during negotiations with the ABC Law Group. This was unethical. *Id.*

On its own, Haugen's unethical use of the Carr memo may not have impacted the outcome here. However, the full extent of the damage caused by VGAL Bemis remains unknowable. She improperly "double-deleted" many of the thousands of emails she intercepted. As a result, they cannot be recovered from the county's email system, and the impact of her misconduct cannot be assessed.

The same is true regarding program coordinator Smith's misconduct. Like Bemis, Smith improperly intercepted conversations between the parents' attorneys. She did this in the courtroom, more than a year before

Judge Farris entered a termination order. RP (2/25/16) 1211; RP (10/6/17) 9; CP 9539-9545.

As Judge Farris pointed out, Smith likely recorded off-the-record comments made by the attorneys to each other. CP 9539-9545. The effect of Smith's misconduct is unknown: neither the State nor the Court/Program created a record showing that Smith only overheard innocuous information.

The Court/Program violated the mother's due process right to counsel by allowing Bemis to intercept and pass on WDA emails and by recording private conversations between the parents' attorneys at counsel table. *See State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998). In *Granacki,* a detective was caught looking at defense counsel's trial notepad. *Id.,* at 600. The legal pad contained "notes about communications between Granacki and his attorneys, trial strategy and tactics, and communications between his attorneys." *Id.* The trial court granted a mistrial and dismissed the prosecution. *Id.* The Court of Appeals affirmed, noting that "there is no meaningful way to isolate the prejudice resulting from such interference" and affirmed. *Id.,* at 603.

Here, as in *Granacki,* the Court/Program improperly gained access to notes about "trial strategy and tactics" as well as "communications between [the parents'] attorneys." *Id.* Although *Granacki* involved the Sixth

Amendment, its reasoning applies to the due process right to counsel afforded parents facing termination. *Id.*

Due process requires procedures that are "fundamentally fair." *Santosky*, 455 U.S. at 753–754. When the government improperly obtains and makes use of the private communications of a parent's attorney, the proceedings are not "fundamentally fair." *Id.*

Through no fault of the mother, the extent of each intrusion is unclear. Despite a directive from Judge Farris, the Court/Program allowed Bemis to permanently delete thousands of emails. Program coordinator Smith did not disclose what she learned while eavesdropping on the parents' attorneys.

Given this uncertainty, the Court of Appeals should presume prejudice. This is the approach taken in criminal cases. *See Granacki*, 90 Wn. App. at 600-604; *see also State v. Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014) (addressing interception of attorney-client communications); *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010); *State v. Cory*, 62 Wn.2d 371, 375, 382 P.2d 1019 (1963).

This is not one of "those rare circumstances where there is no possibility of prejudice." *Fuentes*, 179 Wn.2d at 810-820. Even if it were one of those "rare circumstances," the burden should be on the Court/Program (and the department) to show "beyond a reasonable doubt that the

[mother] was not prejudiced." *Id.*

The Court/Program violated the mother's due process right to the effective assistance of counsel. This denied her a fair trial. *Fuentes*, 179 Wn.2d at 810-820. The termination order must be reversed, and the case remanded for a new trial. *Id.*

2. The Court/Program violated the mother's due process right to counsel by threatening the ABC Law Group and retaliating against the mother's attorneys.

The Court/Program threatened the mother's attorneys with legal action because of their advocacy in this case. CP 10714-10715; RP (2/11/16) 325; CP 12387-12408. The Court/Program also repeatedly retaliated against parents' attorneys—including the ABC Law Group—and their clients.

Among other things, the Court/Program contacted the Office of Public Defense to jeopardize the ABC Law Group's financial future and disseminated nude photographs of an ABC client. RP (12/3/15) 35-37; RP (2/10/16) 69-70; RP (2/11/16) 319-320; RP (3/23/16) 1292-1295, 1394; RP (3/25/16) 211-219, 238-239, 260, 264, 266; RP (3/29/16) 1672-1687; RP (6/10/16) 5, 109-113, 127-128; CP 12947. As Judge Farris noted in her discussion of retaliation, such actions "affect[ ] the willingness of all parents' attorneys to zealously advocate to protect their clients' constitutional rights to raise their children." RP (6/10/16) 127-128.

The threats and retaliatory actions also likely violated the Rules of Professional Conduct, which prohibit attorneys (and their subordinates) from engaging in "conduct that is prejudicial to the administration of justice." RPC 5.3; RPC 8.4(d); *see also In re Disciplinary Proceeding Against Hall*, 180 Wn.2d 821, 833, 329 P.3d 870, 876 (2014), *as corrected* (Sept. 9, 2014).

By making threats and retaliating against the mother's lawyers, the Court/Program infringed the mother's due process right to counsel. The threat to sue and the retaliatory actions were designed to pressure the ABC Law Group to refrain from "zealously advocate[ing] to protect their client's constitutional rights to raise their children." RP (6/10/16) 127-128.

3. The Court/Program violated the appearance of fairness.

As an "arm of Snohomish County Superior Court,"[242] the Court/Program had a duty to avoid the appearance of bias. *Solis-Diaz*, 187 Wn.2d at 540-541. Because the Court/Program was appointed as GAL in this case, it also had an obligation to "maintain…the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom." GALR 2(b).

The Court/Program violated these duties. As outlined throughout

[242] RP (11/4/16) 403.

this brief, the Court/Program allowed its volunteers and staff to commit egregious misconduct showing bias against parents and their attorneys. Judge Farris concluded that the Court/Program showed bias and breached its duty to appear fair. RP (6/10/16) 4, 13, 16, 24-29, 54, 60-61, 160; CP 11707, 11613-11616.

The Court/Program also violated the appearance of fairness by intercepting private attorney conversations, by threatening the ABC Law Group with legal action, and by repeatedly retaliating against parents' attorneys and their clients.

As GAL and as an arm of the court, the Court/Program violated the appearance of fairness. GALR 2(b); *Solis-Diaz,* 187 Wn.2d at 540-541. The termination order must be reversed, and the case remanded for a new trial.

IX. THE MOTHER ADOPTS ARGUMENTS RAISED BY THE FATHER.

Pursuant to RAP 10.1(g), the mother hereby adopts and incorporates the assignments of error, issues, and arguments made by the father in his Opening Brief.

CONCLUSION

For the foregoing reasons, the termination order must be reversed, and the case remanded for a new trial.

Respectfully submitted on July 23, 2018.

BACKLUND AND MISTRY

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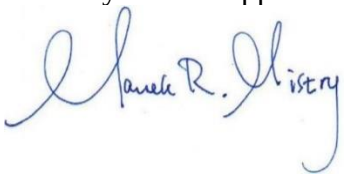

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Motion for Accelerated Review/Opening Brief, postage prepaid, to:

N.A. (mother) (address confidential)

I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Amended Motion for Accelerated Review/Opening Brief electronically with the Court of Appeals, Division I, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 23, 2018.

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