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Division II
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NO. 53292-1-II

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION TWO

In re the Welfare of:

K.B.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Robert¹ is married to R.B, who gave birth to baby K.B. during the marriage. Robert was not living with R.B. at the time, but he visited his son, held him, and bonded with him. Robert cares for his son and wants to parent him.

When the court found Robert's son dependent, it found Robert to be the presumptive father. When the court removed K.B. from his mother's home, however, it denied Robert visitation with his son, stating visitation would not occur until Robert provided a DNA sample. Robert complied with each court-ordered assessment, but did not provide DNA.

At the termination trial one and one-half years later, the only deficiency found was a lack of bond between Robert and his son, as they had not seen each other since his son's removal. The Department had provided no services to correct the deficiency. No evidence showed Robert would not provide for his son's basic needs and safety, as required by statute. Yet the court terminated his parental rights.

¹ A pseudonym is used for appellant R.L.K. to preserve all parties' anonymity.

B. ASSIGNMENTS OF ERROR

1. The court erred in terminating Robert's parental rights when the evidence did not establish he was unfit to parent his son.

2. In the absence of sufficient evidence to support them, the court erred in entering findings of fact 2.13, 2.14, and 2.15.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A parent must be proven currently unfit to terminate his parental rights. To prove unfitness, the parent's deficiencies must make the parent incapable of providing basic nurture, health, or safety. Where removing a child from foster care to place with a parent presents risk to the child's emotional well-being, this risk does not constitute parental unfitness if it might be mitigated through services. Here, although Robert was the legal parent of K.B., the court required he first prove that before he could visit his son. The court then found Robert was unfit because he lacked a relationship with his son after being denied visitation for

close to two years. The Department offered Robert no reunification services. No evidence showed Robert would not be able to nurture and care for his son, provide for his basic needs, or that he presented an immediate or severe risk to his son's safety. Did the court err in finding Robert unfit and terminating his parental rights?

2. The Department is required to offer or provide all necessary, reasonably available services that are capable of correcting the parental deficiencies within the foreseeable future. Further, a court may not deny visitation as a sanction for failing to complete court-ordered services. Here, the only deficiency found was a lack of bond, which the trial court created by denying visitation until Robert underwent genetic testing, which the court labeled a service. The Department offered no necessary services to correct the lack of bond it helped create. Did the trial court err in finding the Department had provided all reasonably available services?

D. STATEMENT OF THE CASE

Robert is married to R.B. RP 10. They are not legally separated or divorced, though they live apart. *Id.* R.B. gave birth to baby K.B. during the marriage. *Id.* While Robert was not living with his wife at the time, he regularly visited his son, held him, and bonded with him. RP 62-63; 64. Robert cares for K.B., considers him his son, and wants to be able to parent him. RP 76-77; RP 156, 167; Ex. 25 at 2, 3.

When the trial court removed Robert's son from his mother's home, it found Robert to be the presumptive father. Ex. 2 at 1, 9.

Despite Robert legally being K.B.'s father, the mother suspected Robert was not the biological father. Ex. 1 at 2. The trial court denied Robert visitation with his son, ordering visitation would not occur until Robert submitted to the court's genetic testing order. Ex. 2 at 7.

Though denied access to his son, Robert attempted to support his son's wellbeing by repeatedly driving his wife across the state for visitations. Ex. 25 at 2.

Robert completed all of the court ordered assessments. RP 223-24. The Department did not refer him to any follow-up services. RP 47, 51-52. However, because Robert did not complete a DNA test, the court continued to deny him visitation with his son, with the Department's support, despite Robert's repeated requests. RP 85, 219; *see* Ex. 2 at 7; Ex. 6 at 11; Ex. 7 at 7; Ex. 9 at 7; Ex. 12 at 7; Ex. 13 at 7; Ex. 15 at 7; Ex. 17 at 7.

At the termination trial one and one-half years after K.B.'s removal from his mother's home, the only deficiency the government alleged against Robert was the lack of bond he had with his son, as they had not seen each other since his son's removal. RP 10, 225. No evidence showed Robert would not provide for his son's basic needs and safety.

The trial court found Robert was unfit, given the lack of bond, and that "all services reasonably available, capable of correcting the parental deficiencies within the foreseeable future, have been offered or provided." CP 205. The court terminated Robert's parental rights. CP 207.

E. ARGUMENT

1. The evidence did not prove clearly and convincingly that Robert was an unfit parent.

a. To terminate the parent-child relationship, the State must prove six statutory elements and current parental unfitness by clear and convincing evidence.

Parents have a fundamental liberty interest in the custody and care of their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005); U.S. Const. amend. XIV; Const. art. I, § 3. This is the most ancient of the fundamental liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion). Only “the most powerful reasons” justify the termination of the parent-child relationship. *In re Seago*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

A Washington court may not terminate the parent-child relationship unless it finds the government proved six statutory elements by clear, cogent, and convincing evidence. RCW 13.34.180; RCW 13.34.190(1)(a). The government must

also establish a parent is currently unfit to care for his child's basic needs. *In re Welfare of A.B.*, 168 Wn.2d 908, 919-20, 232 P.3d 1104 (2010) [*A.B. I*]. The ultimate facts to establish these requirements must be proven highly probable. *Sego*, 82 Wn.2d at 739; RCW 13.34.190. If the requirements are met, the court then decides under a preponderance standard if termination of parental rights is in the child's best interest. *A.B. I*, 168 Wn.2d at 911.

On appeal, the findings of fact are reviewed for substantial evidence, and if supported, to determine whether the findings support the legal conclusions. *In re Dependency of A.M.M.*, 182 Wn. App. 776, 785, 332 P.3d 500 (2014).

b. The government was required to prove by clear and convincing evidence it is highly probable Robert could not provide basic safety to his child.

In Robert's trial, the government presented no evidence to establish he was unfit to parent his son, which is a necessary precedent to termination of parental rights. *A.B. I*, 168 Wn.2d at 911, 919-20.

To prove current parental unfitness, “the State must show that the parent’s deficiencies make him or her incapable of providing ‘basic nurture, health, or safety.’” *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 313, 376 P.3d 350 (2016) (quoting *Welfare of A.B.*, 181 Wn. App. 45, 61, 323 P.3d 1062 (2014) [“*A.B. II*”]). In other words, the parent must be unable to meet the child’s basic needs. *In re Custody of A.L.D.*, 191 Wn. App. 474, 500, 363 P.3d 604 (2015). Put simply, parents need only “passing grades..., not straight A’s.” *David B. v. Superior Court*, 123 Cal. App. 4th 768, 790, 20 Cal. Rptr. 3d 336 (2004).

This Court’s opinion in *A.B. II* illustrates the requirement of proof of a true risk to the child for a finding of unfitness. *A.B. II*, 181 Wn. App. at 64-65. There, the mother was diagnosed with an unspecified cognitive disorder and impaired intellectual abilities. *A.B. II*, 181 Wn. App. at 49. At the termination trial, the court found the mother unfit due to her untreatable “cognitive impairments.” *Id.* at 57. This Court reversed for insufficient proof. *Id.* at 66. While the evidence proved the mother had cognitive impairments posing a risk of

harm due to an inability to recognize “subtle dangers,” this proof did not establish it was “highly probable” the child would be harmed by this inability or that the mother would be unable to meet the child’s basic needs. *Id.* at 64. While the cognitive impairments affected the mother’s ability to learn aspects of parenting, they did not “present an immediate or severe risk to the child’s safety.” *Id.* at 64-65.

Even where removing a child from foster care to place with a parent presents “risks to [the child’s] emotional well-being[,] ... such risks do not constitute parental unfitness if they might be mitigated through services.” *B.P.*, 186 Wn.2d at 321. A correctable lack of relationship between a parent and child may be relevant to the best interest of the child, but not to a finding of fitness. *Id.*; *In re Hauser’s Welfare*, 15 Wn. App. 231, 236, 548 P.2d 333 (1976).

c. The evidence did not prove clearly and convincingly that Robert was unfit to parent his son.

The court found Robert was currently unfit to parent K.B. based on his “current parental deficiency” of a “lack of relationship” with the child. CP 205.

The Court's finding is not supported by clear and convincing evidence. A lack of relationship does not make it highly probable Robert is "incapable of providing 'basic nurture, health, or safety.'" *B.P.*, 186 Wn.2d at 313 (quoting *A.B. II*, 181 Wn. App. at 61). While a lack of relationship may be a consideration in determining a K.B.'s best interest, that determination is irrelevant to fitness and is not permitted if Robert was not proven unfit with sufficient evidence. *See id.* at 321; *A.B. I*, 168 Wn.2d at 911.

A parenting assessor did not identify any inability of Robert's to provide for the basic needs and safety of his son. Ex. 25 at 8. The evaluator discussed Robert's positive relationships with his grandchildren, his ability to verbalize parenting strengths, and his desire to have his son placed with him. *Id.* Robert provided "very good responses" on strategies for nurturing a child and raising him to be healthy and not have emotional or behavioral problems. RP 161; Ex. 25 at 5-7. Robert performed well on testing related to parent-child relations and developmental understanding. RP 195-96.

While Robert's testing showed signals of anger and frustration, he scored below the cutoff for intervention needs. RP 191. Such results are affected by the emotional circumstances of the situation and Robert's frustrations with the dependency process affected his scoring. RP 192, 196.

When the Department social worker opined on whether Robert was fit to parent his son, she could not cite any specific limitations on Robert's ability to provide a safe and healthy home for his son. RP 33-34. She speculated, "there are probably some skills that could be strengthened" and recommended a parenting skills class. RP 34. The social worker admitted she had "no idea how [Robert] would parent." RP 35. However, she did not testify to anything showing Robert would not care for his son's needs.

Perhaps recognizing the absence of such deficiencies, the Department never provided parenting classes to Robert until after the trial began. RP 34, 67-68, 219-221. This was not a timely provision of services. See *B.P.*, 186 Wn.2d at 316,

321. Robert began the classes as soon as the Department referred him. RP 219-221.

The social worker indicated she was not concerned about Robert's parenting skills generally, but would still want to be able to assess his skills specifically with his son. RP 35. She would be able to assess the latter through supervised visits, but she had consistently opposed Robert's requests to visit his son, despite her duty to work towards reunification. RCW 13.34.025; RP 35, 85.

The Guardian ad Litem opined Robert was not "currently fit to parent [his son]," because she had "too many unknowns." RP 98. She elaborated by stating Robert had not "established paternity." RP 98-99. She also stated Robert seemed more interested in what the mother had or had not accomplished than submitting to genetic testing. RP 99.

Two government witnesses stated a belief that Robert did not have a significant bond with his son, given the length of their separation, and the government argued in closing that this made Robert unfit. Ex. 25 at 8; RP 34, 225. However,

a lack of bond relates to determination of a child's best interests, not to whether a parent is unsafe and thus unfit. *See B.P.*, 186 Wn.2d at 313, 321; *Hauser*, 15 Wn. App. at 236.

Substantial evidence does not support the trial court's finding that Robert was unfit to parent his son. The witnesses only speculated that Robert's parenting skills might need improvement. Nothing established that his lack of relationship, created by the court's denial of visitation, "present[ed] an immediate or severe risk to [K.B.]'s safety." *A.B. II*, 181 Wn. App. at 65.

Lack of a relationship does not make a caregiver unsafe. The Department routinely places children in foster or group homes where no prior relationship with the caregivers exists; lack of bond does not prevent someone from being able to provide for a child's basic needs and safety. *See B.P.*, 186 Wn.2d at 313, 321.

K.B.'s foster parents certainly had no relationship with him when he was first placed with them, yet they were still considered fit to be his caregivers. Robert is similarly not

precluded from being fit due to a recent lack of relationship. Unlike a new foster parent, Robert had spent time connecting with his son when he was baby. RP 62-63; 64. Robert continually expressed concern and care for his son, even when he was denied visitation. RP 76-77; Ex. 25 at 2-3. He has good relationships with his adult children and his grandchildren. Ex. 25 at 2-3. The evidence did not establish that Robert was an unfit parent.

A lack of bond does not make a parent unfit, where the parent has expressed an interest in establishing a bond with their child. Risk of emotional harm to Robert's son was not a proper basis for a finding of unfitness when no evidence suggested that services could not remedy any attachment difficulties. *See B.P.*, 186 Wn.2d at 321. The trial court must not address the best interest of the child unless the parent has already been properly proven unfit. *A.B. I*, 168 Wn.2d at 911; *see Hauser*, 15 Wn. App. at 236. No findings explained how or why the lack of bond posed a highly probable risk of harm to Robert's son or made Robert unable to provide "basic

nurture, health, or safety” to his son. *See B.P.*, 186 Wn.2d at 313, 321.

No evidence proved it “highly probable” Robert’s son would be harmed by Robert or that Robert would be unable to meet his son’s basic needs. The termination order was made in in error. *See B.P.*, 186 Wn.2d at 313, 321; *A.B. II*, 181 Wn. App. at 64-66. Accordingly, reversal is required.

2. The Department failed to provide any necessary services to correct the sole parental “deficiency.”

The sole deficiency found by the court was a lack of bond between Robert and his son. CP 205. However, the trial court and Department created this deficiency by denying Robert his right to visitation, and the Department made no effort to offer the necessary services to remedy the lack of bond.

a. Robert was the presumed and legal father of K.B.

The statutory scheme establishing Robert is the presumed father of K.B. is clear. RCW 13.34 defines “parent” as “an individual who has established a parent-child relationship under RCW 26.26A.100.” RCW 13.34.30(17).

RCW 26.26A.100(2) indicates “a presumption” of a person’s parent status exists “under RCW 26.26A.115.”

RCW 26.26A.115 states, “[a]n individual is presumed to be a parent of a child if ... [t]he individual and the woman who gave birth to the child are married ... and the child is born during the marriage,” even if “the marriage ... is or could be declared invalid.” Thus, Robert, as the husband of K.B.’s mother, is the presumed and legal father of K.B.

The presumption exists “unless [it] is overcome in a judicial proceeding or a valid denial of parentage is made” through formalized proceedings. RCW 26.26A.100(2). A presumed father does not have any burden to prove or rebut a presumption in his favor. *See* RCW 13.34. Further, RCW 13.34, both now and as enacted since the inception of the dependency case, provides no authority for a trial court to order an unwilling presumptive parent to undergo genetic testing. *See id.*

Here, the Department’s argument and petitions and the court’s written orders continually acknowledged Robert as the

“presumed” and “legal” father, as well as simply the “father.”
E.g., RP 9, 10, 223; CP 2, 3, 203; Ex. 1 at 1; Ex. 2 at 1, Ex. 15
at 1. Yet, the court ordered Robert to undergo genetic testing
to prove he was K.B.’s father. The court had no authority to
order this and Robert had no burden to prove the relationship
already established by his marriage and his relationship with
his son.

*b. Parents have a fundamental right to visitation,
which must be offered unless necessary to protect
the child from an actual risk of harm.*

“[P]arents’ right to custody of their children is ... a
sacred right that is more precious than the right to life itself.”
In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380
(1991). It is a “fundamental civil right which may not be
interfered with without the complete protection of due process
safeguards.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574,
257 P.3d 522, 526 (2011) (quoting *Halsted v. Sallee*, 31 Wn.
App. 193, 195, 639 P.2d 877 (1982)); U.S. Const. amend. XIV;
Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 24–33, 101 S. Ct.
2153, 68 L. Ed. 2d 640 (1981).

The legislature recognizes that visitation “is the right of the family, including the child and the parents.” RCW 13.34.136(2)(b)(ii)(A); *In re Dependency of T.L.G.*, 139 Wn. App. 1, 4, 16-17, 156 P.3d 222 (2007) [*T.L.G. I*]. “Early, consistent, and frequent visitation is crucial.” RCW 13.34.136(2)(b)(ii)(A). The statute requires the Department to encourage maximum parent-child contact and prohibits courts from limiting or denying visitation without a showing of actual risk of harm to the child. *T.L.G. II*, 139 Wn. App. at 15, 15 n. 23; RCW 13.34.136(2)(b)(ii)(A-B) .

Importantly, a court may not deny or limit visitation “as a sanction for a parent’s failure to comply with court orders or services” unless the parent’s visitation poses a risk to the child’s “health, safety, or welfare.” RCW 13.34.136(2)(b)(ii)(B); *T.L.G. II*, 139 Wn. App. at 15-18. A judicial determination of risk is necessary prior to limiting or restricting visitation. RCW 13.34.136(2)(b)(ii)(C).

The risk of harm to the child “must be ‘an actual risk, not speculation.” *In re Tyler L.*, 150 Wn. App. 800, 804, 208

P.3d 1287 (2009) (quoting *T.L.G. II*, 139 Wn. App. at 17). The burden to prove this “current concrete risk” is on the Department. *T.L.G. II*, 139 Wn. App. at 18; RCW 13.34.136(2)(b)(ii). Here, the record does not show the government ever contended Robert posed an actual risk to his son. Instead, the Department simply insisted he could not have visits unless he conclusively established parentage.

Absent a showing of a concrete risk of harm, frequent parent-child visits are in the best interest of a child. *See* Dependency and Termination Equal Justice Committee Report (2003), at 19-20.² Children experience harm when visitation is denied or restricted. *Id.* at 19. One of the primary benefits is that visits assist in maintaining the parent-child bond. *Id.* Parental visitation and contact should be encouraged throughout the case, unless and until a termination order is signed. *Id.*

Limiting visitation is a key way in which the government “has the power to shape the historical events that

² Available at http://www.opd.wa.gov/documents/0046-2003_DTEJ_Report.pdf.

form the basis for termination.” *Santosky*, 455 U.S. at 763. Denial of visitation creates a self-fulfilling prophecy: it further disrupts the parent-child bond and undermines the legislative goal of reunification. *See id.* at 762 (noting a court’s “unusual discretion to underweigh probative facts that might favor the parent”); *T.L.G. II*, 139 Wn. App. at 18-19.

If a trial court were to find no parent-child bond existed due to no visitation, when the Department had denied visitation with no valid justification, “the injustice of such authoritarian dominance would be apparent.” *Hauser*, 15 Wn. App. at 236. That is exactly what happened here.

Based on the Department’s recommendation, the trial court repeatedly ordered Robert would not be able to visit with his son until Robert completed paternity testing. RP 85, 219; *see* Ex. 2 at 7; Ex. 6 at 11; Ex. 7 at 7; Ex. 9 at 7; Ex. 12 at 7; Ex. 13 at 7; Ex. 15 at 7; Ex. 17 at 7. Testing was considered both “a service” and “a condition to visitation.” CP 205; RP 224. No findings are apparent in the record that the court found there was an “actual risk” of harm to K.B., should visits

occur. *Tyler L.*, 150 Wn. App. at 804; RCW

13.34.136(2)(b)(ii)(C). The denial of visitations violated the statutory mandates and Robert's rights as K.B.'s presumptive and legal father. *See T.L.G. II*, 139 Wn. App. at 16-19; RCW 13.34.136(2)(b)(ii).

The Department and the trial court created a lack of bond between Robert and his son and then used that as the sole deficiency to terminate Robert's parental rights, despite all evidence showing the benefits to a child of retaining ties upon removal. *See Santosky*, 455 U.S. at 763; Dependency and Termination Equal Justice Committee Report, at 19-20. "[T]he injustice of such authoritarian dominance [is] apparent." *Hauser*, 15 Wn. App. at 236.

From the time K.B. was removed from his mother, the trial court should have maintained K.B.'s connection to his legal father. It should have considered Robert as a potential placement, given his legal and personal relationship with his son. *See* RCW 13.34.130(3). Instead, the court denied Robert

all access to and contact with his child and subjected the baby to the potential harms of foster care.

c. The Department has a duty to provide remedial services designed to support reunification.

The Department's responsibility to provide remedial services is crucial to fulfilling the statutory goals of ensuring children's safety and keeping families whole. *In re Dependency of Schermer*, 161 Wn.2d 927, 942-43, 169 P.3d 452 (2007). Indeed, "[t]he primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties." *Id.* at 943 (quoting *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005) [*T.L.G. I*]). Thus, before permanently terminating the parent-child relationship, the Department must offer or provide "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d); *T.L.G. I*, 126 Wn. App. at 198.

The Department is responsible for identifying and coordinating remedial services for a parent. RCW 13.34.025. The services must be provided in a timely fashion and may

not be unnecessarily delayed. *B.P.*, 186 Wn.2d at 315; *In re S.J.*, 162 Wn. App. 873, 883-84, 256 P.3d 470 (2011). The services offered must also be tailored to the individual parent's needs. *Matter of I.M.-M.*, 196 Wn. App. 914, 921, 385 P.3d 268 (2016); *In re Dependency of H.W.*, 92 Wn. App. 420, 428-430, 961 P.2d 963 (1998). The “parent must have the opportunity to benefit from all services available to address a barrier to family reunification.” *B.P.*, 186 Wn.2d at 316.

d. The Department did not meaningfully provide Robert with the necessary services to correct the alleged parental deficiency.

The only deficiency alleged at trial was Robert's lack of bond with his son. CP 2; RP 10. This was the only deficiency found by the court. CP 205. No effective remedial service was offered to correct this deficiency, though the Department characterized paternity testing as a service to correct it. RP 224.

Robert was deprived of the services necessary to create a bond with his son. One necessary corrective step would include visitation, which is arguably not a service. Yet by

reunification or attachment therapy for K.B. and Robert could perhaps accompany visitation to ease and speed the bonding process. The Department did not offer any reunification services, particularly ones tailored to the individual needs of Robert and his son. RP 64-65; *see I.M.-M.*, 196 Wn. App. at 921. Instead of working to reunify Robert and K.B., the Department continually opposed visitation for the two. RP 219.

The trial court and the Department together created the sole deficiency and thus the pivotal termination evidence. *See Santosky*, 455 U.S. at 763. The Department's efforts to prevent visitation between Robert and his son, failed to support the statutory goal of reunification and failed to provide Robert meaningfully with the necessary services. *See B.P.*, 186 Wn.2d at 316; RCW 13.34.025(2)(a); RCW 13.34.180(1)(d). The Department failed in its duty and the trial court erred in finding all requirements for termination had been met.

F. CONCLUSION

The evidence in Robert's trial did not justify the termination of his parental rights. The Department did not prove Robert was unfit to parent his son, as nothing showed he was unsafe and a lack of bond is not relevant to a fitness determination. The Department further failed to provide services to support reunification. This Court should reverse.

DATED this 15th day of November 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marek E. Falk', written in a cursive style.

MAREK E. FALK (WSBA 45477)
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE K.B.,
A MINOR CHILD.

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