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NO. 53292-1-II

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

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In re the Welfare of:

K.B.

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

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# REPLY BRIEF OF APPELLANT

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## A. SUMMARY OF REPLY

Robert's[1] court proceedings were fundamentally unfair. The presumed and legal father, he was denied his rights to visitation and to receive necessary services for nearly three years. The trial court ordered Robert to have no contact with his son without a genetic test, though Robert had no burden to rebut the presumption of paternity. This created a lack of bond that was the sole deficiency used to support termination of Robert's parental rights. Robert's resultant lack of bond was not a sufficient reason for termination.

The Department argues it supplied all necessary services by offering a genetic test and claims reunification would now take too long, though it should have started years ago. Yet no reunification services were ordered, and such services would not be futile.

This Court should reverse the termination order and order that Robert receive visitation and reunification services.

[1] A pseudonym is used for the appellant to preserve anonymity.

B. ARGUMENT IN REPLY

1. **Robert had no burden to prove biological paternity and thus the lack of bond created by the trial court was not a sufficient reason to terminate his rights.**

Legal parents have the same liberty interest in the care, custody, and control of their children as do biological or adoptive parents. *See In re Parentage of L.B.*, 155 Wn.2d 679, 708-10, 122 P.3d 161 (2005). Yet for nearly three years, Robert was denied visitation with his son K.B. in violation of his constitutional rights. RP 17, 154; *see id.*

Pursuant to RCW 26.26A.115(1)(a)(i), Robert is K.B.'s father. Yet the trial court put a burden on Robert to prove genetic paternity. The court's order severed the relationship between Robert and K.B. Then the court used the resultant lack of bond as the sole deficiency to terminate Robert's rights, despite having no evidence Robert was unable to reunify successfully with K.B. or parent him safely.

Courts may not deny a parent visitation without a showing of actual risk of harm to the child. *In re Dependency of T.L.G.*, 139 Wn. App. 1, 15-18, 156 P.3d 222 (2007) ["T.L.G.

II"]; RCW 13.34.136(2)(b)(ii)(A-C). The evidence did not support a finding of risk here. Robert completed every court-ordered assessment and had a positive parenting skills assessment. RP 47, 51, 161, 195-96; Ex. 25 at 5-8. No referrals were made based on any assessment. RP 47, 51-52. The evidence did not establish an actual risk of harm.

Robert was K.B.'s legal father. RP 9, 10, 17, 223. Thus, he was the presumptive father under the Uniform Parentage Act. RCW 26.26A.115(1)(a)(i); RP 10. The trial court acknowledged Robert was the "presumed" and "legal" father, as well as simply the "father." *E.g.*, CP 2, 3, 203; CP 204 (FF 2.5); Ex. 1 at 1; Ex. 2 at 1, Ex. 15 at 1. The Uniform Parent Act does not "diminish parental rights." RCW 26.26A.020(2).

Robert maintained visitation with K.B. before it was denied, and wanted to parent his son. He did not challenge the presumption and thus had no obligation to rebut it; any burden is on the challenging party. RCW 26.26A.245(4).

Consequently, the trial court erred in putting a burden on Robert to prove paternity. *See* RCW 26.26A.245(4). The

court also violated Robert's visitation rights by denying him visitation on the condition of completing a test. *T.L.G. II*, 139 Wn. App. at 16; RCW 13.34.136(2)(b)(ii)(B). This denial of visitation affected the outcome of Robert's trial: it was the foundation for the finding he had no bond and was thus unfit. *See* CP 205 (FF 2.15).

The Department, in its brief, argues Robert's "ability to … [have] visitation and reunification was entirely within his control." Resp. Brief at 9. It faults Robert for the lack of bond because he "refus[ed] to comply with the … court's order for paternity testing." *Id.* (citing RP 77, 99).

The Department does not address several critical facts: Robert was the legal father, Robert had no burden to prove his position, and the improper denial of visitation caused the lack of bond. *See* RCW 26.26A.245(4). The Department cannot establish a legal parent's constitutional right to visitation can be denied without a finding of an actual, non-speculative, risk of harm in all settings. *See T.L.G. II*, 139 Wn. App. at 15-18.

K.B. deserves to be connected to people who knew and loved him from birth. Yet the Department and the trial court categorically excluded a competent and safe caregiver with early connections to K.B. in favor of foster parents who were legal, biological, and factual strangers to K.B. The court's denial of visitation and resultant termination violated the rights of both father and son.

Where the trial court creates a lack of bond through an unsupportable denial of visitation, and termination proceeds on that basis, "the injustice of such authoritarian dominance [is] apparent." *In re Hauser's Welfare*, 15 Wn. App. 231, 236, 548 P.2d 333 (1976). The trial court's unconstitutional denial of visitation "shape[d] the historical events that form[ed] the basis for termination." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

This Court should not permit such fundamentally unfair procedures. It should reverse and hold the trial court's findings were unfounded where the court absolved the Department of its burden, ruled Robert created the lack of

visitation and bond, and found Robert unfit due to the lack of bond the court created. *See* CP 205 (FF 2.13, 2.14, 2.15).

**2. The reasonably available, necessary services to correct Robert's lack of bond with his son were not provided.**

*a. The Department provided no services to remedy the deficiency it helped create.*

The Department had a duty to provide "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d). It provided no services to correct the sole alleged deficiency. The trial court erred in finding this requirement was met. *See id.*; CP 205 (FF 2.14).

The Department argues it met its obligation by offering a genetic test, given Robert refused the improper order for testing. Resp. Brief at 12. It implies its hands were tied, as it was following the trial court's order, though it continually opposed Robert's visitation requests. *See id.*; RP 60-61, 219. It ignores that Robert was the legal parent and had a constitutional right to visitation. *See* Resp. Brief at 12.

The Department has a well-established obligation to support reunification when a parent is not shown to be unsafe. RCW 13.34.020; RCW 13.34.138(2)(c)(i); RCW 13.34.025; RCW 13.34.110(2); RCW 13.34.136(1), (2)(b)(ii)(A-C); RCW 13.34.180(d-e); *see* RCW 13.34.132. There was nothing in the court's orders that prevented the Department from providing necessary, reasonable services to correct the deficiency; the orders merely detail that visitation must await a genetic test. *See, e.g.*, Ex. 2 at 7.

Appropriate services were reasonably and easily available. *See* RCW 13.34.180(d). But for the court's denial of visitation, it is unknown if reunification services would even have been necessary. *See* RP 60-61, 85, 219. There is no reason to suspect visitation and reunification services were not capable of correcting the lack of bond, had the Department provided them. *See* RCW 13.34.180(d). The Department's claim reunification could take nine or more months is based on an uncertain opinion from an untrained witness who did not consider the three successful assessments

Robert completed or the parenting classes he started as soon as she made a referral, after the trial started. RP 1, 35-36, 47, 51-52, 57-58, 64-65, 219-20.; *see* RCW 13.34.180(e).

The Department ignores the unfairness of its position; had any needed services been provided early in the case, years before, they likely have been complete, with the manufactured deficiency corrected, well before the trial date. The Department's duty did not start with the termination trial; if reunification would now take time, that is the Department and the court's doing. The Department had a duty to provide services for close to three years. RP 17, 154.

The Department supported the denial of visitation, which created the sole deficiency. RP 60-61. It failed to offer services to correct it. Now, years later, it argues it is too late to do anything about it. This position is fundamentally unjust. Whether or not the trial court prevented the Department from providing the necessary services, the services were not provided and the trial court erred in finding they were. *See*

RCW 13.34.180(d-e); CP 205 (FF 2.13). This Court should reverse the termination order.

*b. Termination is improper as the unoffered services could have remedied the claimed deficiency.*

"The trial court may not terminate a parent's rights unless … the Department fulfilled [its] duty [to provide necessary attachment services] or that services would be futile." *In the Matter of the Parental Rights of B.P. v. H.O.*, 186 Wn.2d 292, 297, 376 P.3d 350 (2016). "Where there is <u>any reasonable possibility of success</u>, the services must be provided." *Id.* at 322 (emphasis added).

The Department acknowledges Robert "is correct that lack of bond should not be a parental deficiency where it might be remedied through additional services." Resp. Brief at 10-11 (citing App. Brief at 9; *B.P.*, 186 Wn.2d at 321). Yet it asserts this does not apply to Robert's case, assigning the burden to him to prove paternity through genetic testing despite the infirmity of this position under the law. *Id.*; RCW 26.26A.245(4); *see B.P.*, 186 Wn.2d at 297, 322.

Here, visitation alone might have prevented the need for attachment services. However, given the present-day lack of bond alleged, attachment services would have corrected the "deficiency." Robert lacks the mental health issues the parent in *B.P.* had, creating a "reasonable possibility of success." *B.P.*, 186 Wn.2d at 322.

The trial court did not find that such services would be futile. *See* CP 204-06. The Department's brief defines futility but does not claim visitation and attachment therapy would be futile, or that Robert refused those things. *See* Resp. Brief at 12 ("[A] service is futile when the parent is unwilling … to participate.") (citing *K.M.M.*, 186 Wn.2d at 483). Robert repeatedly requested visitation. *See id.* at 13; RP 60-61. He merely refused the improper genetic test.

Nor at trial did the Department argue futility; it argued reunification would take time. RP 223-33. Its speculated it could take nine or 12 months, or likely less time if no additional services were needed. *See* RP 35-36, 57.

The Department argues reunification would be traumatic to K.B., as Robert "is essentially a stranger to him." Resp. Brief at 10 (citing social worker's testimony). However, in *B.P.*, the Court rejected an identical claim by a witness who, like the one here, lacked "formal education in psychology or attachment issues." *B.P.*, 186 Wn.2d at 318, 321; RP 12, 64-65. It ruled "such risks do not constitute parental unfitness if they might be mitigated through services." *B.P.*, 186 Wn.2d at 321. Further, the Department "exacerbated" any potential harm by its "failure to timely provide necessary services." *Id.* at 315. It has an obligation to prevent trauma if the needed services are not futile. *Id.* at 321-22.

Instead of providing remedial services to Robert, the Department offered a cotton swab to collect unneeded evidence. It provided no services to prevent or correct a lack of bond. Such services should not be denied for years, after which several months might be needed for reunification. Reasonable services were not shown to be futile, thus the

court erred in terminating Robert's parental rights. *See B.P.*, 186 Wn.2d at 297, 322. This Court should reverse. *See id.*

C. CONCLUSION

In profoundly unfair proceedings, the trial court and the Department created a lack of bond between Robert and his son and then labeled this a deficiency sufficient to terminate his rights. Yet Robert was not shown to be unfit and no authority permitted placing the burden on Robert to prove his paternity. The Department was obligated to provide remedial services to correct the lack of bond, as such services were not shown to be futile, yet it did not.

These proceedings violated Robert's due process rights. He asks this Court to reverse the termination order and remand with instruction to provide ample visitation and any needed services to repair his relationship with K.B.

Respectfully submitted this 21st day of February 2020.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

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| IN RE K.B.,<br>A MINOR CHILD. | )<br>)<br>)<br>)<br>)<br>) | NO. 53292-1-II |

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