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Supreme Court No. 91921-6

Division III, No. 32490-7-III

IN THE  
SUPREME COURT  
OF THE  
STATE OF WASHINGTON

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*In re the Termination of K.J.B.*

STATE OF WASHINGTON/DSHS,

Respondent,

v.

J.B. (Father),

Petitioner

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PETITIONER'S SUPPLEMENTAL BRIEF

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## **A. ISSUES PRESENTED FOR REVIEW**

Issue 1: In a proceeding to terminate an incarcerated father's parental rights to his child, the trial court's failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) cannot be harmless error.

Issue 2: If this Court finds the trial court's failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) can be harmless error, then the error in this case was not harmless.

## **B. STATEMENT OF THE CASE**

K.J.B. was born on April 20, 2012. (CP 17; RP 5-6, 31). Her father is Mr. J.B. (CP 18; RP 5, 31, 36-38). The Department of Social and Health Services (DSHS) received a referral for K.J.B. on the day she was born, alleging her mother had a positive drug test one month prior. (RP 31).

K.J.B. was initially placed with a relative, and at age one month she was moved to a foster care placement. (RP 6-7, 34, 93). An order of dependency was entered in October 2012. (CP 18; Exhibit 2). The disposition and subsequent review orders required Mr. J.B. to complete the following services, along with any provider recommendations: drug and alcohol evaluation and treatment, parenting assessment and instruction, and random UA/BA testing. (CP 18; Exhibits 2, 3, 5, 6).

Mr. J.B. participated in visits with K.J.B. in January 2013, and from March 2013 to January 2014. (RP 22, 77-78, 97-99, 109, 184-185). He visited K.J.B. regularly from March 2013 to January 2014 with only a few missed visits. (RP 22, 78, 184-185).

On January 24, 2014, Mr. J.B. was found guilty of first degree unlawful possession of a firearm and possession of a stolen firearm and later sentenced to 74 months incarceration. (Exhibits 7, 8, 9; RP 14-15). His last visit with K.J.B. was shortly before his incarceration. (RP 185).

Mr. J.B. was incarcerated at the time of the termination trial. (RP 14-15). The case proceeded to a termination trial on March 17 and March 18, 2014. (RP 5-251).

Witnesses at trial testified Mr. J.B. is still in need of drug and alcohol treatment. (RP 13-14, 49-50).

Social worker Marcinna Heine-Rath observed several visits between Mr. J.B., K.J.B. and K.J.B.'s mother, and one visit between Mr. J.B. and K.J.B. only. (RP 78-79, 97-98). She testified the visits went well, with the parents playing with K.J.B. and interacting with her. (RP 78-79).

Esteban Cabrera, who completed Mr. J.B.'s parenting assessment and provided some parenting instruction, observed a visit between Mr. J.B. and K.J.B. (RP 124-125, 137-138, 152). He testified Mr. J.B. was nurturing and loving towards K.J.B., and that he showed compassion and sensitivity towards her. (RP 159-160).

Social worker Sonny Laform, assigned to the case in October 2013, testified Mr. J.B. was wonderful in maintaining contact with DSHS. (RP 184). He testified Mr. J.B. has not contacted him since his incarceration in January 2014. (RP 185, 193, 198). He testified he does not accept collect calls, did not provide Mr. J.B. with pre-addressed stamped envelopes so he

could communicate with him, and assumed Mr. J.B. had his address available to him while incarcerated. (RP 193).

Mr. J.B. estimated his early release date from prison is just under four years. (RP 15). He testified since being incarcerated, he has not contacted Mr. Laform to ask him how K.J.B. is doing, or communicated with Mr. Laform in any way. (RP 22-23). Mr. J.B. testified he is now ready to get drug and alcohol treatment. (RP 14).

The trial court terminated Mr. J.B.'s rights to K.J.B. (CP 17-24; RP 245-251). In its oral ruling and in its written findings, the trial court did not consider factors applicable to incarcerated parents under RCW 13.34.180(1)(f). (CP 17-24; RP 245-251). Counsel for either side did not make any argument to the trial court regarding these factors. (RP 231-245).

Mr. J.B. timely appealed. (CP 8-16). The Court of Appeals affirmed the termination of Mr. J.B.'s parental rights to his daughter K.J.B. in a published opinion.

### C. ARGUMENT

**Issue 1: In a proceeding to terminate an incarcerated father's parental rights to his child, the trial court's failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) cannot be harmless error.**

Parents have a fundamental liberty interest in the custody and care of their children. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). In order to terminate a parent-child relationship, the State must satisfy a two-part test. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 576, 257 P.3d 522 (2011). First, the State must prove the six statutory elements set

forth in RCW 13.34.180(1). *Id.* If these criteria are met, the court then determines if termination is in the best interests of the child. *Id.* at 577 (citing RCW 13.34.190(1)(b)).

In order to terminate a person's parental rights, the State must prove the six statutory elements by clear, cogent, and convincing evidence. *Id.* at 576-77. "Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be highly probable." *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (internal quotation marks omitted) (quoting *In re Seago*, 82 Wn.2d 736, 739, 513 P.3d 831 (1973)).

The sixth statutory element the State must prove in order to terminate a parent-child relationship is "[t]hat continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f).

This statutory element in RCW 13.34.180(1)(f) was amended, effective July 28, 2013, to require the court to consider three specific factors before terminating the parental rights of an incarcerated parent:

If the parent is incarcerated, the court shall consider [1] whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW 13.34.145(5)(b); [2] whether the department or supervising agency made reasonable efforts as defined in this chapter; and [3] whether particular barriers existed as described in RCW 13.34.145(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

RCW 13.34.180(1)(f); *see also* Substitute H.B. 1284, 63rd Leg., Reg. Sess. (Wash.2013).

Mr. J.B. urges this Court to hold that these three specific factors applicable to incarcerated parents under RCW 13.34.180(1)(f) changed the statutory termination element in RCW 13.34.180(1)(f), becoming part of the termination element that must be proved. *See In re Dependency of A.M.M.*, 182 Wn. App. 776, 784, 787-90, 332 P.3d 500 (2014) (holding the Department did not satisfy its burden of proof on the termination factors, where the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) were not addressed in the trial court, and reversing the termination order and remanding for further proceedings); *In re Termination of M.J. and M.J.*, 187 Wn. App. 399, 407-11, 348 P.3d 1265 (2015) (where the court could not ascertain how, if at all, the trial court applied the meaningful role assessment under RCW 13.34.180(1)(f) in its ruling, reversing the termination order and remanding for further proceedings). Thus, if a parent is incarcerated, in order for DSHS to meet its burden of proof to terminate the parent-child relationship, it must establish the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) by clear, cogent, and convincing evidence. *See A.M.M.*, 182 Wn. App. at 784, 787-90; *M.J.*, 187 Wn. App. at 407-11; *K.N.J.*, 171 Wn.2d at 576-77.

When terminating the parental rights of an incarcerated parent, the legislature mandated the trial court consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f). RCW 13.34.180(1)(f); *see*

*also M.J.*, 187 Wn. App. at 409 (acknowledging the legislature did not require the trial court to enter findings, but instead, mandated consideration of the factors). Before a trial court may terminate parental rights, DSHS must prove each element of RCW 13.34.180(1). *K.D.S.*, 176 Wn.2d at 654-55. Each element must be independently proven. *Id.* at 656. Proving each element of RCW 13.34.180(1) by clear, cogent, and convincing evidence also “satisf[ies] the due process requirement that a court must find parents currently unfit before terminating the parent-child relationship.” *K.N.J.*, 171 Wn.2d at 577 (citing *K.R.*, 128 Wn.2d at 141–42).

Here, Mr. J.B. was incarcerated at the time of the termination trial. (Exhibits 7, 8, 9; RP 14-15). The trial court did not consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f). (CP 17-24; RP 245-251). Therefore, DSHS did not satisfy its burden of proof as to the termination factor in RCW 13.34.180(1)(f).

Because the record does not clearly demonstrate that the trial court actually intended to make findings regarding the factors applicable to incarcerated parents under RCW 13.34.180(1)(f), such findings cannot be inferred. *See In re Welfare of A.B.*, 168 Wn.2d 908, 921, 232 P.3d 1104 (2011) (holding “the appellate court can imply or infer the omitted finding [of current parental unfitness] if—but only if—all the facts and circumstances in the record . . . clearly demonstrate that the omitted finding was actually intended, and thus made, by the trial court.”); *see also A.M.M.*, 182 Wn. App.

at 787-89 (applying *A.B.* to the trial court's failure to consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f)).

Mr. J.B. next urges this Court to hold it cannot be harmless error when DSHS fails to prove, and the trial court fails to consider, the factors applicable to incarcerated parents under RCW 13.34.180(1)(f). Endorsing the Court of Appeals' harmless error analysis in this context conflicts with this Court's opinion in *A.B.* See *A.B.*, 168 Wn.2d at 918-25; Published Opinion at 26-27. First, like current parental unfitness, the statutory termination element set forth in RCW 13.34.180(1)(f), including the factors applicable to incarcerated parents, must be proved in order to terminate the parental rights of incarcerated parent. See *A.B.*, 168 Wn.2d at 918-20; see also *A.M.M.*, 182 Wn. App. at 784, 787-90; *M.J.*, 187 Wn. App. at 407-11. Second, permitting a harmless error analysis would allow the appellate courts to evaluate the evidence and infer findings regarding the factors applicable to incarcerated parents under RCW 13.34.180(1)(f), under circumstances where the trial court did not actually intend to make such findings. See *A.B.*, 168 Wn.2d at 920-25; see also *A.M.M.*, 182 Wn. App. at 787-89. An appellate court does not make findings of fact. *Marcum v. Dep't of Soc. And Health Servs.*, 172 Wn. App. 546, 560, 290 P.3d 1045 (2012).

The State argues a harmless error analysis is appropriate in this context. Response to Motion for Discretionary Review, pgs. 14-20; Answer to Memorandum of Amici Curiae Washington Defender Association and Legal Voice, pgs. 4-7, 10. However, the termination cases cited by DSHS in

support of a harmless error analysis in this context do not involve the trial court's failure to consider a termination factor set forth in RCW 13.34.180(1) altogether. See *In re Welfare of Ferguson*, 41 Wn. App. 1, 5-6, 701 P.2d 513 (1985) (where the trial court entered a finding of fact on the termination factor requiring that the child had been found dependent, applying harmless error to the State's failure to prepare a social study prior to the entry of an agreed dependency order); *In re Welfare of T.B.*, 150 Wn. App. 599, 614-16, 209 P.3d 497 (2009) (concluding the trial court appropriately considered a guardian ad litem recommendation as to the children's best interests, and even if the trial court erred, the error would be harmless); *In re Welfare of M.D.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510 (2008) (rejecting the parent's argument that all necessary services had not been offered, based on the rule that such a finding can be made if the offer of services would be futile; there was no challenge made that the trial court did not consider the termination factor in RCW 13.34.180(1)(d) altogether, but rather, that the State had not done enough).

The basis for the Court of Appeals' harmless error analysis was dicta from its earlier decision in *M.J.* See *M.J.*, 187 Wn. App. at 409 (stating "[i]n many instances, particularly where the evidence is uncontested or the State's case is very strong, the court's conclusion will need no further explanation."); Published Opinion at 26 (after acknowledging consideration of the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) is mandatory, stating "[n]evertheless, a failure to weigh the required

considerations will not require reversal if the State's case is strong or if the factors are not contested.”).

The Court of Appeals did not cite to any support for its dicta in *M.J.* See *M.J.*, 187 Wn. App. at 409. Mr. J.B. is not aware of any termination of parental rights cases in Washington where the appellate courts find harmless error when a trial court fails to consider one of the statutorily mandated factors for termination of parental rights altogether. Cf. *In re Welfare of McGee*, 36 Wn. App. 660, 662-63, 679 P.2d 933 (1984) (applying the harmless error doctrine in a termination case, where the trial court improperly conducted an interview of the child in chambers). Given Mr. J.B.'s fundamental liberty interest at stake, the care and custody of his child, adopting a harmless error analysis in this context is not appropriate. See *K.D.S.*, 176 Wn.2d at 652 (acknowledging this fundamental liberty interest). DSHS should be required to prove, and the trial court should be required to consider, the legislatively mandated termination factors before permanently depriving an incarcerated parent of this fundamental liberty interest.

DSHS failed to establish the required facts to permit the trial court to enter an order terminating Mr. J.B.'s parental rights to K.J.B. See RAP 2.5(a)(2) (allowing a party to raise, for the first time on appeal, “failure to establish facts upon which relief can be granted[.]”); see also, e.g., *In re Adoption of T.A.W.*, 188 Wn. App. 799, 805-08, 354 P.3d 46 (2015) (reversing a termination order where the parties seeking termination failed to

meet the “active efforts” requirement of the Indian Child Welfare Act; neither the trial court nor the parties had discussed this requirement).

Mr. J.B. urges this Court to follow *A.M.M.* and *M.J.*, requiring the trial court to consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) in the first instance, and declining to adopt a harmless error analysis in this context. *See A.M.M.*, 182 Wn. App. at 784, 787-90; *M.J.*, 187 Wn. App. at 407-11. The order terminating the father’s parental rights should be reversed.

**Issue 2: If this Court finds the trial court’s failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) can be harmless error, then the error in this case was not harmless.**

Should this Court disagree with Mr. J.B.’s argument that the trial court’s failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) cannot be harmless error, then the error in this case was not harmless.

Mr. J.B. urges this Court to apply the more stringent constitutional harmless error test here. *See, e.g., In re Dependency of A.W.*, 53 Wn. App. 22, 26-29, 765 P.2d 307 (1989) (applying constitutional harmless error analysis in a termination case, when determining whether the failure to give the father notice of the initial dependency proceeding was harmless error). The trial court’s failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) affected two important constitutional rights, Mr. J.B.’s due process right to have all six termination factors proven by clear, cogent, and convincing evidence, and Mr. J.B.’s

fundamental liberty interest in the care and custody of his child. *See K.N.J.*, 171 Wn.2d at 577 (due process right) (citing *K.R.*, 128 Wn.2d at 141–42, 904 P.2d 1132 (1995)); *K.D.S.*, 176 Wn.2d at 652 (fundamental liberty interest). Constitutional errors are presumed to be prejudicial, and, to overcome this presumption, the State must prove beyond a reasonable doubt that the result of the proceedings would have been the same absent the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *see also A.W.*, 53 Wn. App. at 26-29.

In order to terminate the parental rights of an incarcerated parent, all three factors applicable to incarcerated parents must be considered:

If the parent is incarcerated, the court shall consider [1] whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW 13.34.145(5)(b); [2] whether the department or supervising agency made reasonable efforts as defined in this chapter; and [3] whether particular barriers existed as described in RCW 13.34.145(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

RCW 13.34.180(1)(f).

The factors in RCW 13.34.145(5)(b) are as follows:

- (i) The parent's expressions or acts of manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child;
- (ii) The parent's efforts to communicate and work with the department or supervising agency or other individuals for the purpose of complying with the service plan and repairing, maintaining, or building the parent-child relationship;
- (iii) A positive response by the parent to the reasonable efforts of the department or the supervising agency;

- (iv) Information provided by individuals or agencies in a reasonable position to assist the court in making this assessment, including but not limited to the parent's attorney, correctional and mental health personnel, or other individuals providing services to the parent;
- (v) Limitations in the parent's access to family support programs, therapeutic services, and visiting opportunities, restrictions to telephone and mail services, inability to participate in foster care planning meetings, and difficulty accessing lawyers and participating meaningfully in court proceedings; and
- (vi) Whether the continued involvement of the parent in the child's life is in the child's best interest.

RCW 13.34.145(5)(b).

Here, social worker Mr. Laform testified Mr. J.B. has not contacted him since his incarceration in January 2014. (RP 185, 193, 198). He testified he does not accept collect calls, did not provide Mr. J.B. with pre-addressed stamped envelopes so he could communicate with him, and assumed Mr. J.B. had his address available to him while incarcerated. (RP 193). Mr. J.B. testified since being incarcerated, he has not contacted Mr. Laform to ask him how K.J.B. is doing, or communicated with Mr. Laform in any way. (RP 22-23).

Even assuming, without conceding, that this evidence shows Mr. J.B. did not maintain a meaningful role in his child's life while he was incarcerated, as pertains to the first incarcerated parent factor, there is insufficient evidence in the trial court record to support the second and third incarcerated parent factors.

First, the record does contain facts that DSHS "made reasonable efforts as defined in this chapter." RCW 13.34.180(1)(f). "Reasonable

efforts” is not specifically defined in RCW Chapter 13.34. *See* RCW 13.34.030. In *M.J.*, the Court of Appeals found this language “require[s] DSHS to make reasonable efforts to help the incarcerated person remedy parental deficiencies.” *M.J.*, 187 Wn. App. at 408. However, throughout RCW Chapter 13.34, “reasonable efforts” means more than just remedying parental deficiencies, it means reunification of the family, including reasonable efforts to ensure visitation. *See* RCW 13.34.025; RCW 13.34.062(2)(b); RCW 13.34.065(5)(a)(i); RCW 13.34.110; RCW 13.34.130; RCW 13.34.132(4); RCW 13.34.136; RCW 13.34.138(c)(i).

By making no contact with Mr. J.B. once he was incarcerated and assuming he had his social worker’s address, DSHS did not make “reasonable efforts” under RCW 13.34.180(1)(f). DSHS did not make reasonable efforts to help Mr. J.B. remedy his parental deficiencies while incarcerated by exploring what services were available to him while incarcerated, nor did DSHS make reasonable efforts towards reunification by exploring the possibility of visits while incarcerated.

Second, the record does not contain facts regarding “whether particular barriers existed as described in RCW 13.34.145(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.” RCW 13.34.180(1)(f); *see also* RCW 13.34.145(5)(b). The record is devoid of facts on this required element. *See* Published Opinion, pg. 27 (acknowledging this lack of evidence). Given that

Mr. J.B. visited K.J.B. regularly from March 2013 until shortly before his incarceration, and that he was wonderful in maintaining contact with DSHS prior to his incarceration, it is certainly possible that his lack of contact with DSHS after he was incarcerated was because particular barriers in contacting both K.J.B. and the Department existed after Mr. J.B.'s incarceration. (RP 22, 78, 184-185).

It is DSHS' burden of proof to establish all three factors applicable to incarcerated parents under RCW 13.34.180(1)(f). *See A.M.M.*, 182 Wn. App. at 784, 787-90; *M.J.*, 187 Wn. App. at 407-11; *K.N.J.*, 171 Wn.2d at 576-77. The burden of proof should not be shifted to Mr. J.B. to disprove the statutory elements required to terminate his parental rights to K.J.B.

The State cannot prove, beyond a reasonable doubt, that the result of the proceeding would have been the same absent the trial court's failure to consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f). *See Watt*, 168 Wn.2d at 635; *A.W.*, 53 Wn. App. at 26-29.<sup>1</sup> The termination order should be reversed.

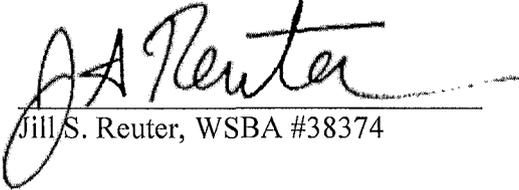
#### **D. CONCLUSION**

The termination order should be reversed and the matter remanded for further proceedings for the trial court to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f).

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<sup>1</sup> Should this Court decline to apply the more stringent constitutional harmless error test here, Mr. J.B. argues reversal is nonetheless appropriate, because he was prejudiced by the trial court's error in failing to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f). *See, e.g., McGee*, 36 Wn. App. at 662-63 (declining to reverse a termination order where the error was not prejudicial to the mother).

Respectfully submitted this 8th day of April, 2016.

  
\_\_\_\_\_  
Jill S. Reuter, WSBA #38374

*/s/ Kristina M. Nichols*  
\_\_\_\_\_  
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In re the Termination of ) Supreme Court No. 91921-6  
K.J.B. ) COA No. 32490-7-III  
\_\_\_\_\_ ) PROOF OF SERVICE

I, Jill S. Reuter, of Counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant father herein, do hereby certify as follows:

On April 8, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Petitioner's attached supplemental brief, addressed to the Petitioner, Mr. J.B., at his confidential address.

Having received prior permission, I also served the following with a true and correct copy of the same by email, at the following addresses: Respondent State of Washington/DSHS (peterg@atg.wa.gov, wendyo@atg.wa.gov, carissag@atg.wa.gov, collienn@atg.wa.gov, rsdyakappeals@atg.wa.gov); Amici curiae Washington Defender Association and Legal Voice: (lillian@defensenet.org, mindy.carr@onglaw.com, sainsworth@LegalVoice.org).

Dated this 8th day of April, 2016.

  
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**Subject:** Case # 91921-6 - In re the Termination of K.J.B.

Dear Clerk,

Please accept for filing the attached Petitioner's Supplemental Brief, in Case No. 91921-6, In re the Termination of K.J.B.

Counsel for the Respondent and amici curiae have consented to service by email and are copied above.

Thank you.

Sincerely,

Jill Reuter  
Counsel for the Petitioner Father Mr. J.B.

--

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