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Division I
State of Washington

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No. 72421-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In Re the Dependency of: D.L.B.

Edelyn Saint-Louis,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

- 1. The trial court's failure to consider the mandatory factors under RCW 13.34.180(1)(f) means the Department failed to meet its burden of proof, requiring reversal and a new trial.**
 - a. A mandatory and controlling statute may be raised for the first time on appeal. This Court may properly consider whether amended RCW 13.34.180(1)(f) applied in this case.**

Ms. Saint-Louis did not waive the claimed error by not raising the amended language in RCW 13.34.180(1)(f) at trial. In A.M.M., the amended language came into effect during the termination trial. In re Dependency of A.M.M., 182 Wn. App. 776, 786-87, 332 P.3d 500 (2014). Although the father had not raised the amended statute at trial, this Court still considered his argument that the trial court failed to apply the law in effect. This Court held that the trial court had failed to apply the statute, resulting in the Department failing to meet its burden of proof. A.M.M., 182 Wn. App. at 787.

This Court's decision to consider the father's argument in A.M.M. was supported by well-established precedent. As explained by our Supreme Court, cases should be governed by the applicable law even if the representing parties ignore it or are unwilling to argue it:

Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the

mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Accordingly, in Maynard, our Supreme Court rejected an argument that a statute could not be applied in rendering a decision on appeal because the statute had not been raised in the trial court. Maynard, 77 Wn.2d at 623.

In accordance with Maynard, Washington appellate courts have regularly considered statutes raised for the first time on appeal. See e.g., Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990); Gross v. City of Lynnwood, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978); Osborn v. Pub. Hosp. Dist. I, Grant County, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972); Optimer Int'l, Inc. v. RP Bellevue, LLC, 151 Wn. App. 954, 961-62, 214 P.3d 954 (2009), affd, 170 Wn.2d 768, 246 P.3d 785 (2011). A.M.M. is another example.

The line of cases cited are consistent with RAP 2.5(a)(2). Under that provision, a party may raise “failure to establish facts upon which relief can be granted” for the first time on appeal. RAP 2.5(a)(2). Here, the Department had the burden to prove RCW 13.34.180(1)(f). When applicable, failure by the trial court to apply the mandatory factors in RCW 13.34.180(1)(f) means the Department has failed to meet its burden

of proof. A.M.M., 182 Wn. App. at 787. In other words, the Department has failed to “establish facts upon which relief can be granted.” RAP 2.5(a)(2).

RAP 2.5(a)(3), which allows consideration of “manifest error affecting a constitutional right” also applies here. RAP 2.5(a)(3). Under constitutional due process, parents have a fundamental liberty interest in the care and custody of their children. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Due process requires the Department to prove parental unfitness and the elements of RCW 13.34.180(1)(a)-(f) by clear, cogent, and convincing evidence. In re Welfare of A.B., 168 Wn.2d 908, 911, 919, 232 P.3d 1104 (2010). Similarly, in criminal cases, due process requires that the State must prove all the elements of the offense beyond a reasonable doubt. City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). And “thus, sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.” Slack, 113 Wn.2d at 859. Similarly, sufficiency of the evidence in termination cases is a question of constitutional magnitude and can be raised for the first time on appeal. As recognized by A.M.M., failure to apply the amended language in subsection (f) in an applicable case means the Department failed to meet its burden. A.M.M., 182 Wn. App. at 787. If this Court

agrees that the statute applied, Ms. Saint-Louis shows that the error is “manifest,” meaning that the error resulted in “actual prejudice.” State v. O’Hara, 167 Wn.2d 918, 935, 155 P.3d 125 (2007). Therefore, Ms. Saint-Louis’ challenge on appeal presents a manifest error affecting a constitutional right.

The Department cites State v. Kirvin, 37 Wn. App. 452, 682 P.2d 919 (1984) in support of its argument. There, this Court refused to address an issue of statutory construction concerning a false reporting ordinance. Kirvin, 37 Wn. App. at 461-62. What the exact issue was is unclear from the opinion. Unlike Kirvin, Ms. Saint-Louis has established that review is proper under the caselaw and RAP 2.5(a)(2), (3).

Regardless, application of RAP 2.5(a) is permissive: “The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a) (emphasis added). It is ultimately a matter of the reviewing court’s discretion. Hardy, 113 Wn.2d at 918. Thus, even assuming waiver, this Court may still reach the issue. See State v. Blazina, No. 89028-5 slip op. at 6 (March 12, 2015); RAP 1.2(a).

As in A.M.M., a parent raises mandatory language in an effective statute. While Ms. Saint-Louis was not incarcerated at the time of the court’s decision, this difference goes to merits of whether the statute

applied in her case, not waiver. Following precedent and applying RAP 2.5(a)(2) and (3), this Court should review Ms. Saint-Louis' claim.

b. The legislature intended amended RCW 13.34.180(1)(f) to apply to all parents who are incarcerated during the dependencies of their children.

In general, a petition seeking termination of a parent and child relationship must make six statutory allegations. RCW 13.34.180(1). One of these is that the 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). In assessing whether the Department has met its burden on this element, the trial court must consider additional factors "[i]f the parent is incarcerated." RCW 13.34.180(1)(f); A.M.M., 182 Wn. App. at 787. Thus, the amended statute substantively changed RCW 13.34.180(1)(f).

This language does not specify the pertinent time point. Contrary to the Department's argument, the language does not say "at time the trial court is charged with making its decision." Br. of Resp't at 24. Applying the rules of statutory interpretation, the only reasonable interpretation is that the statute applies to a parent who "is incarcerated" during the dependency.

Context is essential when interpreting a statute and ascertaining the intent of the lawmaker. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989). Plain meaning analysis does not read language in isolation. Jongeward v. BNSF R. Co., 174 Wn.2d 586, 595, 278 P.3d 157 (2012) (rejecting plain meaning analysis that read language in isolation as too limited); Beecham v. United States, 511 U.S. 368, 372, 114 S. Ct. 1669, 128 L. Ed. 2d 383 (1994) (“The plain meaning that [courts] seek to discern is the plain meaning of the whole statute, not of isolated sentences.”). Further, statutes are interpreted to avoid unlikely, absurd, or strained results. Broughton Lumber Co. v. BNSF Ry. Co., 174 Wn.2d 619, 635, 278 P.3d 173 (2012). In the end, Washington courts interpret statutes so as to advance the purpose of the law. LaCoursiere v. Camwest Dev., Inc., 181 Wn.2d 734, 742, 339 P.3d 963 (2014) (“Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose.”) (quoting Hardy, 113 Wn.2d at 928). The Department appears to agree with these rules.

The Department does not contest Ms. Saint-Louis' argument that the 2013 law expanding the rights of incarcerated parents was to benefit parents who are incarcerated during their dependencies. Reading the

language at issue to apply only to parents who are currently incarcerated at the time the court makes a decision on termination is, at best, a strained interpretation. It reads the language in isolation and fails to give adequate weight to context and the purpose of the law.

In support of its narrow interpretation, the Department refers to other language in chapter RCW 13.34. The Department argues the legislature would have used language identical or similar to language used in other provisions concerning incarcerated parents. In other provisions, the legislature used different language for whether a current or previous incarceration triggers a provision. This language includes: “a parent who is incarcerated,”¹ “[t]he parent is incarcerated, or the parent’s prior incarceration is a significant factor,”² and “a parent’s current or prior incarceration.”³ From this, the Department extrapolates that the

¹ RCW 13.34.145(4)(b) (“The court’s assessment of whether a parent who is incarcerated maintains a meaningful role in the child’s life may include consideration of the following . . .”).

² RCW 13.34.145(5)(a)(iv) (Good cause exception to filing termination petition may exist if “[t]he parent is incarcerated, or the parent’s prior incarceration is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months . . .”).

³ RCW 13.34.180(1)(e)(iii) (if parent has not had contact with the child, the court may consider “mitigating circumstances such as a parent’s current or prior incarceration” in deciding whether conditions will be remedied); RCW 13.34.180(2) (“As evidence of rebuttal to any presumption established pursuant to subsection (1)(e) of this section, the court may consider the particular constraints of a parent’s current or prior incarceration.”).

legislature would have used language similar to “prior incarceration” if it meant to apply the provision to all parents who are incarcerated during the dependencies of their children.

The Department’s argument should be rejected. The phrase “is incarcerated” does not necessarily mean incarcerated at the time of the court’s decision. Using the tools of interpretation, the only reasonable interpretation is that the phrase, “is incarcerated,” means is incarcerated during the dependency.

The State argues that Ms. Saint-Louis’ interpretation is absurd because it means a parent who is briefly incarcerated during a long dependency would be entitled to full consideration of the additional factors. Br. of Resp’t at 29. But what is absurd is an interpretation that fails to apply amended RCW 13.34.180(1)(f) to parents, such as Ms. Saint-Louis, who are incarcerated for a significant portion a dependency. To accept the Department’s interpretation means that lawmakers meant to provide her and other parents in similar circumstances no additional protection. It means that a parent who is incarcerated for the entire dependency, but released on the day of the court’s decision, is entitled to no protection under RCW 13.34.180(1)(f). This cannot be what the legislature intended.

At the very least, Ms. Saint-Louis' interpretation is reasonable. If other interpretations are also reasonable, then the statute is ambiguous. See Campbell & Gwinn, 146 Wn.2d at 12. The Department does not contest Ms. Saint-Louis' argument that legislative history supports her interpretation. It also does not contest that the purpose of the law was to benefit parents who are incarcerated during the dependency. Therefore, this Court should resolve any ambiguity in favor of Ms. Saint-Louis. See Campbell & Gwinn, 146 Wn.2d at 12 (courts may examine legislative history or other aids to construction if the statute is subject to more than one reasonable meaning).

c. When applicable, the trial court's failure to consider the mandatory factors in amended RCW 13.34.180(1)(f) means the Department failed to meet its burden of proof.

Amended RCW 13.34.180(1)(f) requires the trial court to consider additional factors and evidence in assessing whether the State had met its burden to prove termination. See A.M.M., 182 Wn. App. at 787 ("there is no evidence in the record suggesting that the Department presented evidence in an effort to satisfy its burden . . ."). Here, the Department presented no evidence specifically directed at the mandatory factors applicable to parents who are incarcerated during the dependency. And the trial court did not consider these factors. Thus, as in A.M.M., the

Department failed to meet its burden of proof on RCW 13.34.180(1)(f).
A.M.M., 182 Wn. App. at 787, 789-90.

The Department argues that these failures are excused because “the trial court had before it evidence relating to each of the considerations and that evidence informed its determination that RCW 13.34.180(1)(f) was proved.” Br. of Resp’t at 31-32. The Department’s attempt to bootstrap testimony and evidence not directed at the mandatory factors should be rejected. This is not how the legislature envisioned the process. See Judicial Impact Fiscal Note at 2 (explaining that additional mandatory factors would require presentation of evidence that would add an estimated two to three hours per trial).⁴ Evidence aimed at satisfying amended subsection (f) would have included questions to witnesses framed around the mandatory factors. The record here shows that this did not happen. It is the type of record one would find prior to the change in the law in August 2013.

Essentially, the Department asks this Court to infer missing findings. But an appellate court may infer omitted findings “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

⁴ Attached as Appendix D in Opening Brief.

court.” A.M.M., 182 Wn. App. at 788 (quoting A.B., 168 Wn.2d at 921). Because the record does not show that omitted findings were actually intended, no findings may be inferred.

d. The remedy is reinstatement of the dependency and, if a new termination petition is filed, a new trial.

The failure of the Department to meet its burden of proof means that Ms. Saint-Louis is entitled to reinstatement of the dependency and, if the Department chooses to file another termination petition, a new termination trial. See In re Welfare of C.S., 168 Wn.2d 51, 57, 225 P.3d 953 (2010) (reversing for failure of proof on RCW 13.34.180(1)(d) and dismissing termination proceeding); In re Welfare of C.B., 134 Wn. App. 942, 962, 143 P.3d 846 (2006) (reversing for failure of proof on RCW 13.34.180(1)(e), but noting that dependency remained in effect and that Department may file another termination petition). This Court should order this relief upon reversal.

2. The Department failed to prove that it offered or provided all necessary services, that Ms. Saint-Louis was currently unfit, and that D.B. could not be reunited with his mother in the near future.

a. The Department failed to provide all necessary and reasonably available services.

The Department ignores Ms. Saint-Louis’s argument that the Department failed to comply with RCW 13.34.136(2)(b)(i)(A). Under that

provision, if it is possible, permanency plans “must include treatment that reflects the resources available at the facility where the parent is confined.” RCW 13.34.136(2)(b)(i)(A). There was no showing that the Department tried to provide Ms. Saint-Louis services while incarcerated. There was no testimony that urinalyses (UAs) could not have been provided at the facility. Neither was there evidence that an adequate parenting education program was unavailable. This record shows a lack of reasonable efforts and a violation of RCW 13.34.136(2)(b)(i)(A). Because the Department failed to meet its burden to prove that it offered or provided all reasonably available and necessary services to Ms. Saint-Louis, this Court should reverse.

b. The evidence did not prove that Ms. Saint-Louis was currently unfit to parent D.B., or alternatively, that she would not be fit in the near future.

The Department incorrectly contends that the evidence showed that “Ms. Saint-Louis had untreated mental health problems, unresolved domestic violence issues, possible chemical dependency issues, and a serious lack of parenting skills.” Br. of Resp’t at 38.

The Department does not identify what Ms. Saint-Louis’ current “untreated” mental health problems consist of. Ms. Saint-Louis attended six months of mental health counseling, saw a counselor from Sound Mental health about a twice a week while incarcerated, and engaged in

further mental health counseling upon release. RP 157, 280, 335, 403-04. Ms. Saint-Louis was managing her psychotropic medication herself. RP 337. This is not minimal engage. Br. of Resp't at 40. Moreover, the Department does not explain how Ms. Saint-Louis's mental health prevented her from safely parenting D.B. The Department does not contest Ms. Saint-Louis' argument that the trial court failed to connect any mental health issue to an inability to parent. See In re Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005).

The Department's argument that Ms. Saint-Louis had unresolved issues as a victim of domestic violence rests on the bare evidence that Ms. Saint-Louis was currently living with Michael Conley, who had a history of domestic violence. Br. of Resp't at 38-39. There was no evidence, however, that Mr. Conley perpetrated acts of domestic violence against Ms. Saint-Louis (the mother of his expectant child) or that he posed a current danger. Ms. Saint-Louis understood the signs of domestic violence and could protect herself. This evidence did not make Ms. Saint-Louis unfit to parent her son.

Concerning substance abuse, there was no evidence that Ms. Saint-Louis had a current substance abuse problem. She completed an intensive in-patient treatment program in December 2012 and then an outpatient program in April 2013. CP 353 (FF 2.10). Thus, contrary to the findings,

Ms. Saint-Louis ultimately followed through on getting treatment. CP 352 (FF 2.8). She participated in a relapse prevention program and enrolled in another such program after being released, RP 74-75, 424, 427, 442-43. That Ms. Saint-Louis missed some UAs during the dependency does not establish that she had a substance abuse problem. Ms. Saint-Louis submitted many clean UAs throughout the case. RP 396, 425, 434. Had the Department offered UAs while Ms. Saint-Louis was incarcerated, the 90-day requirement of clean and consistent UAs would have likely been met.

The Department's argument that Ms. Saint-Louis had a "serious lack of parenting skills" is not supported by the record. Observations of Ms. Saint-Louis and D.B. were largely positive. RP 422, 510-11; Ex. 16 at 12-13. It does not follow that because Ms. Saint-Louis had not completed the "Incredible Years" parenting education program, she therefore lacked parenting skills. Ms. Saint-Louis had previous parenting education and had attended five classes in the Incredible Years program. RP 73, 282. Moreover, the Incredible Years program was recommended to the foster parents of D.B, yet they were for caring D.B. RP 262. Finally, the Department's bare assertion that Ms. Saint-Louis lacked empathy for D.B. is not supported by a citation to the record and is

contrary to the record showing a loving and caring mother. Br. of Resp't at 39.

Finally, the Department does not contest Ms. Saint-Louis' argument that opinions by a psychologist and social worker in late 2012 were not especially probative (if probative at all) of Ms. Saint-Louis' current fitness. Br. of App. at 41-43. As the opinions were from late 2012, these two opinions failed to consider the progress Ms. Saint-Louis made and did not consider current circumstances.

Even assuming the evidence established that Ms. Saint-Louis was not currently fit to parent D.B., the evidence did not prove she would not be able to care for D.B. in the "near future." RCW 13.34.180(1)(e). Ms. Saint-Louis was engaged in services and was committed to reunification with D.B. D.B. would not have to wait long to be returned to his mother's care. Because the State did not prove RCW 13.34.180(1)(e) or that Ms. Saint-Louis was currently unfit, this Court should reverse.

3. The use of footnotes in the opening brief is appropriate.

To logically structure the brief, to increase brevity, and to ensure that the main points are not lost in sea of minor points, the opening brief uses footnotes on occasion. Some of these footnotes point out that some of findings of fact are erroneous because no evidence supports them or they are clearly contrary to the record. For example, the opening brief

points out that the court erroneously found that the termination trial occurred in 2013 rather than 2014. Br. of App. at 18 n.8; CP 348 (FF 1).

The Department takes the position that this is improper and that some of Ms. Saint-Louis's challenges should be disregarded. Br. of Resp't at 3 n.2. Ironically, the Department makes this argument in a footnote. Thus, by the Department's logic, this Court should disregard its argument that arguments in footnotes are improper.

The case cited by the Department in support does not stand for the proposition that appellate courts should disregard arguments made in footnotes. State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). There, the defendant argued in a footnote that the actual amount of funds embezzled was not supported by the evidence because an exhibit did not prove it. Johnson, 69 Wn. App. at 194 n.4. The exhibit, however, was not a part of the record. Johnson, 69 Wn. App. 189, 194 n.4. Given the "nature" of this argument, this Court declined to address it. Johnson, 69 Wn. App. 189, 194 n.4. Ms. Saint-Louis's use of footnotes is of a different nature.

If this Court disagrees and truly would have preferred that the opening brief not have used footnotes to explain why some of the findings are not supported by substantial evidence, this Court should excuse the

oversight so as to do justice and resolve this case on the merits. RAP 1.2(a).

4. Clarification of the record.

In its statement of the facts, the Department says that Ms. Saint-Louis did not regularly visit D.B. when she was not incarcerated. Br. of Resp't at 15. This is not supported by the record. The initial progress review order, dated July 12, 2012, recounts that Ms. Saint-Louis visited D.B. on a regular basis. Ex. 3 at 6. The next order, dated November 2013, similarly recounts that Ms. Saint-Louis was visiting D.B. on a regular basis. Ex. 5 at 6. Only the order from April 2014 recounts that Ms. Saint-Louis had not regularly visited D.B. Ex. 7 at 6. The order recounts that the reason was because Ms. Saint-Louis has been incarcerated. Ex. 7 at 6. After being released, Ms. Saint-Louis attended all the visits with D.B. before the termination trial. RP 168, 378, 381.

The Department emphasizes testimony given by a social worker who partly observed some of Ms. Saint-Louis' recent visits with D.B. Br. of Resp't at 15-16. The social worker's negative opinion of Ms. Saint-Louis interaction with her son was based on Ms. Saint-Louis allowing D.B. to play games on her cell phone. RP 383-85, 437-38. The trial court, however, rejected the Department's proposed finding about D.B. playing

games on his mother's phone and that mother and son were acting more like playmates. RP 621; CP 355 (crossed out FF 2.30).

Additionally, the Department makes some assertions that are not supported by its citations. For example, the Department asserts that in early 2012, prior to the dependency, Ms. Saint-Louis visited Thomas Martel in jail. Br. of Resp't at 5. Mr. Thomas is Ms. Saint-Louis' former friend who broke a window in her apartment around January 2012. The Department cites to exhibit 9 to support its assertion. This exhibit does not support the assertion. To the contrary, the report says that Ms. Saint-Louis "stopped talking to" Mr. Thomas after he broke the window. Ex. 9 at 4.

Similar to finding of fact 2.23, the Department asserts that Ms. Saint-Louis was arrested and charged with forgery in April 2013. The record does not establish that Ms. Saint-Louis was arrested or charged on that date with forgery. The Department cites to the termination petition, CP 9, and the judgment and sentence for two counts of attempted forgery, Ex. 25. Br. of Resp't at 11. But an allegation in a termination petition is not evidence that something actually happened. And the judgment and sentence does not state the date of the incidents that Ms. Saint-Louis pleaded guilty to. Ex. 25. Ms. Saint-Louis testified that she learned of the allegations while in jail in 2014. RP 93.

B. CONCLUSION

This Court should hold that the legislature intended the amended factors in RCW 13.34.180(1)(f) to apply to a parent who is incarcerated during the dependency. Following A.M.M., this Court should reverse. Additionally, this Court should reverse for insufficient evidence. The Court should order the dependency reinstated.

DATED this 18th day of March, 2015.

Respectfully submitted,



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

IN RE D.L.B.)	
MINOR CHILDREN)	
)	
)	
E. S-L.,)	NO. 72421-5-I
)	
)	
APPELLANT MOTHER.)	
)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MARCH, 2015.

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