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NO. 72421-5-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Welfare of D.L.B.,

STATE OF WASHINGTON
Department of Social and Health Services,

Respondent,

v.

EDELYN SAINT-LOUIS,

Appellant.

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF THE ISSUES.....2

III. STATEMENT OF FACTS.....2

IV. ARGUMENT18

 A. Ms. Saint-Louis Failed to Raise the Issue of Statutory Construction of RCW 13.34.180(1)(f) in the Trial Court and Should Therefore be Precluded From Raising it on Appeal.....20

 B. The Legislature’s Use of the Language “If the Parent Is Incarcerated” in RCW 13.34.180(1)(f) is Deliberate, Clear and Unambiguous; It is Intended to Apply To Parents Who Are Incarcerated at the Time of the Termination Trial and at the Time the Trial Court Determines Whether RCW 13.34.180(1)(f) Has Been Proved22

 C. The Trial Court Properly Applied RCW 13.34.180(1)(f) and Correctly Determined that Continuation of the Parent and Child Relationship Between D.L.B. and Ms. Saint-Louis Clearly Diminished D.L.B.’s Prospects for Integration into a Stable and Permanent Home30

 D. Substantial Evidence Supports the Trial Court’s Findings that (a) the Department Offered or Provided All Necessary Services; (b) There is Little Likelihood the Mother Can Correct Her Parenting Deficiencies Within the Near Future; and (c) the Mother is Unfit34

 1. The Trial Court's Determinations that the Mother was Unfit and that There Was Little Likelihood Conditions Would Be Remedied So the Child Could Be Returned to the Mother in the Near Future Are Supported by Substantial Evidence37

V. CONCLUSION41

TABLE OF AUTHORITIES

Cases

Bellevue Sch. Dist. No. 405 v. Lee,
70 Wn.2d 947, 425 P.2d 902 (1967)..... 21

Fisher Props., Inc. v. Arden–Mayfair, Inc.,
115 Wn.2d 364, 798 P.2d 799 (1990)..... 3

In re Custody of E.A.T.W.,
168 Wn.2d 335, 227 P.3d 1284 (2010)..... 23

In re D.A.,
124 Wn App. 644, 102 P.3d 847 (2004)..... 40

In re Dependency of A.C.,
123 Wn. App. 244, 98 P.3d 89 (2004)..... 30

In re Dependency of A.M.M.,
182 Wn. App. 776, 332 P.3d 500 (2014)..... 31

In re Dependency of B.R.,
157 Wn. App. 853, 239 P.3d 1120 (2010)..... 19

In re Dependency of D.F.-M.,
157 Wn. App. 179, 236 P.3d 961 (2010)..... 23

In re Dependency of K.D.S.,
176 Wn.2d 644, 294 P.3d 695 (2013)..... 34

In re Dependency of K.S.C.,
137 Wn.2d 918, 976 P.2d 113 (1999)..... 19, 30, 34

In re Dependency of P.A.D.,
58 Wn. App. 18, 792 P.2d 159 (1990)..... 41

In re Dependency of Roberts,
46 Wn. App. 748, 732 P.2d 528 (1987)..... 21

| | |
|---|----------------|
| <i>In re Dependency of S.M.H.</i> , 128 Wn. App. 45, 115 P.3d 990 (2005)..... | 35, 37 |
| <i>In re Dependency of T.R.</i> , 108 Wn. App. 149, 29 P.3d 1275 (2001)..... | 18, 35, 40, 41 |
| <i>In re Dependency of A.W.</i> , 53 Wn. App. 22, 765 P.2d 307 (1988)..... | 41 |
| <i>In re Estate of Bunch</i> , 174 Wn.2d 425, 275 P.3d 1119 (2012)..... | 23 |
| <i>In re Welfare of A.B.</i> , 168 Wn.2d 908, 232 P.3d 1104 (2010)..... | 19, 37 |
| <i>In re Welfare of A.G.</i> , 155 Wn. App. 578, 229 P.3d 935 (2010)..... | 18, 34 |
| <i>In re Welfare of Hall</i> , 99 Wn.2d 842, 664 P.2d 1245 (1983)..... | 35, 40 |
| <i>In re Welfare of L.N.B.-L.</i> , 157 Wn. App. 215, 237 P.3d 944 (2010)..... | 3, 35 |
| <i>In re Welfare of M.R.H.</i> , 145 Wn. App. 10, 188 P.3d 510 (2008)..... | 18, 34, 35 |
| <i>In re Welfare of R.H.</i> , 176 Wn. App. 419, 309 P.3d 620 (2013)..... | 30 |
| <i>In re Welfare of Segó</i> , 82 Wn.2d 736, 513 P.2d 831 (1973)..... | 18 |
| <i>In re Welfare of Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980)..... | 18 |
| <i>In State v. Kirvin</i> , 37 Wn. App. 452, 682 P.2d 919 (1984)..... | 22 |
| <i>Karlberg v. Otten</i> , 167 Wn. App. 522, 280 P.3d 1123 (2012)..... | 21 |

| | |
|--|--------|
| <i>Outsource Svcs. Mgmt., LLC v. Nooksack Bus. Corp.</i> , 172 Wn. App. 799, 292 P.3d 147 (2013)..... | 25 |
| <i>Restaurant Dev. Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003)..... | 23, 24 |
| <i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983)..... | 20, 21 |
| <i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)..... | 25 |
| <i>State v. Johnson</i> , 69 Wn. App. 189, 847 P.2d 960 (1993)..... | 3 |

Statutes

| | |
|--------------------------------|----|
| Laws of 2005, ch. 403 | 28 |
| Laws of 2007, ch. 384 §1 | 28 |
| Laws of 2009 ch. 518..... | 28 |
| Laws of 2013, ch. 173 | 24 |
| RCW 13.34.020 | 18 |
| RCW 13.34.067 | 26 |
| RCW 13.34.130 | 18 |
| RCW 13.34.132(4)(g) | 27 |
| RCW 13.34.136 | 19 |
| RCW 13.34.145 | 26 |
| RCW 13.34.145(4)(a)(iv)..... | 26 |
| RCW 13.34.145(4)(b) | 26 |

| | |
|--------------------------------|--------|
| RCW 13.34.145(4)(c) | 27 |
| RCW 13.34.145(5)(b) | 19, 31 |
| RCW 13.34.180 | 27 |
| RCW 13.34.180(1)..... | 18 |
| RCW 13.34.180(1)(d) | 35 |
| RCW 13.34.180(1)(e) | 34, 37 |
| RCW 13.34.180(1)(e)(iii) | 27 |
| RCW 13.34.180(1)(f)..... | passim |
| RCW 13.34.180(2)..... | 27 |
| RCW 13.34.180(d)..... | 34 |
| RCW 13.34.190(1)(a) | 19 |
| RCW 13.34.190(1)(b) | 19 |
| RCW 43.63A.068..... | 28 |
| RCW 72.09.495 | 28 |
| RCW 74.04.800 | 28 |
| RCW Chapter 13.34..... | 24 |

Other Authorities

| | |
|---|----|
| Anne E. Jbara, <i>The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Program</i> , 87 Ind. L.J. 1825, 1834-36 (2012)..... | 28 |
|---|----|

Rules

| | |
|------------------|---------------|
| RAP 2.5(a) | 2, 20, 21, 22 |
|------------------|---------------|

I. INTRODUCTION

Edelyn Saint-Louis appeals the order terminating her parental rights to D.L.B., a six-year-old little boy who has been in foster care nearly half his life.

Ms. Saint-Louis argues the evidence was insufficient to support the trial court's findings that she is an unfit parent, that the Department offered her all necessary and available services, and that there is little likelihood that she can correct her parenting deficiencies in the child's near future. She also argues – for the first time on appeal – that the trial court committed reversible error in failing to correctly interpret and apply a 2013 amendment to RCW 13.34.180(1)(f). The amendment requires a trial court terminating a parent's rights to consider certain additional factors “if the parent is incarcerated.” Although Ms. Saint-Louis was not incarcerated at the time of the termination trial or decision, she claims the legislature intended to include parents who were incarcerated at any time during the dependency within the phrase “if the parent is incarcerated.”

Her arguments are without merit. The trial court properly terminated Ms. Saint-Louis' parental rights and its order should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Should this Court decline to consider the mother's statutory construction issue – asking whether 2013 amendments to RCW 13.34.180(1)(f) apply to a parent who is not incarcerated at the time of the termination trial or decision – where the issue is raised for the first time on appeal, and does not involve any of the RAP 2.5(a) exceptions?
2. Did the Legislature intend the statutory language “if the parent is incarcerated,” contained in RCW 13.34.180(1)(f), to mean “if the parent is incarcerated, or was incarcerated at any time during the dependency action”?
3. Did the trial court properly apply RCW 13.34.180(1)(f), and correctly determine that continuation of the legal relationship between the mother and child clearly diminishes the child's prospects for early integration into a stable and permanent home?
4. Does substantial evidence support the trial court's findings (a) that the mother was offered or provided all necessary services, capable of correcting her parental deficiencies within the foreseeable future; (b) that the mother is unfit; and (c) that there is little likelihood that conditions would be remedied so the child could be returned to the mother in the near future?

III. STATEMENT OF FACTS

D.L.B. was born November 1, 2008, to Edelyn Saint-Louis and Kendrick Bryant.¹ Ex. 1. He was just three years old when he first came to the attention of the Department's Child Protective Services. CPS received a report in January 2012 that D.L.B. was being exposed to

¹ Mr. Bryant never participated in the dependency action and his rights were terminated by default. CP at 130, 172-75; RP at 324.

domestic violence in his home and that police had been called to the home multiple times. Ex. 1; CP at 349 (Finding of Fact 2.4).²

This was not the first time D.L.B. had experienced domestic violence while in his mother's care. CP at 355 (Finding of Fact 2.28).³ In 2009, during an argument between his parents, the child's father picked up then-nine-month old D.L.B. and threw him at Ms. Saint-Louis. RP at 31, 177; Ex. 17 at 2. Mr. Bryant then punched the mother in the face, causing her a head injury. Ex. 13. Mr. Bryant was arrested and charged. RP at 31, 178. As part of his conviction, Ms. Saint-Louis was granted a permanent protective order. RP at 31. Even though there was a life-time no-contact order between the parents and between the father and D.L.B., the parents remained in contact. In 2010, Mr. Bryant called his sister in Chicago, to tell her that Ms. Saint-Louis and the child were losing their housing in Seattle. The sister agreed that D.L.B. and Ms. Saint-Louis could stay with her until they got settled, and the mother and child moved

² Ms. Saint-Louis' challenge to Findings of Fact 2.4, 2.6, 2.8, 2.11, 2.14, and 2.23, are argued only in footnotes throughout the brief. *See, e.g.*, Br. of App. at 10 fns. 2 and 3. This court should decline to consider the arguments raised in footnotes. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

³ Ms. Saint-Louis challenges several findings of fact, including Finding 2.28. Br. of App. at 2-5. The challenge to this finding, along with challenges to Findings 2.7, 2.15, 2.20, 2.22, 2.29, 2.31, 2.34, 2.35, 2.36, 2.39 and 2.40, are not supported with argument in the Opening Brief. The challenges to these findings are therefore abandoned and the findings are considered verities on appeal. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (party claiming error has the burden to show that a finding of fact is not supported by substantial evidence); *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243-44, 237 P.3d 944 (2010) (an appellant waives an assignment of error when she presents no argument in support of the assigned error).

to Chicago. RP at 492. Mr. Bryant followed shortly thereafter. RP at 89-90, 494. During the three and one-half months that Ms. Saint-Louis and D.L.B. were in the sister's home, Mr. Bryant visited frequently – every three or four days – and he frequently assaulted Ms. Saint-Louis. CP at 354 (Finding of Fact 2.18); RP at 494, 504. He was arrested three times while she was there. RP 496-97. It was through the intervention of the father's sister that police were called. CP at 354 (Finding of Fact 2.18); RP at 498. The sister related that, contrary to Ms. Saint-Louis' statement that the child was always asleep during the domestic violence incidents, D.L.B. witnessed the violence between his parents and it was traumatizing. RP at 51, 494, 502.

While living in Seattle in January 2012, Ms. Saint-Louis was in a violent relationship with Martell Thomas. CP at 351 (Finding of Fact 2.4, paras. 12-16). It was due to Mr. Thomas getting angry and throwing something through the window in Ms. Saint-Louis' apartment that CPS was initially called. CP at 351 (Finding of Fact 2.4); RP at 91; Ex. 17 at 2. However, Ms. Saint-Louis did not consider this relationship to be one that had the hallmarks of domestic violence, explaining that Mr. Thomas did not throw anything directly at her and that nothing had been proven or “reached the point of police getting involved.” CP at 351 (Finding of Fact 2.4, para. 16); RP at 91.

While CPS was still investigating the January 2012 allegation, a second report was received; the mother had been arrested for leaving her young child home alone, unattended, for several hours, and police had taken D.L.B. into protective custody. Ex. 1. Ms. Saint-Louis was not charged, but D.L.B. temporarily remained in foster care while the Department attempted to provide Ms. Saint-Louis with voluntary services. Exs. 1 and 17.

The Department offered Intensive Family Preservation Services (IFPS) through Homebuilders. These services were offered twice. The first time the services were intended to support D.L.B.'s return to his mother's care within a week. RP at 106, 117-18. They included an assessment and service plan, help connecting to domestic violence treatment, mental health, chemical dependency, and parenting education resources. RP at 99-100. The services ended because D.L.B. was not returned to Ms. Saint-Louis' care, due to her continuing contact with Mr. Thomas while he was in jail, and due to concerns about domestic violence and a history of child abuse and neglect in the family home in which Ms. Saint-Louis was then residing. Ex. 9.

Rather than return the child to his mother at the end of his voluntary foster care placement, the Department filed a dependency petition on March 8, 2012. Ex. 31. At the shelter care hearing, the court

ordered that D.L.B. be returned to his mother's care. Ex. 31. The court also ordered that Ms. Saint-Louis participate in a psychological evaluation and any recommended services, domestic violence support services, and Intensive Family Preservation Services. Ex. 31.

Homebuilder services were again put in place to support the reunification. RP at 109. However, this service was terminated when Ms. Saint-Louis stopped meeting with the Homebuilder's therapist. RP at 113. She left D.L.B. with her mother and disappeared for three days. Ex. 16 at 4. She told the Homebuilder's therapist that she "needed a break," that she felt "like a child raising a child" and she wanted to place D.L.B. in foster care for 90 days so that she had time to take care of herself. She said "I don't make good decisions," and "I want what's best for [D.L.B.] and I know this ain't it." Ex 10 at 5. Based on her statements, D.L.B. was again taken into foster care on April 17, 2012 "both at mother's request and due to mother's deteriorating mental health condition." Ex. 1 at 4.

A dependency order was entered May 11, 2012. Ex. 1. The order required the mother to participate in three services: (1) random urinalysis (UAs) two times each week for a maximum of 90 days (provided the UAs were consistent, clean, not missed, and not diluted); (2) a psychological

evaluation with parenting component, and follow through with any recommended treatment; and (3) domestic violence support group. Ex. 1.⁴

Ms. Saint-Louis was referred to psychologist Steve Tutty for the psychological evaluation in July 2012, but she did not complete the evaluation until October 2012. Ex. 16; CP at 352 (Finding of Fact 2.9). The evaluation report, which was admitted without objection at the termination trial, was based on the results of a testing session, a clinical interview, a parent-child observation, and review of collateral evidence. RP at 541, 545. Ms. Saint-Louis' testing scores caused serious concerns about her ability to safely and appropriately parent a child. She scored 394 on the Child Abuse Potential Inventory (CAPI) test. Ex. 16. Scores over 166 are considered clinically significant and predictive of abuse. A score of 215 is the "cut-off" score. Ex. 16. Dr. Tutty testified: "So we saw a very high elevation on this scale, exceeding the cutoff range, which places her at a very high risk for child abuse and neglect." RP at 557. Her scores on the Adolescent Adult Parenting Inventory-Second Edition (AAPI-2) also were concerning. This test was designed to assess high risk parenting attitudes and behaviors. Ex. 16. Her scores showed low levels of empathy when parenting, setting inappropriate expectations, and setting

⁴ Parenting classes and mental health counseling were also recommended by the Department, but not ordered by the court. IFPS services were ordered, but are not available in cases where a child will not be reunified within a short time. Ex. 1; CP at 353 (Finding of Fact 2.14).

reverse family roles. “Such parents tend to lack nurturing skills, have significant challenges handling parenting stresses, lack a basic understanding of normal child growth and development, and tend to focus on meeting their own needs above those of their children.” Ex. 16.

Dr. Tutty observed a positive bond between the mother and child, but said that despite this bond, Ms. Saint-Louis “presents with a myriad of risk factors that threaten the safety and well-being” of D.L.B. Ex 16 at 13. He concluded that “her presentation, testing outcomes, and clinical/CPS history support psychological challenges best characterized by bipolar illness, polysubstance abuse, panic disorder, executive functioning deficits, learning disabilities, and histrionic traits.” *Id.*

Dr. Tutty recommended that D.L.B. not be returned to Ms. Saint-Louis’ care. He also was of the opinion that it was “highly unlikely” that she would be able to remedy her parenting deficiencies within the statutory timeframe allowed in dependency actions. Ex. 16 at 15. However, he recommended that, if she were to attempt it, certain services should be completed within six months of his November 2012 report. Those services were: (1) a drug alcohol evaluation, and follow through with all recommendations; (2) a medical consultation to explore additional psychotropic medications to target her mental health issues; (3) participation in the Incredible Years parent education program; (4) attend

a domestic violence support group; and (5) work with her social worker in obtaining suitable housing and employment options. Ex. 16 at 15-16. He also recommended monitored visits one time per week. Ex. 16 at 15.

A reunification assessment was completed by the Foster Care Assessment Program (FCAP) in early December 2012. Ex. 17. Like Dr. Tutty, the FCAP evaluator recommended against reunification. RP at 250; Ex. 17. In addition to recommending trauma-focused therapy for D.L.B., the FCAP evaluator also stated: "If Ms. Saint-Louis is open to services, it is recommended she enroll in the Incredible Years parenting program, sooner rather than later." Ex. 17. She also recommended that visitation be closely supervised. CP at 355 (Finding of Fact 2.26); Ex. 17.

D.L.B. was described by the FCAP evaluator as a "pretty anxious child." RP at 264. He had night terrors or nightmares almost every night when he first entered foster care and, in his sleep, would cry out, "No! Stop! No! Don't!" Exs. 1 at 3, 17 at 3. He also had some developmental disabilities that were untreated. Ex. 17 at 3. The child was seen by therapist Amy Barker for 20 sessions. RP at 194. He was diagnosed with Post Traumatic Stress Disorder, based on his past history of trauma and his reactions to anxiety and anger. RP at 208. He had "explosive reactions to his triggers" and he could be "triggered very quickly." RP at 208. D.L.B. made good progress in therapy. CP at 355 (Finding of Fact

2.29); RP at 201. However, his therapist testified that he was in need of a stable, permanent home; “that’s of the utmost importance for him.” RP at 213.

Ms. Saint-Louis began to engage in services shortly after Dr. Tutty made his recommendations. She enrolled in a 30-day in-patient chemical dependency treatment program beginning November 2012 to address her dependence on alcohol, cannabis and cocaine. RP at 61; Ex. 15. She successfully completed the program and then followed-up with an out-patient program, which she completed in April 2013. RP at 61. She remained clean until May 2013 when she tested positive for alcohol during a random UA. RP at 62. She explained that she had a glass of champagne at a wedding. RP at 62. At the time of trial, she claimed she had been clean since May 2013, but she still had not completed the 90 days of consistent, not missed, clean UAs. CP at 353 (Finding of Fact 2.11). Based on the positive UA, her social worker recommended that she enroll in a relapse prevention program. RP at 276-77. She did not begin the relapse program until the end of July 2014, the week before the termination trial began. RP at 277.

She did not complete the Incredible Years program, despite several opportunities to do so. CP at 353 (Finding of Fact 2.12); Exs. 18 (December 2012 referral), 19 (January 2013), 20 (May 2013). She started,

but did not complete the program the first time she enrolled, RP at 395-96, and restarted the program again just before the termination trial. RP at 281-82, 284.

Ms. Saint-Louis testified that she participated in domestic violence counseling programs both before and after D.L.B. was removed from her care. RP at 53. One of the things she was taught in the courses and at the support group is to try to avoid being around domestic violence perpetrators. RP at 59. Despite this instruction, Ms. Saint-Louis admitted that at the time of the termination trial she was living with a domestic violence perpetrator – Michael Conley, a man who is nearly 30 years her senior, who has been married three times, convicted of domestic violence three times, and also convicted of violating a domestic violence protective order. CP at 353 (Finding of Fact 2.16); RP at 160, 174-76, 294-96; Exs. 26, 28 and 29. She testified that she and Mr. Conley were expecting a child in March 2015, and she intended for Mr. Conley to help her raise D.L.B. CP at 353 (Finding of Fact 2.17); RP at 161, 176.

In April 2013, the same month she finished her outpatient drug treatment program, Ms. Saint-Louis was arrested and charged with forgery. CP at 9; Ex. 25. The charge was amended to attempted forgery and Ms. Saint-Louis was convicted on two counts. Ex. 25.

Shortly after that arrest, in May 2013, the Department had a shared planning meeting with Ms. Saint-Louis to explain the seriousness of her situation. RP at 390. By then D.L.B. had been in foster care for more than one year. RP at 390. The social worker testified that she told Ms. Saint-Louis that the Department would delay filing for termination to give her more time to engage in services. RP at 390. But “we told her that we would really like to see significant progress in the next three months and told her at the end of those three months we would be obliged to refer this case for termination. We explained to her the permanency time line. We went over the services and what she had done and what she still needed to do.” RP at 390-91.

Just two months later, in July 2013, she was arrested again after she stole a car and then was involved in a vehicular assault and hit and run. CP at 9, 354 (Finding of Fact 2.23). She was charged with vehicular assault, hit and run, and taking a motor vehicle without permission. Ex. 22. Ms. Saint-Louis was offered a chance to participate in a Community Center for Alternative Programs (CCAP) program, as an alternative to prosecution. RP at 63, 394. But, due to poor attendance and failing to accurately report in, she was dropped from the program in October 2013, and a bench warrant was issued for her arrest. CP at 9, 354 (Finding of Fact 2.23); RP at 64, 393-94. At the dependency review hearing in

November 2013, the dependency court ordered the Department to file a termination petition by February 13, 2014. Ex. 6 at 3.

In January 2014, Ms. Saint-Louis was convicted and sentenced to 12 months for the vehicular assault, three months for taking the motor vehicle without permission, and 24 months of probation for the hit and run. Exs. 21 and 22. Ms. Saint-Louis had the opportunity to serve her time while on work/education release. Ex. 22. However, her work release was revoked after five days in March 2014. Ex. 23. It was then reinstated and she spent 15 days on work release in April 2014, before voluntarily deciding to return to the county jail to serve out her sentence. RP at 84-85; Ex. 23. While she was on work release in April, she met with the Department social worker to talk about services, particularly the Incredible Years parenting classes, and about potential visits with D.L.B. at the work release facility. RP at 153, 333. The social worker signed the paperwork for the visits to happen, but before any visits occurred, Ms. Saint-Louis voluntarily returned to jail. RP at 349. By that time, the termination petition had been filed and a June 2014 trial date set. CP at 1-16.

Ms. Saint-Louis was released from jail on June 18, 2014, and called the social worker sometime after that to let her know that she was no longer in jail. RP at 153. The social worker immediately made

referrals for UA services and Incredible Years classes, and she scheduled visits between Ms. Saint-Louis and D.L.B. RP at 334-36.

By the time the termination trial began at the end of July 2014, D.L.B. had been in foster care for more than two years. Ms. Saint-Louis had still not successfully completed even 90 days of UAs and, although she had completed in-patient and an out-patient chemical dependency programs, she had relapsed more than a year earlier and was just starting a relapse prevention program. RP at 77-78, 397, 424-25. She had received some mental health counseling, but had not yet completed a full course of mental health treatment. RP at 364, 366, 424. She had participated in domestic violence counseling and support groups, but was not able to incorporate the lessons she learned into her own life and, at the time of trial, was living with a convicted domestic violence perpetrator and was pregnant with his child. RP at 174-76, 317.

Most significantly, she had only just started the Incredible Years parenting education program – a program that both Dr. Tutty and the FCAP evaluator specifically recommended. Exs. 16 and 17. The program would have helped Ms. Saint-Louis address some of the concerns regarding her ability to safely and appropriately parent D.L.B. These concerns are reflected in the FCAP report which relates Ms. Saint-Louis' description of then four-year-old D.L.B. Ex. 17 at 5. Ms. Saint-Louis told

the evaluator that D.L.B. is manipulative and she fears he will become like his father and other men who take advantage of others. The evaluator said the mother described D.L.B. as “a child who wants attention all the time.” Ex. 17 at 5. She told the evaluator that she “heard he was misbehaving at his foster home and she wanted his foster parents to know that [D.L.B.] has an attitude and one needs to be ‘aggressive back to him.’” *Id.* She also told the evaluator that “[t]hings got tougher when [D.L.B.] entered his ‘terrible threes’. He had an attitude and he was unkind to other children. When he pulled another child off the slide, his mother threatened that if he ever did that again, he would never see his mom again.” *Id.*

During the dependency, Ms. Saint-Louis took advantage of the supervised weekly visits “sometimes.” RP at 345. She frequently missed or was late to visits, causing visitation supervisor contracts to be dropped twice. RP at 345-46, 399. One of the visits she missed – due to being late – was D.L.B.’s fifth birthday party at the Family Fun Center. RP 206-07, 346-47. D.L.B. was there, but his mother did not arrive on time and he left without seeing her. RP 347. The social worker rescheduled the visit for the following week, but Ms. Saint-Louis asked that it be reschedule again for the week after that; by then she was in jail. RP at 347-48.

At the first visit after she was released from jail, D.L.B. asked his mother where she had been, as he had not seen her in months. She

responded, "I've been busy lately." RP at 164. Generally there was little interaction between D.L.B. and his mother at visits. The social worker described the interaction at the visits as follows: "They're not looking at each other. They're not talking to each other. And they're not engaging with each other. They don't touch each other. They are not affectionate. . . . And there's just no affection or bonding or anything that a parent and child should be doing." RP at 438. Following the resumption of visits with his mother in June 2014, D.L.B.'s behaviors regressed and he was expected to resume therapy. CP at 355 (Finding of fact 2.29); RP at 360.

Ms. Saint-Louis testified that she did not need any services to be ready to parent D.L.B. "I'm ready now." RP at 86. She initially testified that she believed he could just begin living with her immediately. RP at 86. However, after hearing testimony of others, she agreed he would need a transition period, suggesting the transition begin with overnight visits, since D.L.B. would need to become acquainted with Mr. Conley. RP at 268-69, 304-05. The social worker's reaction to this plan of going from weekly supervised visits to overnight visits in a home with a man who had a history of violence and who the child did not know was that it was "absolutely alarming." RP at 363-64.

At the termination trial, the social worker testified that Ms. Saint-Louis continued to present a risk to D.L.B., that she was not able to make

safe and appropriate choices for herself or for her child. RP at 391. She also testified that there was little likelihood that the mother would be able to correct her parenting deficiencies within D.L.B.'s near future. RP at 389, 390. The child had prospects for adoption and adoption could not occur if the mother's legal relationship with him remained intact. RP at 389. D.L.B.'s Court Appointed Special Advocate (CASA) testified that the child needs stability and that termination of Ms. Saint-Louis' parental rights was in D.L.B.'s best interests. RP at 462-63.

At the close of trial, the court terminated Ms. Saint-Louis' parental rights. It specifically stated, "One thing that the Court was most concerned about in this case was the credibility of the mother, Ms. Edelyn Saint-Louis," which the court found to be minimal. RP at 602; CP at 354 (Findings of Fact 2.19, 2.20). The mother admitted she did not tell the truth on a number of issues and "[u]nder the circumstances, it was very difficult for the Court to take her testimony as true." RP at 602.

The trial court found that the Department proved its case by clear, cogent and convincing evidence and that the order was in the best interests of D.L.B. CP at 348-57; RP at 603-04. It then entered an order terminating the parent-child relationship between Ms. Saint-Louis and D.L.B. CP at 356-57.

IV. ARGUMENT

Although a parent has a fundamental liberty interest in the care, custody and control of his or her child, *In re Welfare of Sumey*, 94 Wn.2d 757,762, 621 P.2d 108 (1980), this fundamental right is not absolute. *Sumey*, 94 Wn.2d at 762; *In re Welfare of M.R.H.*, 145 Wn. App. 10, 29, 188 P.3d 510 (2008). In termination cases, the rights of the parent must be balanced against the child's right to physical and mental health, safety, and basic nurture – which includes the right to a safe, stable, and permanent home and a speedy resolution of any dependency proceeding. *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010); RCW 13.34.020. Ultimately, where the rights of the child and the rights of the parent conflict, the rights and safety of the child must prevail. RCW 13.34.020; *In re Welfare of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973); *In re Dependency of T.R.*, 108 Wn. App. 149, 154, 29 P.3d 1275 (2001).

To protect the parent's fundamental rights, while recognizing the needs and rights of the child, a trial court must find that the Department has proved the six elements set forth in RCW 13.34.180(1)⁵ by clear,

⁵ Those elements are the following: (a) That the child has been found to be a dependent child; (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency; (d) That the services ordered under

cogent and convincing evidence. RCW 13.34.190(1)(a). Clear, cogent and convincing evidence exists when the evidence shows the fact at issue to be highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). The trial court also must make an explicit finding that the parent is currently unfit. *In re Welfare of A.B.*, 168 Wn.2d 908, 921 232 P.3d 1104 (2010); *In re Dependency of B.R.*, 157 Wn. App. 853, 866, 239 P.3d 1120 (2010). Once those elements are found, the trial court must additionally find, by a preponderance of the evidence, that termination of the parent-child relationship is in the child's best interest. RCW 13.34.190(1)(b).

Ms. Saint-Louis challenges the termination order claiming (1) the trial court failed to properly interpret the 2013 amendments to RCW 13.34.180(1)(f); (2) the trial court failed to apply those amendments in Ms. Saint-Louis' case; (3) there is insufficient evidence to support the trial

RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . . and (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. If the parent is incarcerated, the court shall consider 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); whether the department or supervising agency made reasonable efforts as defined in this chapter; and 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.

court's findings that (a) the Department offered all necessary services, (b) the mother is unfit to parent D.L.B., and (c) there is little likelihood that Ms. Saint-Louis could correct her parental deficiencies within the child's near future. Her claims are without merit.

A. Ms. Saint-Louis Failed to Raise the Issue of Statutory Construction of RCW 13.34.180(1)(f) in the Trial Court and Should Therefore be Precluded From Raising it on Appeal

Ms. Saint-Louis' primary argument on appeal is that the trial court should have broadly interpreted the phrase "if the parent is incarcerated" in RCW 13.34.180(1)(f) to include a parent who is not incarcerated at the time the trial court applies RCW 13.34.180(1)(f), but who was incarcerated at some point during the dependency proceeding. Br. of Appellant at 20-27.

Ms. Saint-Louis raises this issue for the first time on appeal. There is nothing in her trial brief on the issue. *See* CP at 317 (arguing the RCW 13.34.180(1)(f) factor in just six lines, without mentioning the 2013 amendments relating to incarcerated parents). Nor was it argued during Ms. Saint-Louis' closing argument. RP at 580-85. At no time during the course of the trial did she claim the amendment applied to her.

This failure to raise the issue in the trial court precludes Ms. Saint-Louis from raising it on appeal. RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

See also Karlberg v. Otten, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012) (failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived). RAP 2.5(a) sets out the exceptions to the rule as follows:

(a) *Errors Raised for First Time on Review*. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

Thus, with few exceptions – none of which exists here – errors raised for the first time on appeal will not be considered. *In re Dependency of Roberts*, 46 Wn. App. 748, 756, 732 P.2d 528 (1987) (also stating that the rule is applicable to termination proceedings); *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 425 P.2d 902 (1967) (this court has steadfastly adhered to the rule that a litigant cannot remain silent as to a claimed error during trial and later, for the first time, urge objections thereto on appeal); *Karlberg*, 167 Wn. App. at 531 (although an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised). The reason for the rule is to give the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Shannon*, 100 Wn.2d at 37.

The rule has also been applied where the appellant raised an issue of statutory construction on appeal. In *State v. Kirvin*, 37 Wn. App. 452, 682 P.2d 919 (1984), this court held:

The juvenile offender's remaining assignment of error, in which he raises a question of statutory construction concerning the false reporting ordinance, is . . . not well taken. It is well settled that we will not consider an issue or theory raised for the first time on appeal, in circumstances other than those enumerated in RAP 2.5(a). Here the juvenile offender did not raise the issue in the trial court. Since the issue does not involve any of the RAP 2.5(a) exceptions, we will not consider it on appeal for the first time.

Kirvin, 37 Wn. App. at 461-62 (footnote and citations omitted).

Here Ms. Saint-Louis proposes a new interpretation of RCW 13.34.180(1)(f) and asks this court to find the trial court erred by not independently guessing and then applying that interpretation. This goes against the letter and the purpose of RAP 2.5(a). Because the issue was not raised in the termination trial and does not fit within any of the exceptions listed in RAP 2.5(a), this court should decline to consider it.

B. The Legislature's Use of the Language "If the Parent Is Incarcerated" in RCW 13.34.180(1)(f) is Deliberate, Clear and Unambiguous; It is Intended to Apply To Parents Who Are Incarcerated at the Time of the Termination Trial and at the Time the Trial Court Determines Whether RCW 13.34.180(1)(f) Has Been Proved

If this Court agrees to consider Ms. Saint-Louis' statutory construction argument, it should determine that the language of the statute is clear and unambiguous, and that it only applies to parents who are

incarcerated at the time of the termination trial – when the trial court’s duty to consider the statutory factors arises.

The primary objective in construing statutes is to ascertain and implement the intent of the legislature. *In re Estate of Bunch*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012); *In re Dependency of D.F.-M.*, 157 Wn. App. 179, 187, 236 P.3d 961 (2010).

The court always begins its analysis with an examination of the plain language of the statutory provision at issue, and discerns legislative intent from that language, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Ass’n of Washington Spirits & Wine Distrib. v. Liquor Control Bd.*, ___Wn.2d___, 340 P.3d 849, 853 (2015); *Restaurant Dev. Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). If the text is clear and unambiguous, there is no need to resort to statutory construction principles, such as legislative history, even if the court believes the legislature intended something else, but did not adequately express it. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343, 227 P.3d 1284 (2010). Only if a statute is susceptible to more than one reasonable interpretation, is it considered ambiguous. It is not ambiguous merely because the parties or the court may be able to conceive of different interpretations. *In re E.A.T.W.*, 168 Wn.2d at 344.

Moreover, a court must not add words where the legislature has chosen not to include them. *Restaurant Dev.*, 150 Wn.2d at 682.

After examining the text of the 2013 amendments to RCW Chapter 13.34, Laws of 2013, ch. 173, this court should hold that the statute is not ambiguous and that the amendment to RCW 13.34.180(1)(f) was intended to apply to parents who are incarcerated at the time the trial court is charged with making its decision as to whether RCW 13.34.180(1)(f) has been proved.

The 2013 law, titled “An Act Relating to the rights of parents who are incarcerated,” amends four sections of the dependency and termination statute, RCW Chapter 13.34. A reading of the law shows that the legislature acted with a reasoned understanding of the issues facing parents who are incarcerated at various points during the dependency and termination process, and it deliberately and clearly set forth its intent with respect to those parents.

The provision at issue in this case amends RCW 13.34.180(1)(f), the element that requires the Department to prove that continuation of the parent-child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home. Under the amendment, “if the parent is incarcerated,” the court is also required to consider whether the parent maintains a meaningful role in the child’s life, whether the

Department made reasonable efforts, and whether particular barriers existed to accessing visitation or other meaningful contact with the child. On its face, the new statutory provision is unambiguous. It applies to parents who are incarcerated at the time of the termination decision. A review of other sections of the 2013 amendment supports this conclusion. The legislature was careful in its use of language in this law. It used precise terms when it intended a particular provision to apply only to parents who are currently incarcerated; and it used different terms when it intended a provision to apply to parents who were incarcerated at sometime during the dependency.

When the legislature uses different words or terms in the same statute, the court presumes the legislature intended those words to have different meanings. *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008); *Outsource Svcs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 818-19, 292 P.3d 147 (2013).

Here the legislature specifically used such terms as “current or prior incarceration” when it intended the statute to apply both to parents who are incarcerated at the time of a specific decision, and to those whose prior incarceration was deemed by the legislature to be a factor that should be considered by the trial court. It uses different terms, such as “if the

parent is incarcerated” or “a parent who is incarcerated” when its intent is to limit a provision’s application to a parent who is currently incarcerated.

For example, RCW 13.34.067, which requires a case conference within 30 days of the shelter care hearing, applies only to a parent who “is unable to participate in person due to incarceration.” The purpose of this provision is to ensure the parent has an opportunity to participate through the use of a teleconference or videoconference.

RCW 13.34.145, was amended in a number of ways. First, the 2013 amendment added a good cause exception to the requirement that a termination petition must be filed in any case where the child has been in foster care for 15 of the last 22 months. The statute, RCW 13.34.145(4)(a)(iv) permits a continuation of the dependency when

The parent is incarcerated, or the parent’s prior incarceration is a significant factor in why the child has been in foster care

(Emphasis added.)

However, when providing guidelines for trial courts making a determination about whether the parent maintained a meaningful role in the child’s life, the legislature again was specific and narrow:

(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

RCW 13.34.145(4)(b) (emphasis added).

And when it intended a provision to apply based on prior or current incarceration, the legislature stated this intent with specificity, as in RCW 13.34.145(4)(c):

(c) The constraints of a parent's current or prior incarceration and associated delays or barriers to accessing court-mandated services may be considered in rebuttal to a claim of aggravated circumstances under RCW 13.34.132(4)(g) for a parent's failure to complete available treatment.

(Emphasis added.)

In addition to the specific amendment at issue in this case, the 2013 law amended RCW 13.34.180 in others ways. For example, in determining whether there is little likelihood that a parent's conditions may be remedied in the near future, under RCW 13.34.180(1)(e)(iii), the court may consider mitigating circumstances "such as a parent's current or prior incarceration." (Emphasis added.) Additionally, as evidence of rebuttal to any presumption under the little likelihood section, the court may consider the particular constraints of a parent's current or prior incarceration. . . ." RCW 13.34.180(2) (emphasis added). But the amendment to RCW 13.34.180(1)(f) applies only "if the parent is incarcerated." (Emphasis added.)

Throughout the 2013 law, the legislature is deliberate in its language and it is clear in stating whether a particular provision applies to a parent who *is* or *was* incarcerated. The legislature knew what words to

use to express its intent and it did so. The text of the statute is plain and unambiguous and this Court should hold that the language of RCW 13.34.180(1)(f) applies to a parent who is incarcerated at the time the trial court's obligations under the statute are triggered.

Ms. Saint-Louis additionally argues that interpreting the statute as written would result in unfairness or in absurdity. This is not the case.

Washington's legislature is one of a handful of state legislatures that has focused on the problems facing incarcerated parents and their children. Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Program*, 87 Ind. L.J. 1825, 1834-36 (2012). For the past decade, the legislature has instructed state agencies to coordinate and expand services for families in order to improve the well-being of children whose parents are incarcerated. Laws of 2005, ch. 403; Laws of 2007, ch. 384 §1; Laws of 2009 ch. 518; RCW 72.09.495; RCW 74.04.800; RCW 43.63A.068. Legislatively-mandated reports, such as the 2006 final Report of the Oversight Committee on Children of Incarcerated Parents, and the 2009 Children and Families of Incarcerated Parents Advisory Committee Annual Report, have provided the legislature with a clear path to writing legislation impacting children whose parents are incarcerated during a

dependency or at the time of a termination trial.⁶ The legislature weighed and determined the competing interests involved and enacted a law that expresses its ultimate intent. Disagreement with the legislative intent is not a reason to graft language onto the statute to make it seem more “fair”.

Additionally, the interpretation proposed by Ms. Saint-Louis, not the language of the legislature, would result in an absurd application of the statute. For example, under Ms. Saint-Louis’ proposed interpretation, a parent who is incarcerated early in a two-year dependency, perhaps for just a day, or a few days, could claim a right to the full considerations that are required for parents who are incarcerated at the time of trial. These considerations are necessary for parents who are imprisoned, but not for parents who are in the community and who are fully able to access services and visits. This population is not who the legislature intended to benefit from the change to RCW 13.34.180(1)(f).

If this court reaches the issue, it should hold that the 2013 amendment to RCW 13.34.180(1)(f) is clear and unambiguous and that it imposes a duty on a trial court to specifically consider certain factors, only when the parent whose rights are subject to being terminated is, at the time of termination, incarcerated.

⁶These reports are available online at: www.dshs.wa.gov/sites/default/files/SESA/legislative/documents/IncarPar0606.pdf and www.k12.wa.us/Incarceratedparents/pubdocs/CFIP2008CommitteeReport.pdf (last viewed on February 28, 2015).

C. The Trial Court Properly Applied RCW 13.34.180(1)(f) and Correctly Determined that Continuation of the Parent and Child Relationship Between D.L.B. and Ms. Saint-Louis Clearly Diminished D.L.B.'s Prospects for Integration into a Stable and Permanent Home

Based on her interpretation of the 2013 amendments to RCW 13.34.180(1)(f), the mother argues the trial court erred in determining that the Department had proved this statutory element without considering the factors applicable to incarcerated parents. Br. of App. at 28-33. She does not argue that the trial court's Finding of Fact 2.33, finding proof of element RCW 13.34.180(1)(f), is not supported by sufficient evidence. *Id.*

RCW 13.34.180(1)(f) requires the Department to prove that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. This element focuses on the *legal* relationship between the parent and child and whether it impedes the child's prospects for permanency – such as integration into an adoptive home. *In re K.S.C.*, 137 Wn.2d at 976; *In re Dependency of A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004).

In *In re Welfare of R.H.*, 176 Wn. App. 419, 427-28, 309 P.3d 620 (2013), the Court explained:

The State can prove RCW 13.34.180(1)(f) in one of two ways. The State can prove prospects for a permanent home exist but the parent-child relationship prevents the child from obtaining that placement. Alternatively, the State can prove the parent-child relationship has a damaging and destabilizing effect on the child

that would negatively impact the child's integration into any permanent and stable home.

(Citations omitted.)

Ms. Saint-Louis does not argue that this part of the statute was not proved. Instead, she argues the court should have considered and made specific findings related to her incarceration during the dependency. Ms. Saint-Louis refers to the following language in RCW 13.34.180(1)(f):

If the parent is incarcerated, the court shall consider 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); whether the department or supervising agency made reasonable efforts as defined in this chapter; and 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.

In *In re Dependency of A.M.M.*, 182 Wn. App. 776, 787, 332 P.3d 500 (2014) this Court stated that “the trial court’s resolution of the (1)(f) factor [is] to be *informed* by evidence presented and conclusions reached regarding the six factors contained in RCW 13.34.145(5)(b).” (Emphasis added.) The trial court here did not enter findings of fact with respect to each of these considerations for the simple reason that the mother was not incarcerated and the statute did not apply to her. However, assuming solely for the sake of argument, that the statute did apply, 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.

Here the trial court considered evidence showing that Ms. Saint-Louis' failed to make any attempt to play a meaningful role in her child's life. Her visits with D.L.B. were supervised, on the recommendation of both Dr. Tutty and the FCAP evaluator, even two years into the dependency. Although she had an opportunity to visit with D.L.B. weekly, she was not consistent in visits and often missed visits because she was late. RP at 345, 399. She was not honest with D.L.B. – even in answering simple questions like “Where are you living now?” and “Where have you been?” RP at 164, 350. Neither D.L.B. nor Ms. Saint-Louis demonstrated affection for each other. RP at 438. During the time Ms. Saint-Louis was incarcerated, she could have served her time on work release, where she could have maintained her regular visits with D.L.B., but she opted for jail instead. RP at 84-85.

Any barriers faced by Ms. Saint-Louis when she was incarcerated were of her own making. By deciding to serve her time in jail, rather than on work release, she delayed opportunities for necessary services and for contact with D.L.B. By her own actions, she limited her opportunities to have contact with D.L.B. and to engage in services.

The trial court also considered the Department's "reasonable efforts." Throughout the dependency proceeding, the dependency court found that the Department had consistently made reasonable efforts to prevent or eliminate the need for removal of D.L.B. from Ms. Saint-Louis' home, but those efforts were not successful. Exs. 1 at 6, 3 at 5, 4 at 5, 5 at 5, 6 at 5, 7 at 5 (stating in each order that "DSHS has made reasonable efforts to provide services to the family and eliminate the need for out of home placement of the child"). The review and permanency planning orders each contains a finding that "DSHS has made reasonable efforts to implement and finalize the permanent plan." Exs. 3 at 3, 4 at 3, 5 at 3, 6 at 3, 7 at 3. The termination court's Findings of Fact 2.8, 2.9, 2.11, 2.12, 2.14, 2.15, 2.24, 2.26, 2.29 and 2.31 all indicate that the court considered factors relating reasonable efforts

Even if the 2013 amendment to RCW 13.34.180(1)(f) applies to a parent who is not incarcerated at the time of the termination trial – which the Department submits it does not – the trial court here had evidence before it that informed its decision on this factor.

There is no reversible error.

D. Substantial Evidence Supports the Trial Court's Findings that (a) the Department Offered or Provided All Necessary Services; (b) There is Little Likelihood the Mother Can Correct Her Parenting Deficiencies Within the Near Future; and (c) the Mother is Unfit

Ms. Saint-Louis argues that the trial court's findings with respect to factors RCW 13.34.180(d) (relating to services) and RCW 13.34.180(1)(e) (little likelihood), and that its findings on unfitness are not support by substantial evidence. Br. of Appellant at 33-43.

A trial court's findings of fact must be upheld if they are supported by substantial evidence in the record from which a rational trier of fact could find the necessary facts by clear, cogent and convincing evidence. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652-53, 294 P.3d 695 (2013); *In re M.R.H.*, 145 Wn. App. at 24. Clear, cogent and convincing evidence exists when the evidence shows the fact at issue to be highly probable. *In re K.S.C.*, 137 Wn.2d at 925. The question is not whether the evidence may have supported other findings of fact, but whether the evidence in the record supports the findings that were made the trial court. *In re A.G.*, 155 Wn. App. at 588 (citing *In re K.S.C.*, 137 Wn.2d at 925).

The decision of the trial court also is entitled to deference and the appellate court does not judge the credibility of the witnesses or weigh the evidence. *In re M.R.H.*, 145 Wn. App. at 24. This deference to the trial court is particularly important in termination proceedings.

In re Welfare of Hall, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); *In re L.N.B.-L.*, 157 Wn. App. at 243. The trial court's determination that the mother was offered or provided all necessary services capable of correcting her deficiencies is supported by substantial evidence

Under RCW 13.34.180(1)(d), the Department must provide services that are necessary, available and capable of correcting parental deficiencies within the foreseeable future. *In re M.R.H.*, 145 Wn. App. at 25; *In re Dependency of S.M.H.*, 128 Wn. App. 45, 54, 115 P.3d 990 (2005); *In re T.R.*, 108 Wn. App. at 164. Services that might have been helpful need not be offered when a parent is unwilling or unable to make use of the services provided. *In re S.M.H.*, 128 Wn. App. at 54. And services that would not remedy the parent's deficiencies within the foreseeable future are not required. *In re T.R.*, 108 Wn. App. at 164.

Ms. Saint-Louis claims RCW 13.34.180(1)(d) was not proved because there was no evidence that she was referred to the Incredible Years parenting education program – a program offered only in the community – and because she was not offered random UAs to see if she was abusing drugs or alcohol while she was voluntarily incarcerated. Br. of Appellant at 34.

Both of these programs were available to Ms. Saint-Louis when she was on work release, as were visits with her son. But she opted not to

take advantage of the opportunities for services and visits and, instead, to serve out her time in jail. Before she went to jail, she had 19 or 20 months and multiple opportunities to participate in these services, but failed to do so. Each time the mother indicated any interest in participating in services, the social worker attempted to facilitate those services. However, Ms. Saint-Louis did not follow through.

In its oral ruling, the trial court stated that there was “plenty of evidence . . . that the State went out of its way” to provide the required services. RP at 603. The Department social worker testified that she met with Ms. Saint-Louis on “multiple occasions” to discuss services. RP at 326, 329-30, 331-32, 386. She communicated with her over the telephone and via email. RP at 327. There was no question that Ms. Saint-Louis knew what she had to do to comply with the dependency court’s order on services. RP at 334.

She was referred for Intensive Family Preservation Services, UAs, the Incredible Years program, the psychological evaluation, the FCAP evaluation, and mental health counseling, and she was provided bus passes to enable her to get to services. CP at 352-54 (Findings of Fact 2.8, 2.9, 2.11, 2.12, 2.15, 2.22, 2.24; RP at 334-36; Exs. 9, 10, 11, 12, 14, 18, 19, 20. Despite the many referrals and opportunities, Ms. Saint-Louis was

unable or unwilling to participate to the point where she could benefit from them and correct her parenting deficiencies.

It was through her own actions, not those of the Department, that she did not finish even 90 days of random UAs or the parenting program that was recommended for her.

The trial court's finding that the Department offered all necessary services is supported by substantial evidence.

1. The Trial Court's Determinations that the Mother was Unfit and that There Was Little Likelihood Conditions Would Be Remedied So the Child Could Be Returned to the Mother in the Near Future Are Supported by Substantial Evidence

The Department is required to prove that the mother is unfit and that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future." RCW 13.34.180(1)(e); *In re A.B.*, 168 Wn.2d at 921. *In re S.M.H.*, 128 Wn. App. at 55. The focus of the little likelihood factor is whether parental deficiencies have been corrected. *In re S.M.H.*, 128 Wn. App. at 55 (citing *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995)).

The mother's deficiencies were clearly outlined in Dr. Tutty's report at the end of 2012. The steps she needed to take to address those deficiencies, and the time frame within which she needed to work, also were clearly explained to her over the more than two-year dependency.

She knew the steps she needed to take to correct her deficiencies so that D.L.B. could be returned to her care. RP at 329-30, 334. She simply is unable to make appropriate choices for herself or for her child. RP at 391, 461.

By the time of trial, she continued to have untreated mental health problems, unresolved domestic violence issues, possible chemical dependency issues, and a serious lack of parenting skills. These parenting deficiencies made her a significant risk to D.L.B. and resulted in her being unfit to parent D.L.B. CP at 355-56 (Findings of Fact 2.27, 2.34 and 2.36); RP at 390.

Although Ms. Saint-Louis had participated in domestic violence support groups, and although she was able to describe the signs of impending domestic violence, she was unable to apply what she learned to her own life. She had participated in domestic violence counseling after her abusive relationship with Mr. Bryant, and before D.L.B. was removed from her care. RP at 53. She also participated in other domestic violence support groups after leaving Mr. Thomas. RP at 53. She admitted that one of the things she learned was that she should not become involved with someone who has a history as a domestic violence perpetrator. RP at 59. But at the time of trial she was living with a man who had four domestic violence related convictions, the most recent in 2012. CP at 353

(Findings of Fact 2.16 and 2.17). Because she had not yet noticed the “signs” of domestic violence in their relationship, she did not believe the relationship posed a risk. RP at 177, 301-02.

Ms. Saint-Louis’ lack of parenting skills, particularly her lack of empathy for her son, and lack of understanding of his needs also had not been addressed by her over the two-year dependency. Both Dr. Tutty and the FCAP evaluator recommended a specific parenting class, the Incredible Years program. Ms. Saint-Louis started the class, but did not finish. This was not because she was voluntarily incarcerated during part of the dependency. She had opportunities to take the class, but she did not take advantage of them. By the time of trial, she had only just re-started the program. RP 306-07.

Ms. Saint-Louis claims that she had no drug/alcohol problems at the time of trial. But there is no way to know the extent of her chemical dependency issues, because she failed to fully participate in the one program that would have shown that – random UAs. RP at 396. She knew that a missed UA was considered a positive UA and yet she missed several. RP at 425.

She also had not completed a course of mental health treatment during the dependency, despite recommendations. In his November 2012 psychological evaluation of Ms. Saint-Louis, Dr. Tutty noted that Ms.

Saint-Louis reported having attempted suicide; she experienced anxiety or panic attacks; she expressed an unreasonable fear of certain animals or insects; she admitted having unwanted, repetitive thoughts and having performed repetitive acts. She was hospitalized three times for emotional problems. Ex 16 at 6. He recommended “extensive psychiatric treatment” to remediate her parenting deficits. Ex. A6 at 15. By the time of the termination trial, Ms. Saint-Louis had engaged only minimally with mental health providers and her need for treatment continued to exist. RP at 364-66.

The trial court’s finding that Ms. Saint-Louis was currently unfit to parent D.L.B. is supported by substantial evidence.

The trial court also found there was little likelihood that Ms. Saint-Louis could remedy her deficiencies within the near future. The near future is determined from the perspective of the child. *In re T.R.*, 108 Wn. App. at 165.

The period of time that constitutes the near future for a child depends in part on the age of the child. *Hall*, 99 Wn. 2d at 851 (eight months is not in the foreseeable future for a four-year-old); *In re D.A.*, 124 Wn App. 644, 657-58, 102 P.3d 847 (2004) (18 months not in foreseeable future for a four-year-old); *T.R.*, 108 Wn. App. at 165-66 (one year not in foreseeable future for a six-year-old);

In re Dependency of P.A.D., 58 Wn. App. 18, 27, 792 P.2d 159 (1990)(six months not in near future of a 15-month-old child); *In re Dependency of A.W.*, 53 Wn. App. 22, 32, 765 P.2d 307 (1988) (one year not in near future of a three-year-old).

The social worker testified that the mother would have to consistently engage in services, at the very minimum for six months, before the Department would begin to look at a possible transition for D.L.B. to his mother's home. RP at 369. But waiting that long to see whether his mother would engage in and complete services is not within D.L.B.'s foreseeable future, and would be harmful to him. RP at 389, 462.

Moreover "what is perhaps eventually possible for the parent must yield to the child's present need for stability and permanence. . . . theoretical possibilities are not enough." *In re T.R.*, 108 Wn. App. at 166. DLB needs permanency now. RP at 213, 221.

The trial court's finding that there is little likelihood that the mother would correct her deficiencies within the near future is supported by substantial evidence.

V. CONCLUSION

For the reasons stated above, this court should decline to consider the mother's statutory construction argument. It should hold that the trial

court's findings of fact are supported by substantial evidence and it should then affirm the order terminating Ms. Saint-Louis' parental rights.

RESPECTFULLY SUBMITTED this 3rd day of March, 2015.

ROBERT W. FERGUSON
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A handwritten signature in black ink, appearing to read 'Sheila Malloy Huber', with the date '193 7 5' written to the right of the signature.

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