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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF D.L.B.,
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent,

v.

EDELYN SAINT-LOUIS,

Petitioner.

BRIEF OF COURT-APPOINTED SPECIAL ADVOCATE JULIE
HILLS

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I. INTRODUCTION

In 2013, RCW 13.34.180(1)(f) was amended to provide that “[i]f the parent *is* incarcerated,” the court at a termination hearing must find additional facts about the actions of the parent while incarcerated. The issue for review is whether a court must find those additional facts when the parent was incarcerated at some point while the child was in the state’s care but is not incarcerated at the time of the termination trial.

The Court-Appointed Special Advocate (CASA)—who, by statute, is a party to this case and is charged with representing the best interests of the child involved in the case, RCW 13.34.030(11), 13.34.100—submits that the answer is clearly “no.” The text, structure, and purpose of the 2013 amendment mandate that conclusion. The Department of Social and Health Services (the Department) explains in its brief why that is so, and the CASA does not repeat those arguments.

Instead, this brief seeks to place a termination trial in the larger context of events that take place between a child entering foster care and an order terminating a parent’s rights. At each stage, then-current conditions are considered, including whether the parent is incarcerated. As a result, by the time a termination hearing is held, a parent who was formerly incarcerated has had the incarceration thoroughly considered. It makes no sense to require a court to consider facts about how a parent acts

when incarcerated when the parent is not incarcerated. There is no reason to deviate from what the statute plainly says.

This brief also addresses the argument of amici that claim Saint-Louis' being a victim of domestic violence was improperly considered. The Court of Appeals noted that Saint-Louis was the repeated victim of domestic violence and that at the time of the termination trial she was choosing to live with a man who has a history of domestic violence. It considered those facts, among many others, when deciding that she was currently unfit to parent and that there was little likelihood that conditions will be remedied in the near future, both of which are requirements for termination. RCW 13.34.180(1)(e).

Being the victim of domestic violence, standing alone, is not a proper basis for terminating parental rights. Failing to provide a safe home for a child may be. The interest of the child—including the most basic interest in personal safety—is the proper focus of a termination trial. An adult's choice to expose a child repeatedly to violence can appropriately be considered, together with other facts, when deciding if termination is required. That is what the court below did. Its decision should be affirmed.

II. STATEMENT OF THE CASE

The CASA adopts the Department's statement of the case.

III. ARGUMENT

A. The stages of a dependency.

When a child enters foster care, a number of people and processes are set in motion. Social workers are mobilized. Parents (and often children themselves) are provided attorneys. Hearings must be held at particular intervals. The initial goal is to address parental deficiencies so a child can be returned safely to the parents. But sometimes that is not possible, and eventually a parent's rights may be terminated so the child can have permanence. Terminating parental rights justifiably requires substantial procedure and protection before the decision is made. To place in context the issues in this case, here is a timeline of the procedures that must take place before a parent's rights are terminated:

Court order to take a child into custody: A court may enter an order directing a child be taken into custody if, among other things, the Department shows "reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody." RCW 13.34.050(1).

Shelter care hearing: Within 72 hours of a child's removal from his parent's care, a shelter care hearing must be held. RCW 13.34.060(1); 13.34.065(1)(a). "The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home

while the adjudication of the dependency is pending.” RCW 13.34.065(1)(a). Parents can have attorneys at the hearing (including state-provided attorneys for low-income parents) and can present evidence under relaxed evidence rules. RCW 13.34.065(2)-(3). After the hearing, the child must be returned home unless the court finds several things, including that the “release of such child would present a serious threat of substantial harm to such child[.]” RCW 13.34.065(5)(a)(ii)(B).

Case conference: Within thirty days of the shelter care hearing, the Department must convene a case conference, which is simply a meeting with the parent, parent’s attorney, social worker, state’s attorney, and the CASA or the child’s lawyer. RCW 13.34.067(1)(a)-(b). The goal of the case conference is “to develop and specify in a written service agreement the expectations of both the department or supervising agency and the parent regarding voluntary services for the parent.” RCW 13.34.067(1)(a).

Fact-finding hearing: The next step is a fact-finding hearing. RCW 13.34.110. The goal of a fact-finding hearing is to determine, with the Department bearing the burden of proof, whether the child is “dependent,” meaning abandoned, abused or neglected, having no parent, guardian or custodian capable of adequately caring for the child, or is receiving extended foster care services. RCW 13.34.030(6).

Disposition hearing: If the court finds the child dependent, it must hold a disposition hearing within 14 days. RCW 13.34.110(4). At that hearing, the court can order the child to be returned home with services designed to alleviate risks to the child, or order the child to continue living away from the home. RCW 13.34.130(1)-(5).

Permanency plan: If the child remains out of the home, the Department must develop a permanency plan within sixty days. RCW 13.34.136(1). “The planning process shall include reasonable efforts to return the child to the parent’s home.” *Id.* The plan must identify as a primary goal whether the child will return to his parent’s care, or whether he will find permanency elsewhere. RCW 13.34.136(2)(a). It must also specifically identify the services that the Department must provide and that the parent must comply with to resume custody. RCW 13.34.136(2)(b)(i); (2)(b)(vii).

Review hearings: At least every six months the court must hold review hearings. RCW 13.34.138(1). “The purpose of the hearing shall be to review the progress of the parties and determine whether court supervision should continue.” *Id.* At the review hearings, the parent has the opportunity to “report to the court the efforts they have made to correct the conditions which led to removal.” RCW 13.34.138(2)(a). If the child is not returned home after the hearing, the court must determine whether the

Department “is making reasonable efforts to provide services to the family and eliminate the need for placement of the child.” RCW 13.34.138(2)(c)(i).

Permanency planning hearings: If a child has been out of the home for more than nine months, the court must hold a permanency planning hearing. RCW 13.34.145(1)(a). The “purpose of a permanency planning hearing is to review the permanency plan for the child, inquire into the welfare of the child and progress of the case, and reach decisions regarding the permanent placement of the child.” RCW 13.34.145(1). Permanency planning hearings must be held at least once a year until permanency is achieved or the child is returned home. RCW 13.34.145(9).

Petition for termination: When a child has been out of the home for at least six months and “there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future,” termination may be appropriate so the child can have permanence. RCW 13.34.180(1)(e). If six conditions are met, the court may order or any party may file a petition for termination. RCW 13.34.180(1).

Termination trial: After a termination petition has been filed, a termination trial is held. At the trial, the Department has the burden of proving by clear, cogent, and convincing evidence the six factors listed in RCW 13.34.180(1), and by a preponderance of the evidence that

termination is in the best interest of the child. RCW 13.34.190. The trial court here found all of those things, and so terminated Saint-Louis' parental rights.

B. Incarceration is taken into account at each stage.

Throughout the process described above, a parent's incarceration is regularly taken into account, often as a result of the 2013 statutory amendments. At the case conference, if "the parent is unable to participate in person due to incarceration, the parent must have the option to participate through the use of a teleconference or videoconference." RCW 13.34.067(3). When writing the permanency plan, "[i]f the parent is incarcerated, the plan must address how the parent will participate in the case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available at the facility where the parent is confined." RCW 13.34.136(2)(b)(i)(A). "The plan must provide for visitation opportunities, unless visitation is not in the best interests of the child." *Id.*

At a permanency planning hearing, when a child has been out of the home fifteen of the past twenty-two months, the court can find good cause not to order the filing of a termination petition if the "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[.]” RCW 13.34.145(5)(iv). A parent’s “current or prior incarceration” may also be considered when deciding if a parent has complied with necessary services. RCW 13.34.145(5)(c).

At a termination trial, when determining whether there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future, the trial court may consider mitigating circumstances such as “current or prior incarceration.” RCW 13.34.180(1)(c)(iii). Along similar lines, when considering the rebuttal presumption authorized by RCW 13.34.180(1)(e)—that failure to improve parental deficiencies in twelve months means there is little likelihood the conditions will be remedied—the court may also consider as evidence “the particular constraints of a parent’s current or prior incarceration.” RCW 13.34.180(2).

In other words, “[t]he effect of the [2013] amendments was to require trial courts to consider whether an incarcerated parent could maintain a meaningful role, as defined, in the child’s life and to require [the Department] to make reasonable efforts to help the incarcerated person remedy parental deficiencies.” *In re Dependency of M.J.*, 187 Wn. App. 399, 408 (2015). The amendments did so by requiring incarceration to be considered at each stage if it then was an issue. As a result, by the

time a termination trial is held, a parent's former incarceration has been well considered.

A parent's prior incarceration is relevant when the question is why the parent has not spent significant time with the child, or why the child has been out of the home for so long. A primary focus of a termination trial is the current state of affairs, and whether conditions may change in the near future so the child could be returned home. Current incarceration is obviously relevant to that question, but prior incarceration is often more attenuated. That, in part, is why several provisions of the 2013 amendments refer to a parent's "current or prior incarceration," while the provision at issue here does not. *E.g.*, RCW 13.34.145(5)(a)(iv) (a court may find good cause not to require a termination petition if the "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"); RCW 13.34.145(5)(c) ("*current or prior incarceration*" may be considered to decide if a parent has complied with necessary services); RCW 13.34.180(1)(e)(iii), (2) ("*current or prior incarceration*" may be considered to decide if a parent failed to have contact with a child for an extended period of time) (emphases added).

During a termination trial, the Superior Court is meant to consider an "assessment of whether a parent who *is* incarcerated maintains a

meaningful role in his or her child's life." RCW 13.34.145(1)(f) (emphasis added). This is not a relevant inquiry for a parent who is no longer incarcerated. The statute applies to parents who are currently incarcerated at the time of trial, and there is no reason not to follow it.

The decision below should be affirmed.

C. The child has the right to safety and nurture.

Several amici argue that the Court of Appeals incorrectly found Saint-Louis' history of being a victim of domestic violence to be a parenting deficiency. The Court could decline to review the argument because it is raised only by amici. *State v. Hirschfelder*, 170 Wn.2d 536, 552 (2010). If the Court were inclined to entertain the argument, it should not alter the outcome. A parent can be a victim of domestic abuse and still protect the child from danger. But where, as here, a parent both fails to provide a safe home for a child *and* abuses and neglects the child herself, termination may be appropriate.

1. Domestic violence is case-specific.

Domestic violence is tragic, and even more so when children are involved. It is also complicated. It does not affect all children in the same way. It varies by the frequency and severity of violence, the age and gender of the child, and a host of other factors. Jeffrey L. Edleson & Sandra Graham-Burman, *Studying the Co-Occurrence of Child*

Maltreatment and Domestic Violence in Families, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY, at 91-100 (2001).

Domestic violence also comes in degrees. The Department's practice guide to domestic violence for social workers observes that there are a wide variety of violence scenarios: the perpetrator may abuse the child as well as the parent; the perpetrator may endanger the child during assaults against the adult victim (throwing objects, for example); the perpetrator may undermine the victim's ability to parent; and so on. Department of Social & Health Services, *Practice Guide to Domestic Violence*, at 11, available at <http://nrccps.org/wp-content/uploads/WA-state-SW-DV-practice-guide-2010.pdf>.

Children need not be abused themselves to be harmed by domestic violence and exposure can harm a child's growth and development, even if the child is not the direct victim. See Kathryn Kolar & Debrynda Davey, *Silent Victims: Children Exposed to Family Violence*, *The Journal of School Nursing* (April 2007) Volume 23, Number 2 (exposure of children to violence can have a negative influence on social, emotional, and cognitive development and have long-term consequences through adulthood); William Harris, et al., *In the Best Interests of Society*, *Journal of Child Psychology and Psychiatry* Volume 48 (2007), at 392-411

(unaddressed consequences brought by exposure to violence adversely impacts children throughout their life).

Both children and parents respond in varied ways to domestic violence. The questions in every case are whether a *particular* child is at risk and whether a *particular* parent is able to keep the child safe. That is what trials are for. They allow Superior Court judges to hear the witnesses, sift the evidence, and decide—under a clear, cogent, and convincing standard—whether there is little likelihood that conditions will be remedied so that the child can be returned home in the near future. RCW 13.34.180(1)(e).

When making that determination, judges may not conclude that termination is appropriate *because* a parent is a victim of domestic violence, but nor can they ignore the danger to the child. The same standard should apply whether a child’s safety—which by statute is included in the “right of a child to basic nurture,” RCW 13.34.020—is threatened by domestic violence or by any other danger. The court must distinguish on a case-by-case basis between a parent who is victimized but can be protective and nurturing and one who cannot. And in all cases judges must have in mind the fundamental principle that “[w]hen the rights of basic nurture, physical and mental health, and safety of the child

and the legal rights of the parents are in conflict, the rights and safety of the child should prevail.” RCW 13.34.020.

2. Substantial evidence supports termination here.

Here, there is substantial evidence that D.L.B. would have been at risk if returned to his mother’s care. To begin with, D.L.B. himself was the victim of violence. Saint-Louis herself abused him. (Ex. 1.¹) When he was less than a year old, his father, in the middle of a fight with Saint-Louis, threw him at her. (VRP at 32; Ex. 10, p. 9.) D.L.B. was not merely a bystander to violence. He was a victim himself.

D.L.B. was placed in other dangerous situations. Saint-Louis started dating a new man in 2012. (VRP at 90-91; Ex. 10, p. 9.) Their relationship was also tumultuous, and the police responded to several reports of violence between the two. (Ex. 1.) In one incident, while Saint-Louis and D.L.B. were in the room, he threw a tool through a window when upset; Saint-Louis does not consider that an incident of domestic violence “because he didn’t throw it at me.” (VRP at 91.) Saint-Louis neglected and left D.L.B. alone frequently, physically abused him herself, failed to visit him, did not benefit from the services designed to remedy her parental deficiencies, and engaged in criminal activity throughout the case. (Ex. 1.)

¹ The verbatim report of proceedings consists of five consecutively-paginated volumes, and is cited as “VRP.” Trial exhibits are cited as “Ex.”

The Superior Court was justified in concluding that Saint-Louis would not be able to keep D.L.B. safe, and that she would not be able to do so in the near future. That was not based on the fact of that Saint-Louis was a victim. It is based on the fact that if D.L.B. had been left with Saint-Louis, it was likely he would remain in harm's way. That is an appropriate basis to conclude that conditions will not be remedied in the near future.

IV. CONCLUSION

There are many opportunities while a child is in care to consider a parent's incarceration. If the parent is *not* incarcerated during a termination trial, considering factors relevant to current incarceration makes no sense and the statute does not require it. The Court of Appeals should be affirmed.

The Court of Appeals also properly considered domestic violence. Neither it nor the Superior Court decided that Saint-Louis' being a victim as a basis for termination. Rather, they properly considered her choices in response, and how those would affect D.L.B., whose interests are paramount.

DATED: April 8, 2016

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**I certify under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.**

DATED this 8th day of April, 2016.

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Dear Clerk of the Court,

Attached please find a Brief of Court-Appointed Special Advocate Julie Hills to be filed in this case:

In Re the Dependency of D.L.B., State of Washington, Department of Social and Health Services, Respondent, v. Edelyn Saint-Louis, Petitioner.

Supreme Court No. 92448-1

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