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No. 97311-3

NO. 52350-7-II Consol.

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

In re the Welfare of

D.H., 1/30/09,
S.T., 9/3/11,
L.L., 8/10/15 &
T.L., 5/22/13,

Minor Children.

**REPLY BRIEF OF APPELLANT
BY THE MOTHER, B.B.**

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY
THE HONORABLE AMBER L. FINLAY, JUDGE**

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I. ARGUMENT IN REPLY

The state argues that it was not responsible for the delay in the mother's services. Br. of Respondent at 23. The state also argues that it was not required to offer DBT to the mother. *Id.* at 27. Both arguments fail because it is ultimately the state's responsibility to provide services to parents, or to prove that these services are not reasonably available or are futile. *See Matter of B.P.*, 186 Wn.2d 292, 317, 376 P.3d 350 (2016). The state failed to meet this burden.

A. The Department Was Responsible for the Delay in the Mother's Mental Health Services.

In its brief, the state argues that the mother was responsible for the delay in her mental health services. Br. of Respondent at 23. According to the state, the mother "prioritize[d] a visit with her children over engaging in the neuropsychological evaluation" which "led to a delay in completion of the service." *Id.* This argument fails for two reasons.

First, the mother's actions only delayed the neuropsychological evaluation for one month. Dr. Whitehill recommended this service in October 2015. Ex. 77 at 1, 17. However, the department did not properly refer it until June 22, 2016, and Dr. Shepel did not complete it until November 2016. Ex.s 62, 63, 78. The mother chose to attend a visit on June 30, 2016, which conflicted with her appointment. Ex. 87. Although the state criticizes this choice, visitation is "crucial for maintaining parent-

child relationships and making it possible for parents and children to safely reunify.” RCW 13.34.136(2)(b)(ii)(A). The department re-referred the neuropsychological evaluation on July 19, 2016. Ex. 63. At most, the mother delayed this service for less than a month; the department’s ineptitude caused the vast majority of the delay.

Second, the state’s argument fails because delaying the neuropsychological evaluation had a cascading effect on this case. The state argues that the mother “still had 15 months” after this evaluation to engage in services and make progress. Br. of Respondent at 24. This is false because the services recommended by this evaluation were also delayed. The mother’s neuropsychological evaluation recommended medication management and DBT services. Ex. 78 at 16-17. The state only provided the mother with DBT a month before trial. RP at 598. Medication management was also delayed. In its brief, the state argues that the mother’s therapist, Ms. Dyrnes, referred her to medication management in December 2016. Br. of Respondent at 5. However, the mother did not start medication until July 2017.¹ The state does not explain or justify this delay.

¹ In July 2018, the trial court found that the mother took “mediation to address mental health issues, which she has been on for approximately one year.” Finding 3.5.13, T.L. CP at 221. In its brief, the state argues that the mother began taking medication in March 2017. Br. of Respondent at 5. However, the state does not assign error to the trial court’s finding.

Ultimately, the responsibility for providing services rests with the state, not with Ms. Dyrnes or the mother. *In re Termination of S.J.*, 162 Wn. App. 873, 883, 256 P.3d 470 (2011) (the state must timely identify services and provide those services). This Court should reverse because the state did not provide the mother with adequate mental health services until shortly before trial.²

B. The State Failed to Timely Provide DBT Services to the Mother.

In its brief, the state attempts to defend the fact that it failed to provide DBT services to the mother until a month before trial. However, its excuses fail.

The state argues that DBT was not a required service because it was not “reasonably available” until February 2018. Br. of Respondent at 27. This argument fails because the trial court made no such finding of fact. *See* T.L. CP at 214-25. In its findings, the trial court never addressed whether DBT was a reasonably available service. *Id.* The state asks this Court to weigh the evidence and find that DBT was not reasonably available. Br. of Respondent at 28-29. However, that is not this Court’s role. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991)

² The state is correct that the mother engaged in individual counseling from June to September 2015 and then resumed this service in April 2016. Ex. 87. In the Appellant’s brief, this attorney misunderstood Ms. Dyrnes’ testimony. Br. of Appellant at 6. I believed that the mother participated in protective parenting group (PPG) from September 2015 to September 2016, and then started individual counseling after she completed PPG. RP at 84. That was my error, for which I apologize.

(appellate courts do not reweigh the evidence or decide the credibility of witnesses). It was the department's responsibility to prove that DBT was not reasonably available, and it failed to meet this burden. *See* RCW 13.34.180(1)(d).

The state argues that even if DBT was reasonably available, the department did not have to provide this service because the mother did not prove that DBT "would have remedied her parental deficiencies in the foreseeable future." Br. of Respondent at 29. The state errs because the burden of proof does not lie with the mother. "Absent a showing of futility," a parent is "entitled to any available services necessary to facilitate reunification." *B.P.*, 186 Wn.2d at 317. It is not the parent's "burden to prove that these services would succeed before the State provide[s] them." *Id.* The state concedes that the trial court made no finding that services were futile in this case. Br. of Respondent at 35-36. Thus, the state must provide DBT; the mother need not prove this service "would succeed" first. *B.P.*, 186 Wn.2d at 317.

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II. CONCLUSION

B.B., the mother, respectfully requests that the Court of Appeals reverse the trial court and vacate the order terminating her parental rights.

The department attempts to reverse the burden of proof and blame the mother for its failings. This Court should reject the state's arguments.

RESPECTFULLY SUBMITTED this 3rd day of January, 2019.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

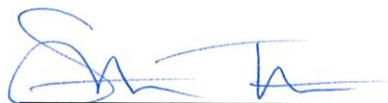
On January 3, 2019, I electronically filed a true and correct copy of Reply Brief of Appellant by the mother, B.B., via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Via email to:

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SIGNED in Port Orchard, Washington, this 3rd day of January,
2019.



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