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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.

**MOTION FOR ACCELERATED REVIEW
BY THE MOTHER, B.B. (Appellant's Opening Brief)**

**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. INTRODUCTION

The child welfare system has failed B.B. at every stage of her life. B.B. is the mother of four children. As a child, B.B. was in and out of state care, abused by both her biological parents and her foster parents. As an adult, B.B.'s children were removed after she was the victim of domestic violence. During the dependency, B.B. battled with PTSD and anxiety. However, the Department of Children, Youth, and Families ("department" or "state") delayed critical mental health services for years. B.B. did not receive all of the mental health services she needed until one month before trial. She never received parenting instruction tailored to meet her mental health needs or learning disability. Despite this, the court terminated her rights, finding that further services would be futile. This decision must be reversed.

II. STATEMENT OF THE ISSUES

The state must provide court-ordered and necessary services to parents in a timely manner. The state must also tailor these services to the parent's individual needs. If the state does not meet these obligations, the trial court must deny a petition to terminate parental rights unless services would be futile. On appeal, the mother raises the following issues:

1. Should the court reverse the order terminating the mother's rights when the state delayed critical mental health services for years, undermining her ability to reunify with her children?

Answer: Yes.

2. Should the court reverse the order terminating the mother's rights when the state failed to tailor parenting instruction to the mother's mental health needs and learning disability?

Answer: Yes.

3. Should the court reverse the order terminating the mother's rights when the evidence at trial showed that services were not futile because the mother was willing and able to participate?

Answer: Yes.

III. ASSIGNMENTS OF ERROR

The mother assigns error to the following portions of the orders terminating her parental rights¹:

1. The trial court erred in concluding that the state met the burden of RCW 13.34.180(1)(d) because the state failed to offer timely or tailored services to the mother. T.L. CP at 216, Conclusion 3.4; D.H. CP at 178, Conclusion 3.4; S.T. CP at 227, Conclusion 3.4; L.L. CP at 210, Conclusion 3.4.
2. The trial court erred in its characterization of the father's testimony because the father, J.L., testified about a different partner attacking him with a knife, not the mother B.B. T.L. CP at 216, Finding 3.4.2; L.L. CP at 210, Finding 3.4.2.
3. The trial court erred in finding that all necessary services were offered to the mother because the state failed to offer timely or tailored services. T.L. CP at 218, Findings 3.4.18, 3.4.19, 3.4.22, and 3.4.23; D.H. CP at 179, Findings 3.4.5 and 3.4.6; S.T. CP at

¹ There are four sets of termination orders, one for each child. Each termination order is located within the clerk's papers for that child. In each termination order, there are numbered findings of fact and conclusions of law. However, the numbers are not identical in each child's order. For example, Finding 3.4.13 in D.H.'s termination order is numbered Finding 3.4.30 in T.L.'s termination order. The Assignments of Error will cite to the finding or conclusion within the orders of every child. However, for clarity, the remainder of the brief will only cite to T.L.'s findings and conclusions. The corresponding finding or conclusion for each other child shall be incorporated by reference.

228, Findings 3.4.5 and 3.4.6; L.L. CP at 212, Findings 3.4.18, 3.4.19, 3.4.22, and 3.4.23.

4. The trial court erred in listing out the mother's court-ordered services by failing to include the recommendations from the mother's neuropsychological evaluation. T.L. CP at 218, Finding 3.4.21; D.H. CP at 178, Finding 3.4.4; S.T. CP at 228, Finding 3.4.4; L.L. CP at 212, Finding 3.4.21.
5. The trial court erred in its characterization of Dr. Whitehill's testimony because Dr. Whitehill testified that he could not determine if the mother had a cognitive impairment and thus recommended a neuropsychological evaluation. T.L. CP at 219, Finding 3.4.30; D.H. CP at 179, Finding 3.4.13; S.T. CP at 228, Finding 3.4.13; L.L. CP at 213, Finding 3.4.30.
6. The trial court erred in finding that the one-year lapse between the mother's psychological and neuropsychological evaluations did not significantly impact her ability to correct her parental deficiencies because this delay had a cascading effect that prevented the mother from benefiting from other services. T.L. CP at 219, Finding 3.4.34; D.H. CP at 179, Finding 3.4.17; S.T. CP at 229, Finding 3.4.17; L.L. CP at 213, Finding 3.4.34.
7. The trial court erred in finding that the mother engaged in a hands on parenting class with Brenda Sullens in December 2017 because she actually engaged in Family Preservation Services with this provider at this time. The trial court also erred in finding that the mother engaged in DBT group in December 2017 because she did not begin this service until February 2018. T.L. CP at 220, Finding 3.4.40; D.H. CP at 180, Finding 3.4.23; S.T. CP at 229, Finding 3.4.23; L.L. CP at 214, Finding 3.4.40.
8. The trial court erred in its interpretation of "foreseeable future," a term of art in RCW 13.34.180, because its interpretation renders this statute nonsensical. T.L. CP at 220, Finding 3.4.41 and 222, Finding 3.5.29; D.H. CP at 180, Finding 3.4.24 and 182, Finding 3.5.19; S.T. CP at 230, Finding 3.4.29, and 231, Finding 3.5.21; L.L. CP at 214, Finding 3.4.41 and 216, Finding 3.5.29.
9. The trial court erred in finding that the mother started "mental health treatment" in April 2016 because she did not begin counseling until September 2016. T.L. CP at 221, Finding 3.5.13;

D.H. CP at 181, Finding 3.5.3; S.T. CP at 230, Finding 3.5.5; L.L. CP at 215, Finding 3.5.13.

10. The trial court erred in its finding that the mother is incapable of applying learned parenting skills because the mother was not provided with appropriate services in order to reach this finding. T.L. CP at 222, Findings 3.5.22 and 3.5.28; D.H. CP at 181, Finding 3.5.12 and 182, Finding 3.5.18; S.T. CP at 231, Findings 3.5.14 and 3.5.20; L.L. CP at 216, Findings 3.5.22 and 3.5.28.
11. The trial court erred in finding that the improvement in visits was due to reducing the number of children because the parenting instructor working with the mother testified that the mother's parenting skills were improving. T.L. CP at 222, Finding 3.5.23; D.H. CP at 182, Finding 3.5.13; S.T. CP at 231, Finding 3.5.15; L.L. CP at 216, Finding 3.5.23.
12. The trial court erred in finding that the mother is unlikely to be able to provide for her children's needs in the near future because the mother only received adequate mental health services a month before trial. T.L. CP at 223, Finding 3.7.1; D.H. CP at 182, Finding 3.7.1; S.T. CP at 232, Finding 3.7.1; L.L. CP at 217, Finding 3.7.1.
13. The trial court erred in concluding that the state met the elements of RCW 13.34.180 by clear, cogent, and convincing evidence because the state failed to prove that it provided services pursuant to RCW 13.34.180(1)(d). T.L. CP at 224, Conclusions 4.2 and 4.4; D.H. CP at 183, Conclusion 4.2; S.T. CP at 232, Conclusions 4.2 and 4.4; L.L. CP at 218, Conclusions 4.2 and 4.4.
14. The trial court erred in granting the state's petition and terminating the mother's rights. T.L. CP at 224, Orders 5.1 and 5.2; D.H. CP at 183, Orders 5.1 and 5.2; S.T. CP at 233, Orders 5.1 and 5.2; L.L. CP at 218, Orders 5.1 and 5.2.

IV. STATEMENT OF THE CASE

B.B. is the mother of four children, nine year old D.H., seven year old S.T., five year old T.L., and three year old L.L. Ex.s 1-4. When she was a child, B.B.'s biological parents abused her. Ex. 77 at 5. The state removed B.B. and her siblings and placed them in foster care. *Id.* B.B.

spent her childhood in and out of foster care. *Id.* at 5-6. She was returned to her mother and removed again several times. *Id.* While in foster care, B.B. was abused by a foster parent, who starved her. *Id.* at 5.

At age 18, B.B. moved out of her mother's home. *Id.* at 6. She had two children, D.H. and S.T. Ex.s 1, 2. She then became romantically involved with J.L., the father of her younger two children, T.L. and L.L. RP at 552-3. This relationship was not healthy. The mother, B.B., was the victim of domestic violence. J.L. assaulted her and threatened to kill her and her older children. RP at 553, 595. In June 2015, the mother's children² were removed from her care due to domestic violence and unsanitary living conditions. Ex.s 5-7, 27.

Throughout the dependency, the mother, B.B., dealt with mental health issues. Ex. 78; RP at 75. When the case began in 2015, she had debilitating anxiety. RP at 79-80. She had trouble making decisions, problem solving under time constraints, and focusing. Ex. 78; RP at 75, 79. The mother also has Post-Traumatic Stress Disorder (PTSD) from her childhood abuse. RP at 78.

After her children were removed, it was the state's responsibility to provide services to the mother. Ex.s 20-22, 32. The department social

² The three older children, D.H., S.T., and T.L., were removed in June 2015. Ex.s 5-7. L.L. was born in August 2015 and removed at that time. Ex. 27.

worker during most of the case was Douglas Willman. RP at 183, 666. The mother engaged in every service offered by Mr. Willman. RP at 290. She also communicated consistently and attended regular visitation with her children. RP at 290-91, 50.

The mother tried to complete services to address her mental health issues, but many of these services were delayed. She participated in a psychological evaluation with Dr. Whitehill in October 2015. Ex. 77. Dr. Whitehill recommended the mother engage in counseling, *id.* at 17, but she had to wait nearly a year for this service. She started individual counseling with Cynthia Dyrnes in September 2016.³ RP at 73, 84. Dr. Whitehill also thought the mother may have a cognitive impairment. Ex. 77 at 15-16. He recommended a neuropsychological evaluation to investigate. *Id.* at 17. However, this service was delayed for over a year. Dr. Shepel completed the mother's neuropsychological evaluation in November 2016. Ex. 78.

Dr. Shepel determined that the mother had neurological issues impacting her parenting and a learning disability. RP at 119, 121, 125, 130; Ex. 78 at 15. She recommended additional mental health services, including medication management and dialectical behavioral therapy (DBT) group.

³ Ms. Dyrnes had prior professional contact with the mother. The mother sought out grief counseling with Ms. Dyrnes in 2010. RP at 73. Ms. Dyrnes also taught the mother's Protective Parenting Group (PPG) class from July 2015 to July 2016. RP at 84. Additionally, Ms. Dyrnes worked with the maternal grandmother in the past. RP at 74.

Ex. 78 at 16-17. However, these services were also delayed. The mother began taking prescribed psychotropic medication in July 2017. T.L. CP at 221, Finding 3.5.13. She started DBT group in February 2018, one month before the termination trial. RP at 598.

The mother also engaged in domestic violence victim's services. She completed an evaluation, engaged in support groups, and developed a safety plan. Ex. 129; RP at 288, 564, 580, 594. She discussed healthy boundaries in her counseling sessions with Ms. Dyrnes. RP at 89-90. Ms. Dyrnes also taught the mother's Protective Parenting Group (PPG) class, which addressed domestic violence and accountability. RP at 84-86.

To address her parenting skills, the mother completed several courses of parenting instruction. She participated in Promoting First Relationships (PFR) in 2015. RP at 248. She also engaged in Positive Parenting Program (Triple-P) from August 2016 to February 2017. RP at 195, 197; Ex.s 89-95. Finally, the mother participated in Family Preservation Services (FPS) with Brenda Sullens from December 2017 to February 2018, just before trial. RP at 248, 250; Ex. 128.

Despite these services, the mother struggled with parenting skills throughout most of the dependency. Visits were challenging. The mother was always prepared for visits and was affectionate with her kids. RP at 20, 39, 50, 55, 58-60. However, she had trouble managing her children's extreme behaviors. RP at 21-23, 31, 39, 56. Eventually visits were reduced

to two children at a time, supervised at an agency. RP at 294-95. The mother and her children were affectionate and bonded to each other. RP at 27, 58, 60, 258, 275, 648.

Although the mother participated in services, she only started making progress once she addressed her mental health issues. The mother started taking psychotropic medication in July 2017. T.L. CP at 221, Finding 3.5.13. According to her therapist, Ms. Dyrnes, medication helped the mother significantly. RP at 91. The mother's brain chemistry improved so that she could function better and apply learned skills. *Id.* The mother's anxiety decreased, improving her cognitive abilities and mental processing speed. RP at 79, 81. She also showed more insight into domestic violence. RP at 89-90.

Most importantly, the mother's parenting skills improved. RP at 254. Before taking medication, the mother made little to no progress in parenting instruction. RP at 209. After she started taking medication, she participated in one parenting course: FPS with Brenda Sullens from December 2017 to February 2018. RP at 248, 250; Ex. 128. Ms. Sullens noticed definite improvement in the mother's parenting. RP at 254, 257. The mother made progress with discipline, consistency, dividing her attention, and managing her children's behaviors. RP at 254, 257, 274-75, 258-59, 269. Ms. Sullens had no concerns for child safety during visits. RP

at 261, 274. She wanted to expand visits to include all three children⁴ and see how the mother did. RP at 257, 261. Ms. Sullens opined that the mother could have unsupervised visits with her children in two to three months. RP at 263-64.

The mother's most recent visit supervisor, Vanessa Malapote, agreed. Ms. Malapote started supervising visits in October 2017. RP at 240. Since that time, she saw the mother make great improvements in her parenting. RP at 641. The mother was better able to manage her children's behaviors and meet their emotional needs. RP at 641, 642-43, 648. Ms. Malpote noticed this improvement even before the mother started working with Ms. Sullens. RP at 641-42.

Other witnesses also noticed an improvement in the mother's parenting skills, although to a lesser extent. The department social worker, Mr. Willman, acknowledged a "noticeable" improvement in the mother's visits but insisted this was not "significant." RP at 696. The Guardian ad Litem for the children, Marina Richardson, testified that the mother responded well to medication. RP at 771. Although she still had concerns, Ms. Richardson acknowledged that the mother's parenting had improved during visits. *Id.*

⁴ D.H. moved to Texas to live with his paternal grandmother in September 2016. Ex. 45.

Figure 1 – Timeline of Mental Health and Parenting Instruction Services	
Jul, 2015	Start of Promoting First Relationships
Aug, 2015	
Sep, 2015	
Oct, 2015	Psychological evaluation completed
Nov, 2015	
Dec, 2015	End of Promoting First Relationships
Jan, 2016	
Feb, 2016	
Mar, 2016	
Apr, 2016	
May, 2016	
Jun, 2016	
Jul, 2016	
Aug, 2016	Start of Triple-P
Sep, 2016	Start of individual counseling with Cynthia Dyrnes
Oct, 2016	
Nov, 2016	Neuropsychological evaluation completed
Dec, 2016	
Jan, 2017	
Feb, 2017	End of Triple-P
Mar, 2017	
Apr, 2017	
May, 2017	
Jun, 2017	
Jul, 2017	Start of psychotropic medication
Aug, 2017	
Sep, 2017	
Oct, 2017	
Nov, 2017	
Dec, 2017	Start of Family Preservation Services
Jan, 2018	
Feb, 2018	End of Family Preservation Services Start of DBT group
Mar, 2018	Termination trial begins

As shown in Figure 1, above, the mother’s mental health services were delayed by years. She only had the opportunity to engage in complete mental health services in February 2018, one month before the termination trial. RP at 598. The mother benefited greatly from mental health treatment, particularly psychotropic medication. RP at 91. However, just when the mother started getting all of the services she needed, the trial court terminated her parental rights. T.L. CP at 214-225. The mother appeals.

V. LEGAL STANDARD

The Washington legislature recognizes that “the family unit is a fundamental resource of American life which should be nurtured.” RCW 13.34.020. Parents have a fundamental liberty interest in the custody and care of their children. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). The state cannot interfere with this interest “unless a child’s right to conditions of basic nurture, health, or safety is jeopardized.” RCW 13.34.020.

In order to permanently terminate the parent-child relationship, trial courts apply a two-step test. First, the court must find that the state has proven the six elements of RCW 13.34.180 by clear, cogent, and convincing evidence:

- a. That the child has been found to be a dependent child;
and

- b. That the court has entered a dispositional order pursuant to RCW 13.34.130; and
- 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; and
- d. That the services ordered under 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; and
- e. That there is little likelihood that conditions will be remedied so that the child can be returned in the near future; and
- f. That continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1)(a)-(f); *In re Welfare of S.V.B.*, 75 Wn. App. 762, 768, 880 P.2d 80 (1994). Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be "highly probable." *K.D.S.*, 176 Wn.2d at 653.

Second, the court must find by a preponderance of the evidence that termination is in the child's best interest. RCW 13.34.190; *In re Welfare of A.J.R.*, 78 Wn. App. 222, 228, 896 P.2d 1298 (1995). Due process also requires a finding, by clear, cogent, and convincing evidence, that the parent is presently unfit to parent the child. *In re Welfare of A.B.*, 168 Wn.2d 908, 919, 232 P.3d 1104 (2010).

On review, appellate courts examine whether substantial evidence supports the trial court's findings. *In re Dependency of A.W.*, 53 Wn. App. 22, 31, 765 P.2d 307 (1988) (citing *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)). Substantial evidence supports a premise when the evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006). The reviewing court may not decide the credibility of witnesses or reweigh the evidence. *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991).

VI. ARGUMENT

The mother, B.B., respectfully requests that the Court of Appeals reverse the trial court and vacate the orders terminating her parental rights, for three reasons. First, the state failed to provide her with timely mental health services. Second, the state failed to tailor parenting instruction to her mental health needs and learning disability. Third, the trial court improperly decided that additional services would be futile, despite a lack of evidence supporting this decision.

A. **The Department Failed to Provide Timely Mental Health Services to the Mother.**

During a dependency, the state must identify services that a parent needs and provide those services. *In re S.J.*, 162 Wn. App. 873, 883, 256 P.3d 470 (2011). The state must offer services in a timely manner, so that

the parent has the opportunity to benefit from them. *Id.* at 883-84 (reversing termination because the state failed to timely provide mental health treatment to the mother); *Matter of B.P.*, 186 Wn. 2d 292, 319-20, 376 P.3d 350 (2016) (reversing termination because the state failed to timely provide attachment services to the mother); *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005) (reversing termination because of the “protracted delay” in providing mental health evaluations to the parents).

Here, the mother was court ordered to complete numerous services, including evaluations, mental health services, parenting instruction, and domestic violence victim’s services.⁵ However, the state failed to provide timely mental health services. The mother had to wait years for counseling, a neuropsychological evaluation, a psychiatric evaluation, medication management, and DBT group. She only started receiving all of the mental health services she needed in February 2018, one month before the termination trial. This inexcusable delay undermined her ability to reunify with her children. The trial court must be reversed because the state failed to meet the requirements of RCW 13.34.180(1)(d).

⁵ The mother was the victim of domestic violence from the father, J.L. In its findings, the trial court erroneously found J.L. reported that the mother, B.B., attacked him with a knife. T.L. CP at 216, Finding 3.4.2. Substantial evidence does not support this finding because it contradicts J.L.’s testimony. J.L. testified that a prior ex-girlfriend, not B.B., attacked him with a knife. RP at 520. He did not mention a knife in the domestic violence incident with the mother, B.B. RP at 512.

1. The mother waited years to receive adequate mental health services.

The state knew early in this case that the mother had mental health issues. As early as July 2015, the mother's court-ordered services included a psychological evaluation and mental health counseling. Ex.s 20-22. As time went on, the importance of mental health services only became more apparent. Each evaluation the mother completed recommended services to address her mental health issues. Ex. 77 at 17; Ex. 78 at 16-17. Despite this, she waited years for access to adequate mental health services.

The mother completed a psychological evaluation with Dr. Whitehill in October 2015. Ex. 77. Dr. Whitehill found that the mother had a dependent personality disorder with avoidant and compulsive traits. *Id.* at 15. He recommended counseling to address this personality disorder as well as the mother's past trauma. *Id.* at 17. Although counseling was court ordered in July 2015 and recommended by Dr. Whitehill in October 2015, the mother did not receive this service until nearly a year later, in September 2016. RP at 84.

Dr. Whitehill could not determine the mother's cognitive ability.⁶ Ex. 77 at 15-16. He recommended a neuropsychological evaluation to

⁶ The trial court erroneously found that Dr. Whitehill concluded that the mother did not have a cognitive impairment. However, substantial evidence does not support this finding because it contradicts both Dr. Whitehill's report and his testimony. In his report, Dr. Whitehill stated that "further information is required" to assess the mother's cognitive abilities. Ex. 77 at 15. In testimony, Dr. Whitehill explained that he recommended a

examine the mother’s “level of comprehension regarding matters of her parenting.” *Id.* at 17. Dr. Whitehill specifically noted that “any and all recommendations that result from this [neuropsychological] evaluation should be followed.” *Id.* However, the mother’s neuropsychological evaluation was not completed until over a year later. It took even longer to implement the services recommended by this report.

Dr. Shepel completed the mother’s neuropsychological evaluation in November 2016. Ex. 78. She found significant issues with the mother’s neurological functioning. The mother displayed a poor ability to concentrate. *Id.* at 13. She had difficulty dividing her attention. RP at 125. She also struggled with executive functioning. RP at 130. Her ability to reason and problem solve “fell within the impaired range.” Ex. 78 at 14. These neurological issues affected her ability to parent. RP at 125, 130.

Dr. Shepel also determined that the mother had a learning disability. Ex. 78 at 15. The mother was capable of learning and retaining information but may not be able to apply learned skills in real-life situations. *Id.* at 14, 16. Dr. Shepel opined that the mother learned best with repetition, multiple reviews, and dividing information into smaller pieces. *Id.* at 14; RP at 144.

neuropsychological evaluation “to more specifically address any cognitive issues that we may have missed in our more cursory assessment.” RP at 454. Given this evidence, a rational and fair-minded person would not have reached the trial court’s finding.

She recommended one-on-one assistance for the mother, as well as role modeling and rehearsal of skills. RP at 149.

Dr. Shepel recommended services to address the mother's mental health issues. Ex. 78 at 16-17. These included a psychiatric evaluation to look at prescribing medication and dialectical behavioral therapy (DBT) group. *Id.* Psychotropic medication would help "stabilize [the mother's] emotional functioning" and "improve her ability to stay on task and focus for longer period of times [sic]." *Id.* at 16. DBT would help the mother "restructure" her "black-and-white thinking, procrastination, [and] avoidant behaviors" and "learn to accept responsibility for her choices." *Id.* Dr. Whitehill agreed. In testimony, he opined that DBT is the "treatment of choice for personality issues." RP at 469.

Despite the importance of these services, the mother had to wait a long time to access DBT group and medication management. She got a psychiatric evaluation and began taking psychotropic medication in July 2017, eight months after Dr. Shepel's report.⁷ The mother also found a DBT group. RP at 598. She started this service in February 2018, fifteen months

⁷ Testimony varied about when exactly the mother began taking psychotropic medication. RP at 92, 592, 628. However, in July 2018, the trial court found that the mother had been taking medication "for approximately one year." T.L. CP at 221, Finding 3.5.13. The mother does not challenge this portion of this finding.

after Dr. Shepel recommended it.⁸ *Id.* This was the first time the mother had complete access to her mental health services, and it occurred a month before trial.

2. By delaying the mother’s mental health services, the state undermined her ability to reunify with her children and failed to meet the requirements of RCW 13.34.180(1)(d).

By failing to provide timely mental health services, the department derailed this case and fell short of the requirements of RCW 13.34.180(1)(d). The trial court did not make written findings about the delays in setting up counseling, medication management, or DBT group. However, the court did find that the one-year delay between the psychological and neuropsychological evaluations was harmless. T.L. CP at 219, Finding 3.4.34. The court found that this delay “did not significantly impact [the mother’s] ability to correct her parental deficiencies because she was engaged in mental health services and parenting education during that time.” *Id.* Substantial evidence does not support this finding for three reasons.

⁸ The trial court erroneously found that the mother was “engaging in DBT therapy [sic]” in December 2017. T.L. CP at 220, Finding 3.4.40. This finding was not supported by substantial evidence. The mother testified that she started DBT group in February 2018. RP at 598. She was the only witness who testified about this; the social worker admitted that he did not help set up this service. RP at 672-73. In its oral ruling, the trial court found that the mother began DBT group in February 2018. RP at 876. Given this evidence, a fair-minded person would conclude that the mother began DBT group in February 2018, just before trial.

First, the court erred by finding that the mother was engaged in mental health services from October 2015 to November 2016. *Id.* Elsewhere in its findings, the trial court found that the mother began mental health services in April 2016. T.L. CP at 221, Finding 3.5.13. This is also in error. Substantial evidence does not support these findings because according to Cynthia Dyrnes, the mother's therapist, she started counseling in September 2016. RP at 84. Nothing in the record suggests that this delay was the mother's fault. Thus, for nearly all of the year between the psychological and neuropsychological evaluations, the mother did not have access to mental health counseling.

Second, the purpose of the neuropsychological evaluation was to determine if the mother comprehended services. Ex. 77 at 17. While it is true that the mother engaged in other services during the year between her evaluations, those services were only useful if she could understand them. Without assessing the mother's cognitive ability, other services were pointless. In fact, the neuropsychological evaluation revealed important information about the mother's cognition. Dr. Shepel determined that the mother had a learning disability and neurological problems affecting her parenting. Ex. 78 at 14-15; RP at 125, 130. As explained below, the department should have tailored services to the mother's cognitive abilities but failed to do so.

Third, the delay in obtaining the neuropsychological evaluation had a cascading effect on this case. Dr. Shepel's evaluation was important in its own right. However, it was also important in order to recommend additional services for the mother. Ex. 78 at 16-17. The year-long delay in obtaining this report was exacerbated by additional delays in implementing its recommendations. The mother did not begin taking prescribed psychotropic medication until July 2017, eight months after Dr. Shepel recommended this service. T.L. CP at 221, Finding 3.5.13. She did not start DBT group until February 2018, a month before trial. RP at 598.

Given this evidence, a rational and fair-minded trier of fact would not conclude that the department's delays were harmless. Instead, she would find that mental health services were critical to correcting the mother's parental deficiencies. A rational trier of fact would find that delaying these services by years undermined the mother's ability to reunify with her children.

S.J. is an instructive case. There, the appellate court reversed termination because the state failed to offer the mother timely services. *S.J.*, 162 Wn. App. at 883-84. The state offered many other services, including parenting education, evaluations, and chemical dependency treatment. *Id.* at 879. However, the state delayed offering mental health services. *Id.* at 881-82. At trial, service providers testified that the mother had not made sufficient progress. Her parenting education provider testified that she

struggled to manage her child’s behaviors in visits and was “unable to recognize [the child’s] emotional needs.” *Id.* at 878. However, the court reversed, holding that the delay in providing services “contributed to the deterioration” of the mother’s relationship with her child. *Id.* at 882. Once the mother received adequate mental health services, she started making progress in other services, such as chemical dependency treatment. *Id.*

Like in *S.J.*, the state undermined the mother’s success in other services by failing to timely address her mental health issues. Also like in *S.J.*, the mother began improving in other services once she received mental health services. For example, the mother significantly improved in counseling once she started taking prescribed psychiatric medication in July 2017. RP at 91. She also started improving her parenting skills. After she began taking medication, the mother participated in parenting instruction with Brenda Sullens from December 2017 to February 2018.⁹ RP at 248, 250. Ms. Sullens testified that the mother made progress with consistency, discipline, and interacting with her children.¹⁰ RP at 254, 257, 274-75, 258-59, 269.

⁹ The trial court erroneously found that the mother engaged in “hands on parenting” with Ms. Sullens, starting in December 2017. T.L. CP at 220, Finding 3.4.40. However, the actual service was Family Preservation Services. RP at 248.

¹⁰ The trial court erroneously found that the improvement in visits was due to reducing the number of children present from four to two. T.L. CP at 222, Finding 3.5.23. Substantial evidence does not support this finding because the professional service provider working with the mother, Ms. Sullens, was in the best position to evaluate whether the

The state delayed the mother’s mental health services for years and then, just as she was beginning to benefit from those services, terminated her parental rights. This “sudden about-face” was “fundamentally unfair,” violating due process as well as RCW 13.34.180(1)(d). *B.P.*, 186 Wn.2d at 320; *S.J.*, 162 Wn. App. at 884 (terminating the mother’s rights after she “awaited delayed services” was “fundamentally unfair in a constitutional due process context”). As explained below, the state cannot rectify this error by arguing that these services were “futile.” The trial court must be reversed because its findings do not support the conclusion that the state offered the mother timely services. *See S.J.*, 162 Wn. App. at 883-84; *B.P.*, 186 Wn.2d at 319-20; *T.L.G.*, 126 Wn. App. at 203.

B. The State Failed to Tailor Services to the Mother’s Needs.

The state also failed to tailor services to the mother’s needs. The department knew from her neuropsychological evaluation that the mother had mental health issues and a learning disability. RP at 125, 130; Ex. 78 at 13-15. This evaluation also explained how to present information so that the mother could learn effectively. Ex. 78 at 14. Despite this, there is no evidence that the department informed the mother’s providers of her mental

mother was making progress. According to Ms. Sullens, the mother’s parenting skills improved. RP at 254, 257. A rational trier of fact would agree with this credible witness.

health issues or learning disability, provided them with her evaluation, or ensured that they were qualified to meet her needs.

The state must tailor services offered to the individual parent's needs. *In re Dependency of T.R.*, 108 Wn. App. 149, 161, 29 P.3d 1275 (2001). If a parent has co-occurring problems, the state must provide integrated services to address those problems. *S.J.*, 162 Wn. App. at 882 (reversing termination where the department failed to integrate services to address the mother's co-occurring mental health and substance abuse issues); *In re Welfare of H.W.*, 92 Wn. App. 420, 426, 961 P.2d 963 (1998) (reversing termination where the department failed to integrate services to address the mother's developmental disability). In order to tailor services to a parent's mental health needs, the department must ensure that providers are informed of, and trained to address, those needs. *Matter of I.M.-M.*, 196 Wn. App. 914, 922, 385 P.3d 268 (2016).

For example, in *I.M.-M.*, the court reversed a termination order because the department did not tailor the mother's chemical dependency treatment to her mental health needs. *Id.* The department knew that the mother had a "significant cognitive impairment impacting her ability to succeed" in services. *Id.* Despite this, social workers did not inform the mother's chemical dependency providers of her cognitive limitations. *Id.* Additionally, "none of [the mother's] service providers testified they were trained to work with cognitively disabled persons." *Id.* These untrained,

uninformed providers did not “deploy techniques specific to [the mother’s] impairment.” *Id.* The court held that the department failed to offer the mother “integrated mental health and chemical dependency services.” *Id.*

Here, the mother had two central deficiencies: mental health issues and lack of parenting skills. The two deficiencies were interconnected. According to her neuropsychological evaluation, the mother’s mental health issues affected her ability to focus on multiple children, apply learned parenting skills, remember parenting instruction, and process information quickly during visits. RP at 125, 130; Ex. 78 at 13-14, 16-17. Dr. Shepel also determined that the mother had a learning disability. Ex. 78 at 14, 16. The mother benefited greatly from repetition, multiple reviews, and dividing information into smaller pieces. *Id.* at 14; RP at 144. She learned best through one-on-one assistance, role modeling, and rehearsal of skills. RP at 149.

Despite her co-occurring deficiencies, there is no evidence that the mother’s parenting instructors were informed of her mental health issues or had the training to address them. Two parenting instructors testified at trial. The first, Noel Villarivera, taught Triple-P (Positive Parenting Program) to the mother from August 2016 to February 2017. RP at 195, 197; Ex.s 89-95. Mr. Villarivera suspected that the mother had cognitive issues. RP at 209-10. However, he did not testify that he received the mother’s neuropsychological evaluation and did not seem aware that the mother had

a diagnosed learning disability. *Id.* Mr. Villarivera repeated some classes for the mother, RP at 210, but his testimony displayed a lack of understanding of her needs. He opined that he did not think repeating Triple-P would be helpful because “for the most part” one round is “more than enough” for parents to learn the material. RP at 210. There is no evidence that Mr. Villarivera was trained to work with persons with mental health issues or learning disabilities.

The second parenting instructor, Brenda Sullens, provided two services to the mother during the dependency: Promoting First Relationships (PFR) in 2015 and Family Preservation Services (FPS) from December 2017 to February 2018. RP at 248, 250; Ex. 128. Ms. Sullens did not testify that she received the mother’s neuropsychological evaluation or knew about her learning disability. There is no evidence that Ms. Sullens was trained to address the mother’s needs.

The department knew, from November 2016 onwards, that the mother had mental health issues affecting her parenting skills and a learning disability. Ex. 78 at 13-15. However, like in *I.M.-M.*, there is no evidence that the department shared this knowledge with her parenting instructors. There is no evidence that her providers were trained to work with persons with these diagnoses. Without this knowledge or training, providers were unable to accommodate services to the mother’s needs. By failing to tailor

services for the mother, the state failed to meet the requirements of RCW 13.34.180(1)(d). *See I.M.-M.*, 196 Wn. App. at 922.

C. “Futility” Does Not Excuse the State’s Failure to Offer Services in This Case.

As explained above, the state failed to provide the mother with adequate services. However, a trial court may make a finding that the department has met the requirements of RCW 13.34.180(1)(d) when “the record establishes that [an] offer of services would be futile.” *In re Welfare of C.S.*, 168 Wn.2d 51, 56 n.2, 225 P.3d 953 (2010) (quoting *In re Welfare of M.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510) (2008)). In this case, substantial evidence does not support a finding of futility for two reasons. First, the mother was willing and able to participate in these services. Second, it is fundamentally unfair for the court to assume that the mother cannot parent in the foreseeable future, given the circumstances of this case.

1. Services were not futile because the mother was willing and able to participate.

A service is futile when “a parent is unwilling or unable to participate in a reasonably available service that has been offered or provided.” *Matter of K.M.M.*, 186 Wn.2d 466, 483, 379 P.3d 75 (2016). The burden of proof is on the state. *See S.J.*, 162 Wn. App. at 884. Services “are not futile just because they are not guaranteed to succeed.” *B.P.*, 186 Wn.2d at 322. Instead, “where there is any reasonable possibility of success, the services must be provided.” *Id.*

In this case, the trial court did not explicitly find that additional services would be futile. However, the court found that the mother cannot retain information and is incapable of applying learned parenting skills. T.L. CP at 222, Findings 3.5.22 and 3.5.28. This amounts to a finding that additional services are futile because the mother is unable to benefit from them.

Substantial evidence does not support the trial court's findings because they are based on outdated information. The only evidence that the mother was incapable of applying learned skills came from providers who worked with her *before* she started taking psychotropic medication. *See, e.g.*, RP at 209. These witnesses may have testified credibly about the mother's abilities at that point. However, once she started medication in July 2017, she only worked with two service providers: Cynthia Dyrnes, her therapist, and Brenda Sullens, her parenting skills instructor. Ms. Dyrnes testified that medication significantly improved the mother's functioning. RP at 91. Ms. Sullens testified that the mother's parenting skills were steadily improving. RP at 254, 260, 265. Both providers testified that the mother was capable of making progress. RP at 91, 254, 260, 265.

At the time of the termination trial, the mother remained willing to engage in services. RP at 601. The only providers qualified to testify about her current mental state also said that she was capable of benefiting from

services. RP at 91, 254, 260, 265. Thus, a rational trier of fact would find that parenting services were not futile and should have been provided per RCW 13.34.180(1)(d). *B.P.*, 186 Wn.2d at 321 (holding that the state failed to meet its burden under RCW 13.34.180 when “no witness testified that [the mother] was incapable of benefiting from services”).

2. Services were not futile based on the “foreseeable future” exception.

The trial court also found that the mother is unlikely to be able to parent in the near future. T.L. CP at 223, Finding 3.7.1. This amounts to a finding that services would be futile because the mother cannot learn to parent independently in the foreseeable future. Courts have held that even when the state “inexcusably fails to offer all necessary services, termination may still be appropriate if the service would not remedy the parent’s deficiencies within the foreseeable future.” *K.M.M.*, 186 Wn.2d at 486 (citing *T.R.*, 108 Wn. App. at 164). Substantial evidence does not support a finding of futility in this case, for three reasons.

First, the “foreseeable future” exception does not apply to the mother’s DBT group because this was a court-ordered service.¹¹ This is an

¹¹ The trial court listed the mother’s court-ordered services in its findings, but erroneously neglected to include DBT group, a psychiatric evaluation, and medication management in this list. T.L. CP at 218, Finding 3.4.21. Substantial evidence does not support this finding because the dependency court specifically ordered the mother to “engage in [a] neuropsychological evaluation & *follow recommendations*.” Exhibit 37 at 10 (emphasis added). Dr. Shepel recommended a psychiatric evaluation to assess medication management and a DBT group, among other services. Ex. 78 at 16-17. Thus,

issue of statutory interpretation, reviewed de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). When possible, courts derive legislative intent solely from the statute’s plain language. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Plain language that is not ambiguous does not require construction. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Per RCW 13.34.180(1)(d), the foreseeable future exception only applies to necessary services:

[The department must prove...]

That the services ordered under 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.

RCW 13.34.180(1)(d) (emphasis added). The phrase “foreseeable future” only modifies necessary services and not court-ordered services. *Id.* Thus, this exception does not apply to the mother’s DBT group, and the state was required to provide this service. *Id.* Providing DBT group a month before

a fair-minded trier of fact would conclude that these recommended services were court ordered.

trial does not meet the state’s obligation because the mother must also “have the opportunity to benefit” from this service. *B.P.*, 186 Wn.2d at 316.

Second, even if the “foreseeable future” exception applies, the trial court erred in its interpretation of this phrase. “Foreseeable future” is not defined within the statute. *See* RCW 13.34.180, 13.34.030. If more than one reasonable interpretation exists, the statute is ambiguous, and courts must engage in statutory construction. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). The “foreseeable future” can be measured from different perspectives and is thus open to many reasonable interpretations.¹² Courts do not interpret statutes in a way that would render any statutory language superfluous or nonsensical. *State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014).

Here, the trial court interpreted the “foreseeable future” as a matter of days or weeks. T.L. CP at 220, Finding 3.4.41 and 222, Finding 3.5.29. This interpretation may be consistent with a child’s understanding of time. However, this is not a permissible interpretation of RCW 13.34.180 because it renders the statute nonsensical. *Johnson*, 179 Wn.2d at 546-47. Under the court’s interpretation, the state could delay offering any services to a parent, file a termination petition, and then argue that it met the

¹² Courts have stated that the “foreseeable future” is determined from the child’s point of view. *In re Welfare of Hall*, 99 Wn.2d 842, 851, 664 P.2d 1245 (1983). However, issues of statutory construction are reviewed de novo. *Evans*, 177 Wn.2d at 191.

requirements of RCW 13.34.180(1)(d) because no service could possibly correct the parent's deficiencies within two weeks. Such a result would be preposterous. It would also be "fundamentally unfair," violating due process. *S.J.*, 162 Wn. App. at 884.

The "foreseeable future" should be measured as a reasonable length of time where a motivated and capable parent could succeed. Using this interpretation, substantial evidence does not support the finding that the mother cannot correct her deficiencies within the foreseeable future. Brenda Sullens, the mother's most recent parenting instructor, testified that the mother could have unsupervised visits in as little as two to three months. RP at 263-64. That is in the foreseeable future for this family.

Third, the trial court erred because there was insufficient evidence to conclude that the mother cannot parent within the near future. Ms. Sullens testified that the children could return home to the mother in nine months to a year. RP at 272; T.L. CP at 222, Finding 3.5.27. She testified credibly about the mother's prospects for improvement during the time they worked together. However, Ms. Sullens did not, and could not, testify about how the mother would progress once she received complete mental health services.

B.P. is an instructive case. There, the state delayed attachment services for months. *B.P.*, 186 Wn.2d at 319. It then argued that the mother lacked the emotional skills to benefit from attachment services within the

foreseeable future. *Id.* at 320. The court rejected this argument, holding that no witness testified the mother was “incapable of benefiting from these services.” *Id.* at 321. The state could not rely on the mother’s “*possible* incapacity for attachment work as grounds for termination.” *Id.* at 319 (emphasis in original).

Like in *B.P.*, the state significantly delayed a critical service for the mother. Here, that service was DBT group, the treatment of choice for her mental health issues.¹³ No witness testified that the mother cannot correct her deficiencies within the foreseeable future once she started benefiting from this service. The state cannot rely on the mother’s “possibly incapacity” to benefit from DBT group as grounds for termination. *See B.P.*, 186 Wn.2d at 319.

Given this evidence, a rational trier of fact would conclude that the mother can benefit from further services. It was the state’s obligation to provide those services. Substantial evidence does not support a finding of futility because “testimony that a parent *might* not have the emotional skills or other personality traits necessary to benefit from services does not amount to clear, cogent, and convincing evidence that the services would

¹³ Dr. Shepel recommended a 12-month DBT group for the mother. Ex. 78 at 16-17. However, that does not mean that it would take a year before the mother could parent. Parents with mental illness can and do receive treatment every day. Mental illness alone is not proof of parental unfitness. *T.L.G.*, 126 Wn. App. at 203.

be futile or that the parent's deficiencies are unlikely to be remedied in the near future." *B.P.*, 186 Wn.2d at 322.

VII. CONCLUSION

B.B., the mother, respectfully requests that the Court of Appeals reverse the trial court and vacate the order permanently severing her parental rights. The department failed the mother at every stage of this case, undermining her efforts to reunify with her children. The mother waited years for adequate mental health services and only received them a month before trial. She never received parenting instruction tailored to her mental health needs and learning disability. Just when she started to succeed, the court terminated her rights, finding that further services would be futile. This decision must be reversed.

RESPECTFULLY SUBMITTED this 20th day of November, 2018.



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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 November 20, 2018, I electronically filed a true and correct copy of Appellant's Motion for Accelerated Review via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said documents as indicated below:

Via email to:

James Richardson
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SIGNED in Port Orchard, Washington, this 20th day of
November, 2018.



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