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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of K.J.B.,

A minor child.

**ANSWER TO MEMORANDUM OF AMICI CURIAE
WASHINGTON DEFENDER ASSOCIATION AND LEGAL VOICE**

ROBERT W. FERGUSON
Attorney General

Carissa A. Greenberg
Assistant Attorney General
WSBA #41820
1433 Lakeside Court, Suite 102
Yakima, WA 98902
(509) 575-2468

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I. INTRODUCTION

Amici ask this Court for a blanket rule requiring reversal in every instance in which a trial court does not make specific findings regarding the incarcerated parent considerations in RCW 13.34.180(1)(f). Ignoring civil case law regarding harmless error, *Amici* ask for reversals in every such case, without consideration of the facts and circumstances of the case, the strength of evidence presented by the State, and whether a parent had been incarcerated for one day or one year during a dependency. But nothing in the plain language of the statute changes the well established principle that error without prejudice does not require reversal.

The Court of Appeals decision below does not conflict with other Court of Appeals decisions regarding incarcerated parents. Rather, those opinions agree that a trial court must make the incarcerated parent considerations. The Court of Appeals opinion here merely applied well established law that error without prejudice does not necessarily result in reversal, given the fact that prior to the father's 51-day incarceration, he was at liberty for 640 days, during which he failed to establish a bond with his daughter and failed to remedy his chronic and longstanding methamphetamine addiction due to his sporadic and unsuccessful efforts to engage in his court-ordered services.

The public policy concerns addressed by *Amici* may be implicated in other cases with incarcerated parents, but here the failure to explicitly address the considerations was harmless. This Court should deny review.

II. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Opinion Below Does Not Conflict with *In re Dependency of A.M.M.*

Amici misconstrue *In re Dependency of A.M.M.* to create a conflict with the Court of Appeals decision below that does not exist. The decision below does not, as *Amici* claim, acknowledge a conflict with *A.M.M.*, but rather makes important factual distinctions between the cases which explain why the Court of Appeals decision below is correct.

In *A.M.M.*, the significant issue on appeal was whether the Department of Social and Health Services (Department) and the trial court were required to apply the incarcerated parent considerations when the newly amended statute became effective part-way through the trial to terminate the father's parental rights. 182 Wn. App. 776, 782-90, 332 P.3d 500 (2014). The Court of Appeals found the incarcerated parent considerations applied because the trial court "was required to apply the law in effect at the time of its ruling." *Id.* at 790. The Court of Appeals reversed the trial court's order, reasoning:

[T]he trial court's resolution of the (1)(f) factor was to be *informed by* evidence presented and conclusions reached

regarding the six factors contained in RCW 13.34.145(5)(b). Yet there is no evidence in the record suggesting that the Department presented evidence in an effort to satisfy its burden *or* that the trial court did, in fact, make the findings referenced in the amended subsection

Id. at 787 (emphasis added).

Here, the case below also involves the trial court's failure to explicitly address the incarcerated parent considerations under RCW 13.34.180(1)(f). Consistent with *A.M.M.*, the Court of Appeals found that the incarcerated parent considerations are mandatory. *K.J.B.* at 26 ("The amended statute does not contain an exception to the mandatory language. We therefore will not imply one.")¹ However, the Court of Appeals correctly found that the facts of this case are significantly different than *A.M.M.* In *A.M.M.*, the father was incarcerated for all but one and a half months of the dependency, whereas the father in this case was at liberty for all but the last 51 days. *Compare A.M.M.*, 182 Wn. App. at 780, with *K.J.B.* at 26. Unlike *A.M.M.*, the record in this case included evidence regarding the father's meaningful role (or lack thereof) in his daughter's life and the Department's reasonable efforts to remedy the father's parental deficiencies. *Compare K.J.B.* at 26-27, with *A.M.M.*, 182 Wn.

¹ A copy of the Court of Appeals decision below was attached to the Department's Response to the father's motion for discretionary review as Appendix A. Citations to the state and regional reporters are not available at this time, and citations in this response will refer to the pages of the decision as attached in Appendix A.

App. at 787-90; *see also* RCW 13.34.180(1)(f). After describing the factual differences between this case and *A.M.M.*, the Court of Appeals determined: “Therefore, unlike *A.M.M.*, we conclude that the trial court’s failure to weigh the required considerations was harmless error, which does not require reversal.” *K.J.B.* at 27.

The court’s conclusion was not, as *Amici* argue, a recognition that its holding conflicted with *A.M.M.* *Amici Mem.* at 5. Instead, the Court of Appeals compared the facts of this case with *A.M.M.* and determined that in this case, the trial court’s failure to make the incarcerated parent considerations was harmless error because of the father’s limited incarceration, the fact that once incarcerated he made no effort to play a meaningful role in his daughter’s life, the Department’s efforts to remedy his parental deficiencies, and the lack of evidence that the father’s limited incarceration impacted his case. *K.J.B.* at 26-27. The Court of Appeals did not recognize a conflict with *A.M.M.* because no such conflict exists.

B. The Court of Appeals Correctly Applied the Well Established Doctrine of Harmless Error in This Case, Where There Is No Evidence That the Father’s 51 Day Incarceration Impacted His Ability to Maintain Meaningful Contact with His Daughter, His Required Services, or His Ability to Participate in Court Proceedings

There is no dispute that the trial court was required to make the incarcerated parent considerations in RCW 13.34.180(1)(f) because the

father was incarcerated at the time of the trial to terminate his parental rights. RCW 13.34.180(1)(f). *Amici* incorrectly suggest that the trial court's failure to make these required considerations cannot be harmless and advocate for a blanket rule that is contrary to civil case law.

"Errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party." *In re Marriage of Morris*, 176 Wash. App. 893, 903, 309 P.3d 767 (2013) (quoting *Saleemi v. Doctor's Assocs., Inc.*, 176 Wash.2d 368, 380, 292 P.3d 108 (2013)). The party claiming error must show that his case was materially prejudiced by the error, and absent such proof, the error is harmless. *In re Welfare of M.G.*, 148 Wn. App. 781, 790-91, 201 P.3d 354 (2009); *see also Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991). Here, *Amici* have failed to show how the trial court's error prejudiced the father.

Amici suggest that the trial court's failure to address the incarcerated parent considerations can never be harmless because of the impact incarceration has on the parent. In this case specifically, they argue that the Court of Appeals ignored evidence that the father's incarceration "necessarily impacted" his ability to maintain meaningful contact with his child and his access to services. *Amici Mem.* at 6-7.

Their focus is misplaced. There is no evidence in the record that the facts the Court of Appeals allegedly overlooked prejudiced the father.

Although the Department social worker testified that he does not accept collect calls, he did not provide preaddressed stamped envelopes to the father, and he assumed the father had his contact information, there is no evidence that this prevented the father from calling the Department or sending letters. RP at 193. There is no evidence that once incarcerated the father tried to contact the Department or inquire about his daughter. In fact, the father failed to contact the social worker or inquire about his daughter's wellbeing at all, even via his attorney, despite personally attending trial on the first day and having the opportunity to speak to the social worker at that time. RP at 22-23, 185, 198. Had any evidence to the contrary existed in this case, it was the father's responsibility—not the Department's—to present this rebuttal evidence. No such evidence exists in the record.

Moreover, evidence showed that the father could not have maintained a meaningful relationship with the child once he became incarcerated because he failed to establish a meaningful relationship with her during the significantly longer time he was at liberty. CP at 12 (unchallenged F.F. 1.17); CP at 14 (unchallenged F.F. at 14).

The evidence overwhelmingly demonstrates that there was nothing the Department could have done in the 51 days that the father was incarcerated that would have helped him create a meaningful relationship

with his daughter or conquer his over 15-year methamphetamine addiction, when he had been unable to do so during the 640 days he had been at liberty, with services and visitation available to him. The trial court's failure to explicitly address the incarcerated parent considerations was error, but the error was harmless because the father was not prejudiced by the trial court's omission.

C. Although This Case Includes an Incarcerated Parent, It Does Not Involve Any of the Public Policy Concerns Cited by *Amici*

Amici reference several reports highlighting the impact of incarceration on families and children and the importance of maintaining parent-child attachment once a parent is incarcerated, stating this type of evidence is the reason the legislature enacted Substitute House Bill (SHB) 1284, without citing any authority or legislative history for this representation. *Amici Mem.* at 8-10. Even assuming this evidence is the reason the legislature enacted SHB 1284, these policy concerns are not implicated by the facts of this case.

Here, the father and his daughter were not separated because of the father's incarceration, but rather, because of the father's own inaction. The father was at liberty for 640 days following the filing of the dependency petition and became incarcerated only 51 days before the trial to terminate his parental rights. Ex.1, 7-9; CP at 12 (unchallenged F.F.

1.15). Despite being at liberty, it is undisputed that for the first eight months of his daughter's life, the father intentionally misled the Department about his whereabouts, did not participate in his court-ordered services, and made no attempt to arrange visits with his daughter through the Department or the court. RP at 6-8 (unchallenged F.F. 1.10). He later started visiting as permitted by the dependency court orders but then decided to change his visits so he was visiting only once a week, instead of twice a week. RP at 109.

Similarly, the father's 51-day incarceration did not present any barrier to meaningful contact with his daughter, because he failed to establish a meaningful relationship with her during the previous 640 days during which he was at liberty. CP at 12 (unchallenged F.F. 1.17), 14 (unchallenged F.F. 1.22).

While there may be cases where a parent's incarceration could present damaging effects due to separation and where maintaining contact with an incarcerated parent would likely improve and support parent-child attachment, these policy concerns are not implicated by the facts here.

D. SHB 1284 Did Not Change the Child's Right to a Safe, Stable, and Permanent Home and to a Speedy Resolution of the Proceedings

This Court should not overlook that SHB 1284 did not change the basic and fundamental tenet of child welfare law 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. Significantly, the legislature also did not amend the portion of this statute which provides that a child has “the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” *Id.* And even when undertaking the consideration of whether the parent played a meaningful role in the child’s life, the best interests of the child are still considered. RCW 13.34.145(5)(b); RCW 13.34.180(1)(f).

When interpreting statutes it is the role of the court to “discern and implement the intent of the legislature.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). This is accomplished by looking at the plain meaning of the statute as well as related statutes. *Id.* Where, as here, additional considerations about incarcerated parents are enacted, but do not replace existing law, existing law cannot be said to have changed. In making any assessment of the amendments to RCW 13.34.180(1)(f), the court must consider that K.J.B.’s fundamental right under RCW 13.34.020 to a safe, stable, and permanent home and a speedy resolution of these proceedings is unchanged.

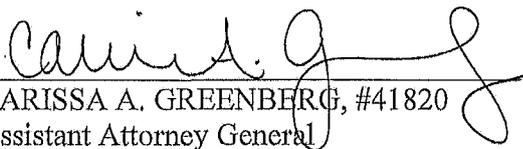
III. CONCLUSION

This Court should deny review. *Amici* advocate for an inflexible rule regarding the incarcerated parent considerations which is contrary to existing civil case law regarding harmless error. The Court of Appeals case below does not conflict with other cases involving the incarcerated parent considerations.

Harmless error is appropriate here, where prior to the father's 51-day incarceration, he was at liberty for 640 days, during which he failed to establish a bond with his daughter and failed to remedy his chronic and longstanding methamphetamine addiction due to his sporadic and unsuccessful efforts to engage in his court-ordered services.

The record contains no evidence that the father had established a bond with the child prior to his incarceration or that his limited incarceration actually impacted his ability to make progress in the dependency. Therefore, the public policy concerns cited by *Amici* are not implicated by the facts of this case.

RESPECTFULLY SUBMITTED this 16th day of September,
2015.


CARISSA A. GREENBERG, #41820
Assistant Attorney General