

ELECTRONICALLY FILED

NO. 91921-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of K.J.B.,
a minor child.

**SUPPLEMENTAL BRIEF OF THE
STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

ROBERT W. FERGUSON
Attorney General

Peter B. Gonick, WSBA 25616
Deputy Solicitor General

Office ID 91087
PO Box 40100
Olympia, WA 98504-0100
360-753-6245
peter.gonick@atg.wa.gov

Carissa A. Greenberg, WSBA 41820
Assistant Attorney General
1433 Lakeside Court, Suite 102
Yakima, WA 98902
509-575-2468
carissag@atg.wa.gov



ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF ISSUE.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT AND AUTHORITY	8
	A. Incarcerated Parent Considerations Are Not Elements Necessary for a Termination of Parental Rights But Merely Factors a Court Must Consider.....	8
	B. The Harmless Error Doctrine Is Well Established in Civil Cases and Child Welfare Cases in Particular.....	11
	C. Any Error Is Harmless Because Weighing the Incarcerated Parent Considerations Would Not Have Affected the Outcome	13
	D. Other Court of Appeals Decisions Addressing Incarcerated Parent Factors Are Distinguishable and Not Controlling Here	18
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Five Corners Family Farmers v. State</i> 173 Wn.2d 296, 268 P.3d 892 (2011).....	10
<i>Ford v. Chaplin</i> 61 Wn. App. 896, 812 P.2d 532 (1991).....	12
<i>In re Dependency of A.C.</i> 123 Wn. App. 244, 98 P.3d 89 (2004).....	14
<i>In re Dependency of A.M.M.</i> 182 Wn. App. 776, 332 P.3d 500 (2014).....	10, 18-19
<i>In re Dependency of K.D.S.</i> 176 Wn.2d 644, 294 P.3d 695 (2013).....	13
<i>In re Dependency of K.N.J.</i> 171 Wn.2d 568, 257 P.3d 522 (2011).....	9
<i>In re Dependency of K.S.C.</i> 137 Wn.2d 918, 976 P.2d 113 (1999).....	9
<i>In re Dependency of M.S.R.</i> 174 Wn.2d 1, 271 P.3d 234 (2012).....	3
<i>In re Dependency of O.J.</i> 88 Wn. App. 690, 947 P.2d 252 (1997), <i>review denied</i> , 135 Wn.2d 1002 (1998).....	12
<i>In re Dependency of P.P.T.</i> 155 Wn. App. 257, 229 P.3d 818 (2010), <i>review granted</i> , 170 Wn.2d 1008 (2010), <i>and dismissed as improvidently granted</i> (Mar. 7, 2011)	13
<i>In re Termination of M.J.</i> 187 Wn. App. 399, 348 P.3d 1265 (2015).....	11, 18-19
<i>In re Welfare of A.B.</i> 168 Wn.2d 908, 232 P.3d 1104 (2010).....	19

<i>In re Welfare of C.B.</i> 134 Wn. App. 336, 139 P.3d 1119 (2006).....	12
<i>In re Welfare of K.J.B.</i> 188 Wn. App. 263, 354 P.3d 879 (2015).....	8, 11, 18
<i>In re Welfare of M.R.H.</i> 145 Wn. App. 10, 188 P.3d 510 (2008), <i>review denied</i> , 165 Wn.2d 1009 (2008), <i>and cert. denied</i> , 556 U.S. 1158 (2009).....	12
<i>Saleemi v. Doctor's Assocs., Inc.</i> 176 Wn.2d 368, 292 P.3d 108 (2013).....	12

Statutes

Laws of 2013, ch. 173, § 4.....	10
RCW 13.34	16
RCW 13.34.020	13
RCW 13.34.145(5)(b)	10, 15
RCW 13.34.180(1).....	8
RCW 13.34.180(1)(f)	9, 14, 16-17, 19
RCW 13.34.190	9
RCW 13.34.190(1)(b)	9

I. INTRODUCTION

K.J.B. is now four years old. Her father, J.B., has a longstanding and very serious drug addiction to methamphetamine. This addiction prevents him from safely parenting his daughter, and despite being offered treatment on multiple occasions, he has failed to correct this parental deficiency. K.J.B., who was nearly two years old at the time of the hearing to terminate parental rights, has never been placed with J.B. and he has not established a bond with her. Since she was one month old, she has lived with the same foster family, who wish to adopt her. All of this is undisputed. Also undisputed is that these facts, the petition to establish dependency, the petition to terminate parental rights, and the scheduling of the hearing to terminate parental rights, all occurred before J.B. was incarcerated. This is because J.B. was incarcerated for only the last two months of a nearly two-year dependency.

Simply put, J.B.'s incarceration had nothing to do with the reasons for the underlying dependency, nothing to do with his failure to address his parental deficiencies despite being offered services, nothing to do with his failure to establish a bond with his daughter, and nothing to do with the petition to terminate parental rights. At the hearing to terminate parental rights, the trial court erred by not explicitly addressing statutorily required considerations regarding incarcerated parents. But that error is harmless

here. This Court should affirm the Court of Appeals and uphold K.J.B.'s right to a stable and permanent home.

II. STATEMENT OF ISSUE

Whether it was harmless error for the trial court to not explicitly address statutorily required considerations regarding incarcerated parents in determining whether continuation of the parent-child relationship clearly diminished the child's prospects for a stable and permanent home where (1) nearly all of the dependency occurred before the parent was incarcerated; (2) the parent made no effort to contact the child after incarceration; (3) the Department had made reasonable efforts to remedy parental deficiencies; and (4) no evidence showed that barriers of incarceration impacted the parent's required assessments, services, or ability to participate in court proceedings.

III. STATEMENT OF THE CASE

K.J.B., the girl whose welfare is the focus of this case, first came to the attention of the Department shortly after her birth due to her mother's drug use and J.B.'s lack of availability or interest. RP 31-33. The dependency proceedings ultimately lasted 691 days—nearly two years—before the hearing to terminate J.B.'s parental rights was held in March

2014.¹ CP 9, 11. For all but the first four days, K.J.B. was placed outside the home. Ex. 3 at 14. K.J.B. has asthma and reactive airway disease, which can be life threatening and requires a nebulizer almost daily. RP 79-80. Her condition also requires her caregivers to be vigilant about odors or other environmental factors such as cigarette smoke or perfume that can set off her asthma. *Id.* Caregivers must watch her breathing carefully because if her breathing shallows she may need urgent medical care. *Id.*

For the first 21 months of dependency proceedings, J.B. was not incarcerated. CP 12 (FF 1.15) (J.B. incarcerated Jan. 24, 2014); Ex. 1 (Dependency Pet. filed Apr. 24, 2012). During that time, J.B. had many opportunities to correct his parental deficiencies, but failed to do so. Initially, J.B. lied to a Department social worker about his drug use and stated that he did not want anything to do with the Department. RP 32-33.

For the next eight months, J.B. intentionally misled the Department about his whereabouts. RP 8; CP 11 (unchallenged FF 1.10).² He did not participate in court-ordered services and made no attempt to arrange visits with K.J.B.³ RP 6-8; CP 11 (unchallenged FF 1.10). During this time, he

¹ K.J.B.'s mother voluntarily relinquished her parental rights. CP 10 (FF 1.2).

² J.B. failed to challenge most of the trial court's findings of fact, which are therefore verities on appeal. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 9, 271 P.3d 234 (2012). These will be referred to as "unchallenged FF."

³ J.B. did live in the home where the child was initially placed for one month, unbeknownst to the Department and in violation of dependency court orders. RP 6, 34, 211-12; Ex. 3 at 17 (K.J.B. in current placement since May 25, 2012).

was actively using methamphetamine. RP 8. In his own words, he “was on drugs” and did not “recall a whole lot from that period of time.” RP 7-8.

Approximately eight months into the dependency, J.B. contacted the Department to inquire about services. CP 11 (unchallenged FF 1.10). He started visiting with K.J.B. twice a week as permitted by dependency court orders but later decided to visit only once a week. RP 109. Although other deficiencies and services to correct them were identified, J.B.’s primary deficiency was his chronic and longstanding drug addiction. *E.g.*, RP 83; CP 13 (unchallenged FF 1.20, 1.21). As uncontested testimony showed, J.B. could not adequately address his other deficiencies before addressing his drug addiction. RP 184.

J.B., who was 31 at the time of trial, admitted that he had been actively using drugs since he was 15 years old except during times when he was incarcerated. RP 8, 24; CP 11 (unchallenged FF 1.11). His drug of choice was methamphetamine. RP 8. Over the course of the dependency, J.B. was not successful in addressing his drug addiction. He acknowledged that he was using drugs throughout the dependency, and his numerous positive urinalysis tests and missed urinalysis tests confirm this.⁴ RP 8, 16-18; CP 12 (unchallenged FF 1.16). As one example, J.B. reported in

⁴ J.B. was ordered to provide random urinalysis testing five times per month since January 2013. He only provided “a few” UAs, some of which were positive. CP 12 (unchallenged FF 1.16).

April 2013, one year after K.J.B. was born, that he was then using methamphetamine three to four days per week. RP 43.

Four times, the Department arranged for J.B. to enter in-patient treatment or intensive out-patient treatment, and each time J.B. either failed to start or failed to complete the treatment. J.B. first participated in a drug and alcohol evaluation on May 6, 2013, about one year after dependency proceedings began. RP 42. The evaluator diagnosed methamphetamine and nicotine addiction, and recommended intensive in-patient treatment. RP 42-43; CP 11 (unchallenged FF 1.12). J.B. failed to show for a treatment bed date, explaining that he was “really busy” and did not see his life as “so dysfunctional that he needed treatment.” RP 45-46; CP 11 (unchallenged FF 1.12). At trial, he explained that he did not show up for this bed date because “[he] was using.” RP 17.

The Department’s second attempt was to arrange an intensive out-patient treatment. CP 11 (unchallenged FF 1.13). J.B. participated in this program in July and August 2013, but left the program due to a self-admitted relapse. *Id.* In consultation with J.B., the Department then made a third attempt, scheduling a bed date for intensive in-patient treatment in September 2013. CP 11 (unchallenged FF 1.14). J.B. did show up and begin treatment, but left after nine days. CP 11-12 (unchallenged

FF 1.14). J.B. later admitted that he had used one day prior to the treatment, and left because he was “uncomfortable with getting sober.” *Id.*

J.B.’s fourth and final attempt to address his drug use began in December 2013. CP 12 (unchallenged FF 1.15). J.B.’s plan was to complete “detox” and then attend in-patient treatment. *Id.* J.B. only stayed at detox for four days and did not enter in-patient treatment. *Id.* He made no further attempts at treatment until he was incarcerated on January 24, 2014. *Id.*

In July or August 2013, J.B. participated in a parenting assessment. CP 12 (unchallenged FF 1.17); RP 120, 168. According to the evaluator, J.B. had some “common sense as far as what parenting is and what you should do.” RP 124. However, the parent-child interaction was concerning. J.B. did not have a bond with his daughter. RP 125; CP 14 (unchallenged FF 1.22). In an observed visitation, J.B. had minimal interaction with K.J.B. because he did not want to “further stress” her. RP 137; CP 14 (unchallenged FF 1.22). The evaluator described J.B.’s bond with his daughter as “distant” and assessed that K.J.B. did not really understand that J.B. was a parent to her. RP 138.

Fifty-one days before the trial to terminate parental rights, and long after the petition to terminate parental rights had been filed, J.B. was

incarcerated due to convictions for unlawful possession of a firearm and possession of a stolen firearm. Ex. 9; CP 12 (unchallenged FF 1.15); CP 312 (petition filed May 8, 2013). He was sentenced to 74 months. Ex. 9; CP 12 (unchallenged FF 1.15). After being incarcerated, J.B. did not contact the social worker or inquire about K.J.B.'s well-being, despite personally attending trial on the first day and having the opportunity to speak to the social worker at that time. RP 22-23, 185. The social worker also did not receive any messages from J.B. via his attorney or by letter once he was incarcerated. RP 198.

Since just one month after her birth, K.J.B. has lived with the same foster family. Ex. 3 at 17; RP 85. Her foster parents have nurtured her and cared for her medical needs, and she considers them parents. *Id.* The foster parents are interested in adopting K.J.B. CP 14 (unchallenged FF 1.25).

At the trial to terminate parental rights, the court heard from numerous witnesses, including J.B., social workers, chemical dependency and parenting counselors, and the guardian ad litem. RP 5, 29, 40, 66, 118, 172, 220. The trial court made numerous findings of fact that are unchallenged on appeal, including that J.B. had a serious drug addiction (CP 11, FF 1.11); that his parental deficiencies had not been corrected (CP 11, FF 1.10); that he has not maintained sobriety for any significant period of time "despite being provide[d] ample time and opportunity to do

so” (CP 13, FF 1.20); that he was unable to provide a safe residence for K.J.B. (*id.*); that he will be incarcerated for up to 74 months and that even after release he will need to complete treatment and maintain sobriety outside of prison (CP 13, FF 1.21); and that he does not have a bond with K.J.B. (CP 14, FF 1.22). The court considered and rejected a guardianship, noting that K.J.B. had been in her current foster placement nearly her entire life and that the foster parents were interested in adoption, not guardianship. CP 14 (unchallenged FF 1.25).

Finding all necessary elements met, the court terminated J.B.’s parental rights. The Court of Appeals affirmed, finding that although the trial court erred by not considering factors regarding incarcerated parents, the error was harmless because there was no evidence that incarceration presented any barriers to J.B., the Department had made reasonable attempts to remedy J.B.’s parental deficiencies, and that once incarcerated J.B. made no efforts to maintain a meaningful role in K.J.B.’s life. *In re Welfare of K.J.B.*, 188 Wn. App. 263, 284-85, 354 P.3d 879 (2015).

IV. ARGUMENT AND AUTHORITY

A. Incarcerated Parent Considerations Are Not Elements Necessary for a Termination of Parental Rights But Merely Factors a Court Must Consider

A trial court may order termination of parental rights if the Department proves the six statutory elements of RCW 13.34.180(1) by

clear, cogent, and convincing evidence.⁵ RCW 13.34.190; *In re Dependency of K.N.J.*, 171 Wn.2d 568, 582, 257 P.3d 522 (2011). The court must also find termination is in the child's best interests. RCW 13.34.190(1)(b). The trial court's decision is entitled to great deference on review, and its findings must be upheld if they are supported by substantial evidence in the record. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

The only issue remaining in this case is the element set forth at RCW 13.34.180(1)(f). *See* Pet. Review at 1. Thus, J.B. concedes that all other elements in support of termination of parental rights have been met. To meet RCW 13.34.180(1)(f), the court must find:

That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. If the parent is incarcerated, the court shall consider whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW 13.34.145(5)(b); whether the department or supervising agency made reasonable efforts as defined in this chapter; and whether particular barriers existed as described in RCW 13.34.145(5)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

⁵ The court must also explicitly or implicitly find current parental unfitness; here the court explicitly found current parental unfitness. CP 14 (unchallenged FF 1.22).

RCW 13.34.180(1)(f). The non-exclusive factors of RCW 13.34.145(5)(b) cross-referenced in the (f) element generally address the limitations of an incarcerated parent in maintaining a relationship with the child and in addressing parental deficiencies.⁶

The language after the first sentence quoted above, and the cross-referenced factors, were added by Laws of 2013, ch. 173, § 4. The plain language of the 2013 amendments does not change the actual element that the Department is required to prove. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (court looks to plain meaning of statute's words). Rather, the added language provides factors that may inform the court as to whether this element is met. *In re Dependency of A.M.M.*, 182 Wn. App. 776, 787, 332 P.3d 500 (2014). The language plainly does not require specific findings by the court, but

⁶ The non-exclusive factors listed are: "(i) The parent's expressions or acts of manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child; (ii) The parent's efforts to communicate and work with the department or supervising agency or other individuals for the purpose of complying with the service plan and repairing, maintaining, or building the parent-child relationship; (iii) A positive response by the parent to the reasonable efforts of the department or the supervising agency; (iv) Information provided by individuals or agencies in a reasonable position to assist the court in making this assessment, including but not limited to the parent's attorney, correctional and mental health personnel, or other individuals providing services to the parent; (v) Limitations in the parent's access to family support programs, therapeutic services, and visiting opportunities, restrictions to telephone and mail services, inability to participate in foster care planning meetings, and difficulty accessing lawyers and participating meaningfully in court proceedings; and (vi) Whether the continued involvement of the parent in the child's life is in the child's best interest." RCW 13.34.145(5)(b).

only “consideration” of the specified factors. *In re Termination of M.J.*, 187 Wn. App. 399, 409, 348 P.3d 1265 (2015).

In this case, the trial court concluded that continuation of the parent-child relationship clearly diminished K.J.B.’s prospects for integration into a stable and permanent home: “The child has no bonding to her father. No permanent setting can be established until the father’s parental rights have been terminated and she is allowed to integrate into her ‘forever home.’” CP 14, 15 (FF 1.23, CL 2.7). The court was aware of J.B.’s incarceration and as discussed below did consider some of the factors listed, but no party referenced the required considerations in argument, and the record does not show a conscious effort by the court to consider all of these factors. Thus, the Court of Appeals concluded that the trial court had not weighed the incarcerated parent considerations. *K.J.B.*, 188 Wn. App. at 284. Nevertheless, this omission should not result in reversal of the termination of parental rights because it was harmless error.

B. The Harmless Error Doctrine Is Well Established in Civil Cases and Child Welfare Cases in Particular

The Court of Appeals properly found that the trial court’s failure to weigh the considerations regarding incarcerated parents was harmless error. *K.J.B.*, 188 Wn. App. at 284-85. As recently stated by this Court, “[i]t is well established that errors in civil cases are rarely grounds for

relief without a showing of prejudice to the losing party.” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013) (citing numerous cases); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (party claiming error must show that her case was materially prejudiced or the error is considered harmless).

Lest there be any doubt that this doctrine is applicable to proceedings to terminate parental rights, Washington courts have upheld terminations of parental rights on numerous occasions where an alleged error would not have affected the outcome. *E.g.*, *In re Welfare of C.B.*, 134 Wn. App. 336, 347, 139 P.3d 1119 (2006) (affirming despite insufficient evidence to support a finding of fact because “error without prejudice is no basis for reversal”); *In re Welfare of M.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510 (2008) (even in situations where the Department “‘inexcusably fails’ to offer services,” a termination of parental rights will be upheld if the services would not have remedied parental deficiencies in the near future), *review denied*, 165 Wn.2d 1009 (2008), *and cert. denied*, 556 U.S. 1158 (2009); *In re Dependency of O.J.*, 88 Wn. App. 690, 696, 947 P.2d 252 (1997) (upholding termination despite failure to appoint guardian ad litem as required by statute where party had not raised issue at trial court and the “testimony is so strong that we are confident that a guardian ad

litem would have reached the same conclusion as the therapists and the court”), *review denied*, 135 Wn.2d 1002 (1998).

The harmless error doctrine is important in any case to prevent unnecessary use of judicial resources, encourage finality, and to recognize that virtually no trial is perfect. But it is even more important in child welfare cases, because a child’s right to basic nurturing includes “the right to a safe, stable, and permanent home and a speedy resolution of [a dependency and termination] proceeding[.]” RCW 13.34.020.

C. Any Error Is Harmless Because Weighing the Incarcerated Parent Considerations Would Not Have Affected the Outcome

In his pleadings to date, J.B. has offered no inkling of how consideration of incarcerated parent factors could have affected the outcome in his case. Nor could he. Broadly speaking, in a case such as this where adoption was available, the key consideration in determining whether the parent-child relationship clearly diminishes a child’s prospects of integration into a stable and permanent home is the *legal* relationship between the two.⁷ *In re Dependency of P.P.T.*, 155 Wn. App. 257, 268, 229 P.3d 818 (2010), *review granted*, 170 Wn.2d 1008 (2010), and *dismissed as improvidently granted* (Mar. 7, 2011). This is because the

⁷ An alternative basis for satisfying RCW 13.34.180(1)(f), not alleged here, is that the parent-child relationship itself is destabilizing for the child, regardless of whether there is any prospect for adoption in the future. *E.g.*, *In re Dependency of K.D.S.*, 176 Wn.2d 644, 659, 294 P.3d 695 (2013).

legal parent-child relationship is an obstacle to adoption. *In re Dependency of A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004). Consideration of the incarcerated parent factors in this case would not change that analysis.

The incarcerated parent factors are: (1) whether J.B. maintained a meaningful role in his child's life; (2) whether the Department made "reasonable efforts"⁸; and (3) whether incarceration created particular barriers in the dependency. RCW 13.34.180(1)(f). Even if the trial court had explicitly addressed these factors, it would not have changed the correct decision of the trial court that the legal parent-child relationship clearly diminished the prospects for K.J.B. to be adopted into a permanent home. The trial court reasoned that at age two, K.J.B. will be more easily integrated into a new family now rather than if the process is delayed, that K.J.B. had no bond with J.B., and that no permanent setting could be established until parental rights had been terminated. CP 14 (FF 1.23). In this case, then, whether J.B. maintained a meaningful relationship with the child, whether the Department had made reasonable efforts, and whether J.B.'s incarceration created any barriers would not affect the court's analysis of the *legal* parent-child relationship diminishing K.J.B.'s prospects for adoption.

⁸ "Reasonable efforts" is undefined; its meaning is addressed below.

Even if the incarcerated parent considerations could have impacted the court's analysis, the facts of this case, in which J.B. was incarcerated for only the last two months of a nearly two-year dependency, show that any error is harmless.

The first consideration is whether J.B. maintained a meaningful role in K.J.B.'s life, considering factors relating to incarceration set forth at RCW 13.34.145(5)(b). Those factors include the parent's efforts to maintain contact with the child despite incarceration, the parent's efforts to work with the Department to comply with services, and obstacles due to incarceration in accessing services, visiting with the child, and maintaining contact with the Department. RCW 13.34.145(5)(b). Here, the trial court determined that J.B. had no bond with K.J.B., but it was not incarceration that led to the failure to create a bond. Rather, it was J.B.'s actions prior to incarceration. As discussed above, he avoided the Department for the first eight months of dependency, reduced visitation from twice a week to once a week, and was actively using methamphetamine throughout the dependency. Evaluators testified that he had no bond with K.J.B. based on observations before incarceration. Once incarcerated, he made no effort to contact K.J.B. or even to inquire about her well-being. It is pure and improbable speculation that J.B. could have improved his bond with K.J.B. after being incarcerated, and even if

he had, it would not have changed the conclusion that severance of the parent-child relationship allowed K.J.B. a chance to be adopted. Failure to explicitly consider the impact of incarceration on whether J.B. maintained a meaningful relationship with K.J.B. did not prejudice J.B.

The second consideration is whether the Department made “reasonable efforts.” RCW 13.34.180(1)(f). Although “reasonable efforts” is not defined, other parts of RCW 13.34 require reasonable efforts to provide services to eliminate the need for out-of-home placement of the child, which is also consistent with federal law. *See* Resp. Mot. Accelerated Review 40-43. Even if “reasonable efforts” in this context refers to services while a parent is incarcerated, failure to consider the “reasonable efforts” is harmless. Here, the trial court specifically found, and it is unchallenged in review to this Court, that the Department had provided all necessary and reasonably available services capable of correcting parental deficiencies within the foreseeable future. CP 10, 15 (FF 1.9, CL 2.5).

J.B.’s primary parental deficiency is his sixteen-year long, chronic methamphetamine use. Four times the Department arranged for intensive substance abuse treatment, and four times J.B. failed to complete the treatment. The trial court heard testimony that incarceration might assist in J.B. maintaining sobriety, but that intensive treatment would still be

necessary upon release from custody. RP 85-86; CP 13 (unchallenged FF 1.21). Thus, even if J.B. were released from incarceration today, it would be at least seven months before he completed drug treatment, and only then could he begin to form a bond with K.J.B. and address his other parenting deficiencies. *Id.* And J.B. himself testified that despite being “clean” after prior incarcerations, he had relapsed immediately after release. RP 14. Given that the trial court found that the “near future” for K.J.B. was “a few months, not years,” that J.B. had been sentenced to 74 months incarceration, CP 13 (unchallenged FF 1.21), and that it would be at least seven months after release for J.B. to address his methamphetamine addiction, whether or not the Department had made reasonable efforts to provide services to J.B. during his two months of incarceration would not change the outcome. Thus, failure to engage in any additional consideration of the Department’s “reasonable efforts” in light of J.B.’s incarceration, even if required, did not prejudice J.B.

The third consideration is whether incarceration presented particular barriers to accessing services, visiting with the child, and otherwise participating in the dependency. RCW 13.34.180(1)(f). While not explicitly acknowledging all of the factors required by statute, the trial court was aware of the incarceration and considered the barriers J.B.’s incarceration posed. Specifically, the court noted that J.B.’s incarceration

would not allow him to complete services in the near future because he would need to establish sobriety after his release. CP 13 (unchallenged FF 1.21). More importantly, 640 days of this 691-day dependency proceeding occurred prior to J.B.'s incarceration, and during that time J.B. either actively avoided attempting to address his deficiencies and establishing a bond with his daughter, or failed in doing so. As the Court of Appeals held, "there is no evidence that the barriers of incarceration impacted J.B.'s . . . required assessments, services, or his ability to participate in court proceedings." *K.J.B.*, 188 Wn. App. 285.

D. Other Court of Appeals Decisions Addressing Incarcerated Parent Factors Are Distinguishable and Not Controlling Here

J.B. fails to argue that the trial court's error caused any prejudice, or to provide a rationale for why harmless error should not apply here. Instead, J.B. relies on two Court of Appeals opinions that reversed terminations of parental rights where the trial court had not weighed the incarcerated parent considerations. Mot. Discr. Review at 8-10 (citing *A.M.M.*, 182 Wn. App. 776; *M.J.*, 187 Wn. App. 399). Each of those cases is factually distinguishable. Unlike here, those cases involved parents whose lengthy incarceration during the dependency could have impacted the result. *A.M.M.*, 182 Wn. App. at 780 (father sentenced to 43 months in prison and incarcerated for all but the first month and one-half of

dependency); *M.J.*, 187 Wn. App. at 402 (mother sentenced to 123 months in prison and incarcerated for all of dependency).

Moreover, neither case addressed the harmless error doctrine. In *M.J.*, the court first established that the legislature did not require trial court findings regarding incarcerated parent considerations, but merely that they be considered. *M.J.*, 187 Wn. App. at 409. The court did not address harmless error, although it noted that it could not affirm because the case before it was not one where “the evidence is uncontested or the State’s case is very strong[.]” *Id.* at 409-10. Similarly, the court in *A.M.M.* did not address harmless error. Rather, the *A.M.M.* court applied the rationale that this Court previously used to determine whether a court may infer a missing finding: “in order to imply or to infer a missing finding, all the facts and circumstances in the record must clearly demonstrate that the omitted finding was actually intended.” *A.M.M.*, 182 Wn. App. at 788 (citing *In re Welfare of A.B.*, 168 Wn.2d 908, 921, 232 P.3d 1104 (2010)).

There are two problems with the approach endorsed by *A.M.M.* First, the plain language of the statute does not require any findings at all. RCW 13.34.180(1)(f); *M.J.*, 187 Wn. App. at 409. Thus, there are no intended “findings” to infer. Second, a key component of the *A.B.* Court’s analysis was that the finding at issue, that a parent is currently unfit, was constitutionally required by the due process clause. *A.B.*, 168 Wn.2d at

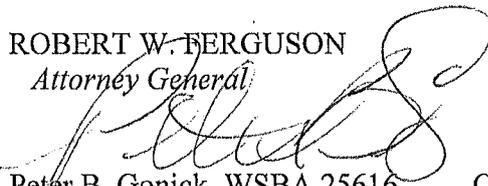
918. Here, by contrast, the trial court made all constitutionally required findings. CP 14-15. Weighing the incarcerated parent considerations would not have changed the outcome, and this Court should affirm.

V. CONCLUSION

The 2013 amendments to child welfare statutes were enacted as a shield to protect incarcerated parents who face unique circumstances affecting their ability to reunify with their dependent children. Here, J.B. seeks to use his incarceration not as a shield but as a sword to prevent K.J.B. from achieving a permanent and stable home, when the record conclusively shows that the reasons for the dependency and termination did not result from J.B.'s incarceration. J.B.'s deficiencies—and his failure to correct them—occurred before his incarceration. This Court should affirm the Court of Appeals and provide K.J.B. with the long-delayed stability and permanence to which she is entitled.

RESPECTFULLY SUBMITTED this 8th day of April 2016.

ROBERT W. FERGUSON
Attorney General


Peter B. Gonick, WSBA 25616
Deputy Solicitor General

Office ID 91087
PO Box 40100
Olympia, WA 98504-0100
360-753-6245
peter.gonick@atg.wa.gov

Carissa A. Greenberg, WSBA 41820
Assistant Attorney General

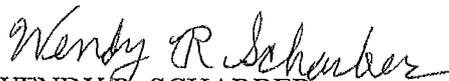
1433 Lakeside Court, Suite 102
Yakima, WA 98902
509-575-2468
carissag@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Supplemental Brief Of The State Of Washington to be served via electronic mail on the following:

Kristina M. Nichols
Jill Reuter
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
wa.appeals@gmail.com
jillreuterlaw@gmail.com

DATED this 8th day of April 2016, at Olympia, Washington.


WENDY R. SCHARBER
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: Greenberg, Carissa (ATG); Sanchez, Collien (ATG); ATG MI RSD YAK Appeals;
wa.appeals@gmail.com; jillreuterlaw@gmail.com; lillian@defensenet.org;
dward@legalvoice.org
Subject: RE: In re the Welfare of K.J.B.

Rec'd 4/8/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Friday, April 08, 2016 2:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Greenberg, Carissa (ATG) <CarissaG@ATG.WA.GOV>; Sanchez, Collien (ATG) <CollienN@ATG.WA.GOV>; ATG MI RSD YAK Appeals <rsdyakappeals@atg.wa.gov>; wa.appeals@gmail.com; jillreuterlaw@gmail.com; lillian@defensenet.org; dward@legalvoice.org
Subject: In re the Welfare of K.J.B.

Sent on behalf of: Peter B. Gonick, Deputy Solicitor General WSBA 25616
360-753-6245 : peter.gonick@atg.wa.gov

In re the Welfare of K.J.B. Cause No. 91921-6

Supplemental Brief Of The State Of Washington, Department of Social And Health Services

Wendy R. Scharber
360-753-3170 : wendyo@atg.wa.gov