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No. 72421-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In Re the Dependency of: D.L.B.

Edelyn Saint-Louis,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF/MOTION FOR ACCELTRATED
REVIEW

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A. INTRODUCTION

In 2013, Washington changed the law as to the rights of incarcerated parents. One change was to require a court hearing on a termination petition to consider additional factors for incarcerated parents. During the dependency of her son, Edelyn Saint-Louis was incarcerated for about eight months. While incarcerated, the Department of Social and Health Services did not offer services or visitation opportunities. Shortly before the termination trial, Ms. Saint-Louis was released. She reengaged in services and visited her son. Despite Ms. Saint-Louis's recent incarceration and the change in the law, the trial court did not consider the additional mandatory factors when it terminated Ms. Saint-Louis's parental rights. When the trial court fails to consider these factors, the Department fails to meet its burden of proof, requiring reversal. In re Dependency of A.M.M., 182 Wn. App. 776, 332 P.3d 500, 507 (2014). Because the trial court erred in this respect, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. In terminating Ms. Saint-Louis's parental rights, the trial court failed to comply with its duty under RCW 13.34.180(1)(f) to consider the additional factors affecting the rights of incarcerated parents.

2. The Department failed to meet its burden to prove the requirements necessary for termination.

3. The court erred in finding that the required services were provided to Ms. Saint-Louis. FF 2.1 (CP 349); FF 3.31 (CP 355).

4. The court erred in finding that there was little likelihood that the conditions that caused the child to be removed will be remedied such that he could be returned in the near future. FF 2.32 (CP 355).

5. The court erred in finding that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. FF 2.33 (CP 356).

6. The court erred in determining that Ms. Saint-Louis was unfit to parent the child. FF 2.38 (CP 356).

7. The court erred in finding that termination was in the best interests of the child. FF 2.39; CL 3.2 (CP 356).

8. The court erred in concluding that the requirements for termination were proved by clear, cogent, and convincing evidence. CL 3.3 (CP 356).

9. The trial court erred in finding that the facts established in the dependency order were proven by clear, cogent, and convincing evidence. FF 2.4; CL 3.3 (CP 349, 356).

10. The trial court erred in finding that the termination trial occurred in 2013 rather than 2014. FF 1.1 (CP 348).

11. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.6. (CP 352).

12. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.7. (CP 352).

13. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.8. (CP 352).

14. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.9. (CP 352).

15. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.11. (CP 353).

16. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.14. (CP 353).

17. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.15. (CP 353).

18. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.16. (CP 353).

19. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.17. (CP 353).

20. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.18. (CP 354).

21. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.20. (CP 354).

22. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.21. (CP 354).

23. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.22. (CP 354).

24. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.23. (CP 354).

25. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.24. (CP 354).

26. Misquoting an exhibit, the trial court erred in entering Finding of Fact 2.25. (CP 354).

27. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.26. (CP 355)

28. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.27. (CP 355).

29. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.28. (CP 355).

30. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.29. (CP 355)

31. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.31. (CP 355).

32. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.32. (CP 355).

33. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.34. (CP 356).

34. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.35. (CP 356).

35. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.36. (CP 356).

36. Lacking substantial evidence, the trial court erred in entering Finding of Fact 2.40. (CP 356).

C. ISSUES

1. Under the law expanding the rights of incarcerated parents, RCW 13.34.180(1)(f) now requires that the court consider additional factors before termination if the parent “is incarcerated.” Under the rules of statutory interpretation, words in statutes must be read in context and in a manner to avoid absurd results. Does this provision apply to parents like Ms. Saint-Louis, who though not incarcerated at the time of the court’s decision, was incarcerated during the dependency?

2. Before termination, the Department must satisfy its burden of proof as to all of the requirements for termination. The trial court must also apply the law in effect. The Department did not argue or present evidence that related to the law concerning incarcerated parents under RCW 13.34.180(1)(f). And the court, as shown by its oral and written rulings, did not consider the law in effect under RCW 13.34.180(1)(f). Did the Department fail to meet its burden of proof?

3. Before termination, the Department must prove that all court ordered services and all other necessary services were provided. Court ordered services were not provided to Ms. Saint-Louis while she was incarcerated. The Department did not prove that these services were unavailable in the facility where Ms. Saint-Louis was serving her sentence. Did the Department fail to meet its burden on this element?

4. Before termination, the Department must prove that the parent is currently unfit to parent the child. The Department must also prove that the parent will not be fit in the near future. Ms. Saint-Louis completed most of the services. She had remedied the purported parental deficiencies related to substance abuse, mental health, and being a victim of domestic violence. She already had adequate parenting skills and had completed part of the recommended parenting education course. Did the Department

fail to prove that Ms. Saint-Louis was currently unfit or would not be fit in the near future?

D. STATEMENT OF THE CASE

D.B., a boy, was born on November 1, 2008. CP 349 (FF 2.3). His mother is Edelyn Saint-Louis. CP 348 (FF 1.2). Ms. Saint-Louis is a survivor of domestic violence. RP 177. Growing up, domestic violence was common in her family. Ex. 9 at 3. For example, as a child, she witnessed her stepfather hit her mother. RP 58-59. Unfortunately, D.B.'s father, Kendrick Bryant,¹ was also a perpetrator of domestic violence. RP 30, 59-60. In one instance, he threw D.B. at her. RP 30, 32. She called the police. RP 494. Ms. Saint-Louis last saw Mr. Bryant in Chicago in 2010 when she and D.B. were staying with D.B.'s paternal aunt, Chanae Rogers. RP 30, 491-92. After repeated acts of domestic violence perpetrated by Mr. Bryant against her, Ms. Saint-Louis left Chicago and returned to Washington. RP 494, 497, 502-03. A no-contact now order forbids Mr. Bryant from contacting Ms. Saint-Louis or D.B. RP 32. As part of her recovery, Ms. Saint-Louis completed a twelve-week domestic violence support group program in late 2011. RP 59; Ex. 34.

¹ Mr. Bryant did not participate in the case. His parental rights were terminated by default. CP 130; 7/28/14RP 21.

Around January 2012, Ms. Saint-Louis was living in an apartment operated by the YWCA (Young Women's Christian Association). See Ex. 9 at 2-3. The Department received a report concerning possible domestic violence by Ms. Saint-Louis's then boyfriend, Martell Thomas. Ex. 1 at 2; RP 90. Because Mr. Thomas had broken a window in Ms. Saint-Louis's apartment unit, the YWCA asked Ms. Saint-Louis to leave. Ex. 9 at 2.

In February 2012, Ms. Saint-Louis was preparing to move while D.B. was asleep. RP 159. Letting D.B. sleep, she ran to the nearby storage unit about a block away. RP 159-60; Ex 9 at 2. YWCA staff found D.B. in the apartment, unsupervised. Ex. 9 at 2. Police arrested Ms. Saint-Louis for leaving D.B. unattended and took D.B. into protective custody. Ex 1 at 2; Ex. 9 at 2. D.B. was placed out of his mother's care under a 30-day voluntary placement agreement. Ex. 1 at 2.

Ms. Saint-Louis was not charged with any crime in relation to leaving D.B. momentarily. RP 160. Ms. Saint-Louis moved back to her mother's home. RP 34; Ex. 9. Ms. Saint-Louis's three younger sisters, ages 18, 14, and 9, also lived there. Ex. 10 (service summary) at 2. Preparing for D.B. to come home to her, Ms. Saint-Louis participated in the Homebuilders program, which is an intensive family preservation service program. RP 99; Ex. 9. The first Homebuilder's report, dated March 23, 2012, recommended that it would be safe for D.B. to return to

his mother's care at the maternal grandmother's home based on Ms. Saint-Louis's willingness to participate in services, such as domestic violence treatment. Ex. 9 at 4.

Homebuilders closed the case on March 12th, however, because D.B was not returned home. Ex. 9 at 3; RP 119. By contract, Homebuilders closes its cases unless the child is returned within seven days. RP 120. The Department filed its dependency petition on March 9th, 2012. CP 349 (FF 2.3). Shortly thereafter, on March 15th, the court ordered D.B. returned to Ms. Saint-Louis upon conditions. Ex. 31 at 5; RP 121. Ms. Saint-Louis was to abide by an IFPS (Intensive Family Preservation Services) contract, not allow men in the home, and not have contact with Mr. Bryant or Mr. Thomas. Ex. 31 at 5-6; RP 121.

Ms. Saint-Louis then participated in a second Homebuilder's placement effort. RP 123; Ex. 10. D.B.'s overall well-being was assessed as positive by Homebuilders. Ex 10 at 4. In late April, Homebuilders closed the case early because Ms. Saint-Louis did not appear for all her sessions. RP 127. The social worker for the Department, Chris Luedtke, then had D.B. placed in foster care. Ex. 10 (service summary) at 5. He was concerned about "the adequacy of the placement with [the maternal grandmother]." Ex. 10 (service summary) at 5. Contrary to the order of

dependency, the record shows that D.B. was not placed in foster care at Ms. Saint-Louis's request. Ex. 10 (service summary) at 5; RP 42, 46.²

The court found D.B. dependent as to his mother on May 11, 2012. Ex. 1 at 12.³ The court ordered that Ms. Saint-Louis participate in a drug/alcohol evaluation, submit to drug testing through random urinalysis ("UAs") two times per week, undergo a psychological evaluation with a parenting component, complete a domestic violence support group program, participate in the intensive family preservation services program, and follow recommendations from these programs. CP 352 (FF 2.5); Ex. 1 at 9-10, 12. Although the Department had recommended parenting classes and mental health counseling, the court rejected these service requirements. Ex. 1 at 9-10.

² The trial court's findings that D.B. was returned to foster care at the mother's request and due to her mental health are not supported by substantial evidence. CP 352 (FF 2.6); CP 353 (FF 2.14).

³ In the termination order, the court incorporated findings from the dependency order. CP 349-352 (FF 2.4). The court also entered a conclusion of law stating that the "foregoing findings of fact . . . have been proven by clear, cogent and convincing evidence unless otherwise noted." Finding of Fact 2.4 is not "otherwise noted." A finding of dependency need only be supported by a preponderance of the evidence. In re Dependency of Schermer, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). Because the dependency findings were only proven by a preponderance of the evidence, the court erred in ruling they were established by clear, cogent, and convincing evidence. This Court should disregard these findings.

After D.B.'s removal, Ms. Saint-Louis moved in with a friend in Seattle. RP 61. The initial progress review order, dated July 12, 2012, recounts that Ms. Saint-Louis visited D.B. on a regular basis. Ex. 3 at 6. The order notes that the Department was only in partial compliance and that there had been a "lapse" by the first social worker. Ex. 3 at 5. Ms. Saint-Louis was deemed to have not made progress "[d]ue to a lapse in referrals and a need for bus tickets." Ex 3. at 5. The court ordered the Department to provide bus tickets or an ORCA card to Ms. Saint-Louis. Ex. 3 at 10.

Ms. Saint-Louis submitted to a chemical dependency assessment in late July 2012 at Sound Mental Health. Ex. 13. She reported having migraines, which related to a brain injury inflicted upon her in 2009 in a domestic violence incident. Ex. 13. She admitted to using marijuana and tobacco. Ex. 13. Ms. Saint-Louis stated she took medicine prescribed to address her bipolar condition. Ex. 13. Ms. Saint-Louis also reported having a learning disorder. Ex. 13.

Ms. Saint-Louis underwent psychological and parenting evaluations by Dr. Steven Tutty in October 2012. Ex. 16 at 1. She told Dr. Tutty she had been in special education classes in school. RP 531. Ms. Saint-Louis, who had a learning disorder and had been provided special accommodations in the past for other tests, had difficulty taking

the written tests. RP 527-29. She did not understand all the questions. RP 528. Based largely on these tests, Dr. Tutty's opinion on Ms. Saint-Louis was mostly negative. See Ex. 16.⁴ He recommended psychiatric treatment; completion of a drug and alcohol evaluation; consultation with a medical provider to explore additional psychotropic medicines targeted at her bipolar disorder; parenting education, specifically the Incredible Years program; and participation in a domestic violence support program. Ex. 16 at 15.

Despite his largely negative opinion, Dr. Tutty's observation of D.B. and Ms. Saint-Louis was positive. Ex. 16 at 12-13. He saw that Ms. Saint-Louis was attentive to D.B.'s safety, needs, and interests. Ex. 16 at 12. Her general behavior was warm and affectionate. Ex. 16 at 12. She read to D.B. and asked him questions. Ex. 16 at 12-13. D.B. interacted warmly with his mother and did not present any behavioral issues. Ex. 16 at 12-13. Dr. Tutty also recounted that Ms. Saint-Louis strongly desired reunification and that there was a reciprocal bond between mother and son. Ex. 16 at 13.

⁴ Dr. Tutty opined that it was unlikely that Ms. Saint-Louis could "remediate her psychological and parenting skill deficits in the timeframe established for permanency in the foreseeable future." Ex 16 at 15. The related finding misquotes this statement. CP 354 (FF 2.25).

In early November 2012, Ms. Saint-Louis participated in an intensive 28-day inpatient alcohol/drug treatment program at Recovery Centers of King County (RCKC) Detoxification Facility. FF 2.10 (CP 353); Ex. 15. She completed the treatment and was discharged on December 5, 2012. FF 2.10 (CP 353); Ex. 15, 32. She then attended an outpatient program at Sound Mental Health, which was completed in April, 2013. FF 2.10 (CP 353); Ex. 33. As part of this program, Ms. Saint-Louis also attended AA (Alcoholics Anonymous) and NA (Narcotics Anonymous) meetings. RP 276.

The permanency planning hearing order, dated December 20, 2012, recounted that Ms. Saint-Louis was in compliance and had made progress toward correcting the problems that necessitated the child's placement in out-of-home care. Ex. 4 at 5. The order stated that Ms. Saint-Louis would need to submit to random urinalysis, connect with a domestic violence advocate, and complete recommendations from the psychological evaluation. Ex. 4 at 5. The order recounted only partial compliance by the Department. The court noted that it had "questions regarding what referrals have been made and the SW [social worker] failed to appear at Court." Ex. 4 at 5. The court ordered the Department to refer Ms. Saint-Louis to the Incredible Years program and for random urinalysis within seven days. Ex. 4 at 10.

The Department referred Ms. Saint-Louis to the Incredible Years program, but Ms. Saint-Louis was unable to begin because the program did not have enough students yet. RP 70, 281, 414-15. She was told to wait. RP 70. Although other suitable parenting programs existed, the Department did not refer Ms. Saint-Louis to these programs. RP 282, 417-18, 441. In May 2013, shortly before the review hearing, the Department referred Ms. Saint-Louis to the Incredible Years program again. Ex. 20. Ms. Saint-Louis began the program. RP 71, 282.

The review hearing order, dated May 30, 2013, found that Ms. Saint-Louis was in compliance with all services except that she had not attended parenting education and had missed five urinalysis tests. Ex. 5 at 5. At some point Ms. Saint-Louis completed a domestic violence support program on her own. RP 339. Ms. Saint-Louis was still visiting D.B. on a regular basis. Ex. 5 at 6. The court added an additional service, mental health counseling. Ex. 5 at 9.

Also in May 2013, Ms. Saint-Louis made a mistake and sipped some champagne at her cousin's wedding. RP 62-63; 426-27. As a result, she had one positive urinalysis for alcohol. This was a wakeup call for Ms. Saint-Louis and she enrolled in a relapse prevention program to ensure her sobriety. RP 75, 427. Ms. Saint-Louis produced clean test results afterwards. RP 425.

In July 2013, Ms. Saint-Louis got into a car accident. RP 63. Scared, she drove away. RP 63. She was charged with hit and run, vehicular assault, and taking a motor vehicle without permission. RP 63; Ex. 21, 22. She was in jail for about a month and was then released to CCAP (Community Center for Alternative Programs),⁵ an alternative to prosecution, in August. RP 63-64, 394. Around October, Ms. Saint-Louis left the area due to a family medical emergency and forgot to get a doctor's verification of the emergency. RP 64. She missed a court date and a warrant was issued for her arrest. RP 394. She was arrested in November. RP 64. She pleaded guilty to the charges. Ex. 21, 22. She also pleaded guilty to two counts of attempted forgery stemming from an incident in February 2013 when Ms. Saint-Louis cashed a check for a friend that she did not know was fake.⁶ Ex. 25; RP 92, 532, 535.

⁵ "CCAP, formerly Day Reporting, holds offenders accountable to a weekly itinerary directed at involving the offender in a continuum of structured programs. The goal of CCAP is to assist offenders in changing those behaviors that have contributed to their being charged with a crime. CCAP provides on-site services as well as referrals to community-based services. Random drug tests are conducted to monitor for illegal drug use and consumption of alcohol. Offenders participating in CCAP receive an individual needs assessment and are scheduled for a variety of programs." http://www.kingcounty.gov/courts/detention/community_corrections/programs.aspx (last accessed January 23, 2015).

⁶ Contrary to Finding of Fact 2.23, the record does not show that Ms. Saint-Louis was arrested for forgery in April 2013.

Ms. Saint-Louis was incarcerated from November 2013 to June 2014, about eight months. RP 80. During this time, while she wanted to visit D.B., she did not see him. RP 82-84, 287, 306. D.B. did not know his mother was incarcerated. RP 163. While jailed, no one from the Department visited Ms. Saint-Louis. RP 287-88, 428. For two brief periods, Ms. Saint-Louis was on work release.⁷ The first time was for about a week in March 2014; the second was for about two weeks in April 2014. RP 80-82. During her second work release, she was finally able to see the assigned social worker from the Department, Allyssa Livingston. RP 333. Ms. Saint-Louis asked Ms. Livingston about having D.B. visit her and about services. RP 82-84, 333. Ms. Livingston told her it would be better for her to wait until she was released to start services. RP 85. Excluding the time Ms. Saint-Louis was at the work release facility, no one from the Department visited her during her incarceration. RP 288, 428. Although no one offered her services, Ms. Saint-Louis participated

⁷ Work Education Release or “WER” is “an alcohol and drug free residential alternative where offenders go to work, school, or treatment during the day and return to a secure facility at night. Offenders who work at night are required to spend the day at the facility. Random drug testing is used to monitor for use of illegal drugs and consumption of alcohol. Offenders are required to pay room and board on a sliding scale based on their hourly rate of gross pay. They also pay restitution, child support or court costs as required by the Court. Offenders are involved in a case management process that directs them to structured programs and/or treatment.”
http://www.kingcounty.gov/courts/detention/community_corrections/programs.aspx (last accessed January 23, 2015).

in a domestic violence program while in jail and also saw a counselor from Sound Mental Health. RP 53, 157.

While Ms. Saint-Louis was incarcerated, the Department filed its termination petition on January 31, 2014. CP 1. At the review hearing held on April 21, 2014, the court found that Ms. Saint-Louis was not in compliance; had not engaged in services; had not made progress; and had not visited D.B. Ex. 7 at 5-6. The court noted the reason for these shortcomings was that Ms. Saint-Louis was incarcerated. Ex. 7 at 5-6.

Ms. Saint-Louis was released on June 18, 2014. RP 82. The social worker, Ms. Livingston, was unaware of Ms. Saint-Louis's release. RP 334. Ms. Saint-Louis called Ms. Livingston so that she could visit D.B. and engage in services. RP 334. Ms. Saint-Louis attended all the visits with D.B. before the termination trial. RP 168, 378, 381. D.B. was happy to see his "mommy" and the visits went well. RP 88, 422. Ms. Saint-Louis enrolled in the Incredible Years program. RP 284. She submitted to random urinalyses. RP 442-43. She enrolled in a relapse prevention program, anger management, and mental health counseling with Sound Mental Health. RP 155-6, 424. Ms. Saint-Louis was managing her prescriptions adequately without assistance from the Department. RP 337, 424; Ex. 35. Ms. Saint-Louis also moved in with her boyfriend, Michael

Conley. RP 293. The two were expecting a child in March 2015. RP 174.

The court held the termination trial in late July and early August 2014. CP 348 (FF 1).⁸ Despite Ms. Saint-Louis's progress, her recent engagement in services since her incarceration, and her good relationship with D.B., the court terminated her parental rights. In doing so, the court did not address the changes made in 2013 concerning the rights of incarcerated parents.⁹

E. ARGUMENT

1. The Department failed to satisfy its burden of proof as to the termination factors and the trial court failed to apply the law in effect.

a. The Department bears the burden of proving the statutory elements of RCW 13.34.180(1) and parental unfitness.

Parents have a fundamental liberty interest in the custody and care of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Dependency of K.D.S., 176 Wn.2d 644, 652, 294 P.3d 695 (2013); U.S. Const. amend. XIV. Only the most powerful reasons justify termination of a person's parental rights. In re

⁸ The finding erroneously says 2013.

⁹ A copy of the court's order is attached as "Appendix A."

Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). By itself, a parent's incarceration does not support the termination of parental rights. In re Infant Child Skinner, 97 Wn. App. 108, 120, 982 P.2d 670 (1999).

In general, before terminating the parent-child relationship, the Department must prove six statutory elements:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (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;
- (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;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . . and
- (f) 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.

RCW 13.34.180(1) (emphasis added). Additionally, the Department must prove that the parent is currently unfit to parent the child. In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010). These requirements must be proved by clear, cogent, and convincing evidence. K.D.S., 176 Wn.2d at 652; RCW 13.34.190(1)(a)(i). Absent an exception, the petition to terminate must allege all of the statutory elements. RCW 13.34.180(1).

b. RCW 13.34.180(1)(f) requires that the court consider additional factors for incarcerated parents before termination.

The latter part of RCW 13.34.180(1)(f) was part of “AN ACT Relating to the rights of parents who are incarcerated.” Laws of 2013, ch. 173.¹⁰ The law amended portions of chapter 13.34 RCW, the part of the code governing dependencies and parental terminations, and became effective on July 28, 2013. Laws of 2013, ch. 173. Under this law, “If the parent is incarcerated,” the court “shall” consider three factors in making its decision on termination: (1) whether the parent maintains “a meaningful role in the child’s life,” (2) whether the Department made “reasonable efforts,” and (3) whether “particular barriers” impeded the parent from “accessing visitation or other meaningful contact with the

¹⁰ A copy of the session law is attached as “Appendix B.”

child.” RCW 13.34.180(1)(f). Consistent with the mandatory language, the court must consider these requirements. In re Dependency of A.M.M., 182 Wn. App. 776, 332 P.3d 500, 505 (2014); see also Goldmark v. McKenna, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011) (use of “shall” in a statute is presumptively imperative and creates a mandatory duty unless there is contrary legislative intent).

In assessing the role of the parent in the child’s life and whether barriers impeded the parent’s contact with the child, RCW 13.34.180(1)(f) directs the court to consider the criteria set out in RCW 13.34.145(5)(b). This statute lists six factors that the court should use in assessing whether an incarcerated parent maintains a meaningful role in his or her child’s life:

(b) The court’s assessment of whether a parent who is incarcerated maintains a meaningful role in the child’s life may include consideration of the following:

(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).

c. RCW 13.34.180(1)(f) applies to parents who were incarcerated during the dependency.

In A.M.M., this Court held that the additional factors in RCW 13.34.180(1)(f) applied to a parent who was incarcerated at the time of the court's decision on termination. A.M.M., 332 P.3d at 502, 507 (2014). In this case, Ms. Saint-Louis was not incarcerated at the time of the court's decision in August 2014. However, shortly before the termination trial began in July 2014, Ms. Saint-Louis was incarcerated for about eight months, from November 2013 to June 2014. CP 348 (FF 1.1), 353 (FF 2.13). Although Ms. Saint-Louis had been incarcerated for a significant period during the dependency and the changes in law were in effect, the court decided the case as if the law had not changed. Applying the tools

of statutory interpretation, this Court should hold that the additional mandatory factors in RCW 13.34.180(1)(f) applied in this case and that the court erred in failing to apply them.

The meaning of a statute is a question of law reviewed de novo. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Washington statutes are to be liberally construed. RCW 1.12.010. In interpreting a statute, the Court ascertains and carries out the Legislature's intent. Campbell & Gwinn, 146 Wn.2d at 9. If the statute's meaning is plain, the court applies the plain meaning. Campbell & Gwinn, 146 Wn.2d at 9-10. Plain meaning "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Campbell & Gwinn, 146 Wn.2d at 11. An interpretation that reads language in isolation is too limited and fails to apply this rule. Jongeward v. BNSF R. Co., 174 Wn.2d 586, 595, 278 P.3d 157 (2012) (rejecting plain meaning analysis that read language in isolation as too limited); see Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). A court may examine legislative history or other aids to construction if the statute is subject to more than one

reasonable meaning. Campbell & Gwinn, 146 Wn.2d at 12. Statutes are interpreted to avoid unlikely, absurd, or strained results. Broughton Lumber Co. v. BNSF Ry. Co., 174 Wn.2d 619, 635, 278 P.3d 173 (2012).

The language, “If a parent is incarcerated,” does not specify the pertinent time point. While it certainly encompasses parents who are, in fact, incarcerated at the time of the court’s decision, the language does not limit itself to that time point. If it did, the language should say something like, “If the parent is incarcerated [at the time of the court’s decision], the court shall consider” The most reasonable interpretation is that RCW 13.34.180(1)(f) applies to parents who are incarcerated during the dependency preceding termination.

A cramped interpretation that limits the provision to parents who are incarcerated at the time of the trial court’s decision fails to consider other language in RCW 13.34.180(1). Under preceding language, all the statutory elements must be alleged in the termination petition itself. RCW 13.34.180(1) (petition “shall allege all of the following”). The filing of the termination petition occurs before the court makes its decision. It tells the parent that his or her incarceration during the dependency must be considered by the court. Thus, the harmonious interpretation of these provisions requires that the mandatory factors apply to all parents who were incarcerated during the dependency.

Reading the statute to only cover parents who happen to still be incarcerated at the time of the court's decision would create absurd results. For example, under such an interpretation, a parent who is incarcerated during the entire dependency, but is released from incarceration a day before the court's decision on the termination petition, would not be covered by RCW 13.34.180(1)(f). This does not make sense and thus could not be what the Legislature intended. A parent who is incarcerated during the dependency, but released shortly before the decision on termination, still experienced significant barriers.

In interpreting the provision at issue, it is important to consider the 2013 law as a whole. See generally Laws of 2013, ch. 173. Besides the provision at issue, the Legislature made other changes so that parents incarcerated during a dependency would have a fairer opportunity to have a meaningful relationship with their children and avoid termination. One change was to increase the participation of incarcerated parents during the dependency. RCW 13.34.067(3) (incarcerated parent who is unable to participate in a case conference must have option to participate remotely via telephone or video);¹¹ RCW 13.34.136(2)(b)(i)(A) (permanency plans must address how an incarcerated parent will participate, include treatment

¹¹ Laws of 2013, ch. 173 § 1.

reflecting available resources at the facility where parent is confined, and provide for visitation unless it is not in the child's best interests).¹² Other provisions recognize that incarceration often creates unfair barriers to reunification and instruct the courts that termination may not be justified. RCW 13.34.145(4) (parent's incarceration may qualify as a "good cause exception" for the court to decline to order the Department to file a termination petition);¹³ RCW 13.34.180(2) (in rebuttal to any presumption established under subsection RCW 13.34.180(1)(e), court may consider constraints imposed by incarceration).¹⁴ Another provision instructs that when a parent faces a long-term incarceration, the Department should examine other options besides termination when the parent maintains a meaningful role with his or her child. RCW 13.34.180(5) (when a parent is sentenced to a long-term incarceration and has maintained a meaningful role in the child's life, the Department should consider placements that allow the parent to maintain that relationship, including a guardianship).¹⁵ These changes show that the Legislature was creating a law to benefit

¹² Laws of 2013, ch. 173 § 2.

¹³ Laws of 2013, ch. 173 § 3

¹⁴ Laws of 2013, ch. 173 § 4.

¹⁵ Laws of 2013, ch. 173 § 4.

parents who are incarcerated during the dependency. Thus, reading RCW 13.34.180(1)(f) to apply to all parents incarcerated during the dependency is in accord with the related changes and the purpose of the legislation.

Legislative history also supports this interpretation.¹⁶ For example, the final bill report states, in its summary section, “In determining whether a parent has failed to complete court-ordered treatment, the court must consider constraints that a parent experienced by a current or prior incarceration.” Final Bill Report SHB 1284 at 3 (emphasis added).¹⁷ The fiscal note also anticipated that, due to “the new factors added to RCW section 13.34.180,” “[p]resentation of additional evidence, exhibits and testimony by the Department will be required,” adding an “estimated two to three hours per trial.” Judicial Impact Fiscal Note at 2.¹⁸ The note does not claim that the factors would only be applied to parents who are still incarcerated at the time of the court’s decision.

¹⁶ The history of the bill, with links to related documents and videos, is available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1284&year=2013> (last accessed January 21, 2015).

¹⁷ Attached as “Appendix C.” Available at <http://lawfilesexternal.leg.wa.gov/biennium/2013-14/Pdf/Bill%20Reports/House/1284-S%20HBR%20FBR%2013.pdf> (last accessed January 21, 2015.)

¹⁸ Attached as “Appendix D.” Available at <https://fortress.wa.gov/binaryDisplay.aspx?package=35057> (last accessed January 21, 2015).

In sum, applying the pertinent tools of statutory interpretation, this Court should hold that the amended text of RCW 13.34.180(1)(f) applies to parents who were incarcerated during the dependency.

d. By failing to apply the law in effect as to incarcerated parents, the Department failed to meet its burden of proof, requiring reversal.

In A.M.M., this Court reversed an order terminating the parental rights of an incarcerated parent because the trial court did not apply amended RCW 13.34.180(1)(f), which was effective at the time of its ruling. A.M.M., 332 P.3d at 504, 507. This Court reasoned that nothing in the record showed that the Department had presented evidence to meet its burden or that the trial court actually complied with its duty:

It was the Department's burden to prove by clear, cogent, and convincing evidence the six termination factors enumerated in RCW 13.34.180(1), most notably here, subsection (1)(f). Additionally, the 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, while nevertheless somehow failing to memorialize its determinations in the findings of fact or conclusions of law.

A.M.M., 332 P.3d at 506. Following our Supreme Court's decision in A.B., which required a clear demonstration that an omitted finding on

parental unfitness was actually intended,¹⁹ this Court rejected the Department's argument that other findings were an adequate substitute:

Applying the rationale of *A.B.* to the facts in this case, it would be improper to infer from the record that findings as to RCW 13.34.180(1)(f) or as to RCW 13.34.145(5)(b) were intended to be made. Tellingly, the trial court applied the language contained within former subsection (1)(f), but made no mention of the amended language added to RCW 13.34.180(1)(f) or to RCW 13.34.145(5)(b). Given this, we cannot conclude that all of the facts and circumstances in the record clearly demonstrate that the omitted findings were actually intended.

A.M.M., 332 P.3d at 506-07.

As argued, because Ms. Saint-Louis was incarcerated during the dependency (and during the pendency of the termination petition), the court had a mandatory duty to apply the additional factors in RCW 13.34.180(1)(f). As in A.M.M., there is no indication in the record that the Department or the court considered the applicable law per RCW 13.34.180(1)(f) and RCW 13.34.145(5)(b). The brief submitted by the Department to the trial court quoted the previous version of RCW 13.34.180(1)(f), not the one in effect. CP 298. The Department did not refer to the additional factors during closing argument. RP 573-77, 585-91. The court's oral ruling did not refer to the factors. RP 599-605. Most

¹⁹ A.B., 168 Wn.2d at 921.

critically, the findings of fact and conclusions of law show no consideration of the factors. CP 348-58. As in A.M.M.:

The Department was required to satisfy its burden of proof as to all of the termination factors, and the trial court was required to apply the law in effect at the time of its ruling. Neither did as was required.

A.M.M., 332 P.3d at 507 (footnote omitted). Accordingly, because the Department failed to meet its burden on RCW 13.34.180(1)(f), this Court should reverse and remand for a new trial. A.M.M., 332 P.3d at 507.

A.M.M. notwithstanding, the Department may advance some kind of harmless error analysis and argue that the evidence was adequate to satisfy its burden of proof. This analysis is incompatible with A.M.M. and A.B. Regardless, the Department's argument would fail because the evidence showed that Ms. Saint-Louis maintained a meaningful role in D.B.'s life, that the Department failed to make reasonable efforts, and that particular barriers impeded Ms. Saint-Louis. RCW 13.34.180(1)(f).

While incarcerated, Ms. Saint-Louis tragically did not see D.B. RP 84. Nevertheless, the evidence from her visits after release showed that she still maintained a meaningful role in D.B.'s life. Once released, she contacted the Department to set up visits. RP 334. She attended all the scheduled visits leading up to the termination trial. RP 168, 378, 381.

During these visits, D.B. called her “mommy.” RP 88. D.B. was very happy to see his mom and had many questions. RP 164. They played games together.²⁰ RP 88. D.B. did not show aggressive behaviors during his visits. RP 422. When visits ended, mother and son would hug and say, “I love you” to one another. RP 422. The child advocate recounted that D.B. knew who his mother was, loved her, and believed he would miss her if he did not see her again. RP 464.

The evidence also showed a lack of reasonable efforts by the Department. Excluding the brief times Ms. Saint-Louis was on work release, no one from the Department visited her. RP 288, 428. Thus, contrary to the findings, assigned social workers did not meet Ms. Saint-Louis “[t]hroughout” the case. CP 354 (FF 2.24). Although Ms. Saint-Louis wanted visits with D.B., the Department did not set up any. RP 287. This was contrary to the law, which contemplates visitation opportunities for incarcerated parents and provision of services that are available at the facility where the parent is confined. RCW 13.34.136(2)(b)(i)(A).²¹

²⁰ The social worker was very critical of Ms. Saint-Louis for allowing D.B. to play games on her phone. RP 383-85. The trial court noted this was not unusual. RP 621. The court rejected the Department’s proposed finding about D.B. playing games on his mother’s phone and that mother and son were acting more like playmates. RP 621; CP 355 (crossed out FF 2.30).

²¹ This statute reads:

Concerning services at the jail, Ms. Livingston claimed that she spoke to someone at the jail about services once or twice. RP 428. However, despite the availability of a chemical dependency program at the jail, Ms. Saint-Louis was not referred to it. RP 154-55, 428. Ms. Livingston did not testify that drug testing or parenting classes were unavailable at the facility. Once released, Ms. Saint-Louis had to call the Department to set up services. RP 334.

Given her incarceration and the lack of reasonable efforts by the Department, Ms. Saint-Louis faced barriers in demonstrating compliance with court ordered services and in visiting D.B. Ms. Saint-Louis had a difficult time trying to contact her assigned social worker, who was her main contact with the Department. RP 157-59. The review hearing order from April 2014 recounted that Ms. Saint-Louis had not engaged in services during the review period, had not made progress, and had not visited with D.B. Ex. 7 at 5-6. The order recounts that the reason for

If the parent is incarcerated, the [permanency] plan must address how the parent will participate in the case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available at the facility where the parent is confined. The plan must provide for visitation opportunities, unless visitation is not in the best interests of the child.

RCW 13.34.136(2)(b)(i)(A). This law became effective on July 28, 2013. Laws of 2013, ch. 173. Thus it was applicable when Ms. Saint-Louis was incarcerated in November 2013.

these shortcomings was Ms. Saint-Louis's incarceration. Ex. 7 at 5-6.

The child advocate filed a report in April 2014, stating that she supported termination "due to mother being unavailable to parent [D.B.] or make progress toward court orders, due to incarceration." CP 54.

Accordingly, even assuming some harmless error analysis was appropriate, the record shows the trial court's failure to apply RCW 13.34.180(1)(f) was prejudicial. This Court should reverse and remand for a new trial.

2. The Department failed to meet its burden to provide all court ordered and other necessary services.

Lacking clear, cogent, and convincing evidence, the trial court erroneously found that RCW 13.34.180(1)(d) was satisfied, meaning that the Department had provided the court ordered and other necessary services to Ms. Saint-Louis. CP 349, 355 (FF 2.1., FF 3.31). The court also erroneously found that "[t]hroughout the Department's involvement," the assigned social workers met and provided Ms. Saint-Louis with service referrals. CP 354 (FF 2.24).

Before termination, all court ordered services under RCW 13.34.136 must have been expressly and understandably offered or provided. RCW 13.34.180(1)(d); In re Dependency of T.L.G., 126 Wn. App. 181, 200, 108 P.3d 156 (2005). Additionally, all other necessary

services must be provided. T.L.G., 126 Wn. App. at 200. Under the 2013 change in the law as to incarcerated parents, so long as it is possible, permanency plans “must include treatment that reflects the resources available at the facility where the parent is confined.” RCW 13.34.136(2)(b)(i)(A).

The record does not show that the Department made reasonable efforts to offer Ms. Saint-Louis services during her incarceration. Outstanding court ordered services at that time included 90 days of consistent and clean urinalyses and a parenting education program (specifically the Incredible Years). There was no testimony urinalyses could not have been provided at the facility. Neither was there testimony that an adequate parenting education program was unavailable. And while there was a chemical dependency program available, Ms. Saint-Louis was not referred to it. This record shows a lack of reasonable efforts and a violation of RCW 13.34.136(2)(b)(i)(A). Accordingly, the findings referred to above are erroneous and the Department failed to meet its burden to prove RCW 13.34.180(1)(d). This Court should reverse.

3. The Department failed to meet its burden to prove Ms. Saint-Louis unfit, or alternatively, that she would not be fit in the near future.

Before termination, a court must find that the parent is currently unfit to parent the child. A.B., 168 Wn.2d at 920. In addition to parental

unfitness, the Department must prove that “there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.” RCW 13.34.180(1)(e). In short, the Department must prove that the parent will not be fit in the near future. The court found that Ms. Saint-Louis was unfit and that RCW 13.34.180(1)(e) was satisfied. CP 355-56 (FF 2.32, 2.38). The court lacked sufficient evidence to make these findings.

“Identifying parenting deficiencies is not the equivalent of proving parental unfitness.” In re Welfare of A.B., 181 Wn. App. 45, 60, 323 P.3d 1062 (2014). In this case, the court appears to have identified Ms. Saint-Louis’s purported deficiencies as relating to drugs and alcohol, mental health, parenting skills, and domestic violence. See CP 354, 355 (FF 2.21, 2.27).

a. The evidence did not establish a current substance abuse problem.

Concerning drugs and alcohol, there was no evidence that Ms. Saint-Louis had a current substance abuse problem. She completed an intensive in-patient treatment program in December 2012 and then an outpatient program in April 2013.²² CP 353 (FF 2.10). While she made

²² Thus, contrary to the findings, Ms. Saint-Louis ultimately followed through on getting treatment. CP 352 (FF 2.8).

an error in judgment in sipping champagne at a wedding in May 2013, Ms. Saint-Louis enrolled in a relapse prevention program. RP 75, 427. There was no evidence of further drug or alcohol use.²³ Since her release in June 2014, Ms. Saint-Louis was engaged in another relapse prevention program and had complied with drug testing requirements. RP 74, 424, 442-43.

While Ms. Saint-Louis did not complete 90 days of clean and consistent urinalyses, this was not because she was “unable or unwilling.” CP 353 (FF 2.11). She did not complete the requirement because she was incarcerated for about eight months and the Department did not offer her testing during that time. Ms. Saint-Louis submitted many urine samples and, excluding the time during her incarceration, the social worker did not recall a month where she did not receive a test result. RP 396, 434. In sum, the evidence did not show that Ms. Saint-Louis had a current substance abuse problem that would make her unfit to parent D.B.

²³ Contrary to the findings, there was no admitted evidence showing that Ms. Saint-Louis tested positive for marijuana use. CP 353 (FF 2.11). While the laboratory results, Exhibit 36, show she tested positive for marijuana in 2012 (before being admitted to the intensive inpatient program), this evidence was not admitted. Excluding the result showing alcohol use in May 2013, all the urinalysis results in 2013 were negative. Ex. 36.

b. The evidence did not establish that Ms. Saint-Louis's mental health impeded her ability to parent.

Concerning Ms. Saint-Louis's mental health, the evidence did not show there was an unaddressed problem. The order of dependency declined to order Ms. Saint-Louis into mental health treatment. Ex. 1 at 10. Moreover, at trial, the Department admitted that Ms. Saint-Louis did not need assistance on medication management. RP 337. Ms. Saint-Louis was taking medication daily to address her bipolar condition. RP 78-80; Ex. 35. While in jail, she saw a counselor from Sound Mental Health about twice a week. RP 157, 404. Additionally, she had attended about six months of mental health counseling. RP 404. Finally, since being released, Ms. Saint-Louis was engaged in mental health counseling at Sound Mental Health, which she had accessed on her own. RP 77, 280, 335, 403. Thus, contrary to the finding, Ms. Saint-Louis did not have "long-standing mental health issues" and she did not fail to make progress. CP 355 (FF 2.27).

Even assuming that Ms. Saint-Louis had unaddressed mental health issues, the Department failed to connect them to her parental capabilities. "[M]ental illness is not, in and of itself, proof that a parent is unfit or incapable." T.L.G., 126 Wn. App. at 203. "The court must examine the relationship between the mental condition and parenting

ability.” T.L.G., 126 Wn. App. at 203. Here, the court did not connect any mental health concern with an inability to parent. The court’s finding that Ms. Saint-Louis’s mental health was a “deficiency that directly impacts her ability to parent [D.B.]” is not supported substantial evidence. CP 355 (FF 2.27). In sum, the evidence concerning the mother’s mental health did not prove she was unfit to parent D.B.

c. The evidence did not establish that Ms. Saint-Louis lacked parenting skills.

Concerning Ms. Saint-Louis’s parenting skills, the record showed that while she had once neglected to watch D.B. in the past, she did not lack for parenting skills. Ms. Saint-Louis’s younger sister, Jaime Saint-Louis, testified that Ms. Saint-Louis properly cared for D.B. RP 510-11. Similarly, Ms. Rogers, who saw Ms. Saint-Louis parent D.B. while they lived with her in Chicago, testified that Ms. Saint-Louis was a good parent and properly cared for D.B. RP 492-93. Dr. Tutty’s observation of Ms. Saint-Louis and D.B. was positive. Ex. 16 at 12-13. Ms. Livingston’s observations of recent visits was generally positive. RP 422. Her only real criticism was that Ms. Saint-Louis let D.B. play games on her cell phone and appeared to be more of a playmate. RP 383-85, 443-44. The court rejected her opinions as unwarranted. RP 621; CP 355 (crossed out FF 2.30).

While completion of the Incredible Years program would have probably benefited Ms. Saint-Louis, her incompleteness of the program did not establish that she was unfit. The order of dependency rejected parenting instruction as a service. Ex. 1 at 9. Ms. Saint-Louis had completed other parenting education classes before. RP 73. She was also able to attend five classes in the Incredible Years program. RP 282. Moreover, the foster parents themselves, who were caring for D.B., were recommended to participate in the Incredible Years program because they were new parents and it was a good program for teaching parents about child development. RP 262. In sum, the evidence did not prove that Ms. Saint-Louis lacked adequate parenting skills.

d. The evidence did not establish that Ms. Saint-Louis was in danger of becoming a victim of domestic violence again.

Ms. Saint-Louis also addressed the Department's concern about domestic violence. She participated in at least three domestic violence prevention programs. CP 353 (FF 2.16). She was no longer in a relationship with D.B.'s father or Mr. Thomas. RP 30, 90. Contrary to the court's finding,²⁴ in 2010, Ms. Saint-Louis understood how to call the

²⁴ CP 354 (FF 2.18).

police and did call them in response to being assaulted by D.B.'s father.

RP 501, 503.

Still, the court's findings insinuate that Ms. Saint-Louis must have not learned anything from these programs because she was currently in a relationship with a man with a history of domestic violence, raising concerns about "control issues." CP 353 (FF 2.17) 354 (FF 2.18, 2.21). These findings are not supported by substantial evidence.

At the time of trial, Ms. Saint-Louis was about six-weeks pregnant. RP 294. The father of the expectant child was Michael Conley.²⁵ RP 161. At trial, Ms. Saint-Louis clarified on redirect that while her mother's house was her mailing address, she was actually living with Mr. Conley. RP 292-93. Due to her confusion, she had earlier answered a question incorrectly about living with her sisters. RP 293. Contrary to the court's findings, she did not "hide" the fact that she was in a relationship with Mr. Conley and was living with him. CP 354 (FF 2.21).

Ms. Saint-Louis testified there were no signs of domestic violence in her relationship with Mr. Conley, which usually involve issues of power and control. RP 176-77. She was aware that Mr. Conley had a criminal history and that he had taken classes to address domestic violence

²⁵ The transcripts spell the name "Connelly." The correct spelling appears to be "Conley."

concerns. RP 176, 296. Mr. Conley had convictions for domestic violence assault in 1988, 1990, and 2010. Ex. 26-28.

There was no evidence that Mr. Conley had a current problem with domestic violence. Moreover, the evidence of domestic violence was not recent. This evidence was inadequate for the court to conclude that Ms. Saint-Louis had not learned how to deal with issues of domestic violence. See In re Dependency of B.R., 157 Wn. App. 853, 870-72, 239 P.3d 1120 (2010) (overturning finding of parental unfitness and holding trial court erroneously relied on testimony from witnesses who lacked current information about the steps the mother had taken to address relationships with potentially abusive partners). Absent recent evidence of domestic violence by Mr. Conley, it was purely speculative for the court to infer that Ms. Saint-Louis had not learned how to protect herself.

e. The stale opinions from late 2012 by a psychologist and a social worker did not establish that Ms. Saint-Louis was unfit in August 2014 or that she would not be fit in the near future.

Finally, in deciding the Department had met its burden, the court erroneously relied largely on expert opinions made by a psychologist and social worker in late 2012. CP 354 (FF 2.25), 355 (FF 2.26). Because these opinions were stale and failed to account for subsequent progress made by Ms. Saint-Louis, the trial court erred in relying on them.

“[A]n expert opinion must be based upon facts in the case and not upon conjecture and speculation.” Clements v. Blue Cross of Washington & Alaska, Inc., 37 Wn. App. 544, 549, 682 P.2d 942 (1984). Moreover, in evaluating parental fitness and whether a parent is likely to remedy any deficiencies in the near future, a court may not rely solely on past performance when a parent shows evidence of recent improvement. In re Welfare of C.B., 134 Wn. App. 942, 953, 143 P.3d 846 (2006) (“the State may not rely solely on past performance to prove that it is highly probable that there is little likelihood that the parent will be reunited with her children in the near future.”); see B.R., 157 Wn. App. 870 (“Because neither Dr. Freedman nor [counselor] Springer had current information about the steps [the mother] had taken to address relationships with potentially abusive partners, the trial court’s reliance on their testimony is misplaced.”)

The court admitted the reports and opinions from psychologist Steven Tutty and social worker Carol Prigge. Ex. 16, 17. Dr. Tutty’s report was based on testing and interviews conducted in October 2012. Ex. 16 at 1. Ms. Prigge’s Foster Care Assessment report was from early December 2012 and relied largely on previous third party statements. Ex. 17. Both reports had negative opinions as to whether Ms. Saint-Louis could successfully reunify with D.B.

These opinions were made nearly two years before the termination trial. They failed to take into account the services that Ms. Saint-Louis later completed or started, which included chemical dependency, domestic violence courses, parenting education, medication management, and mental health counseling. Because they did not rely on current evidence, their opinions were speculative and inaccurate as to Ms. Saint-Louis's current fitness. They were based entirely on past deficient performance and ignored recent evidence of improvement. Accordingly, the opinions of Dr. Tutty and Ms. Prigge from 2012 do not support a conclusion that Ms. Saint-Louis was unfit in August 2014 or would not be fit in the near future. See C.B., 134 Wn. App. at 953, 959; B.R., 157 Wn. App. 870-72.

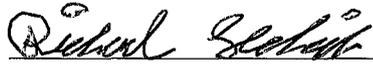
In sum, the evidence failed to show that Ms. Saint-Louis had parental deficiencies that rose to current parental unfitness. Regardless, the Department failed to prove that Ms. Saint-Louis would not be fit in the near future. Her remaining outstanding services were not onerous. And contrary to the court's finding, the evidence did not prove that Ms. Saint-Louis was unwilling to participate or complete the services offered. CP 355 (FF 2.32). The evidence showed that Ms. Saint-Louis was engaged in the remaining services and that she would continue engagement. This Court should reverse.

F. CONCLUSION

This Court should hold that the amended language concerning incarcerated parents in RCW 13.34.180(1)(f) applies to all parents who are incarcerated during the dependency. Because the court failed to apply this mandatory provision, the Department failed to meet its burden of proof, just as in A.M.M. Accordingly, this Court should reverse and remand for a new trial. Additionally, this Court should reverse because the Department failed to prove the other requirements necessary for termination.

DATED this 30th day of January, 2015.

Respectfully submitted,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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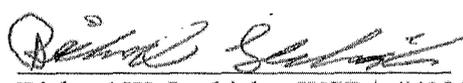
In re the Dependency of:)
)
D.L.B.) No. 92448-1
)
) RE: Revised Appendix
)

This Court ordered the Petitioner to provide a revised appendix to the opening brief filed in the Court of Appeals. Per the court's direction and consistent with its instructions, a revised appendix is attached.

Appendix A.

DATED this 17th Day of March, 2016.

Respectfully submitted,


Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Petitioner

 ORIGINAL

Appendix A

FILED

14 SEP 05 AM 9:31

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 14-7-00282-1 SEA

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING, JUVENILE COURT

Dependency of:

D. L. B.
dob: 11/1/2008

Minor Child.

Trm No: 14-7-00282-1 SEA

Dpy No: 12-7-00623-5 SEA

Hearing, Findings, and Order Regarding
Termination of Parent-Child Relationship

Granted (ORTPCR)

Dismissed (ORDSM)

Clerk's Action Required: Paragraph 4.1

The child is legally free. An attorney must be appointed for the child in dependency case number 12-7-00623-5 no later than six months from today's date. (NCLF)

I. Hearing

1.1 The court held a trial in this case on July 28, 29, 30, 31 and August 5, 2013 on a petition requesting termination of the parent-child relationship. *Oral decision on 5/8/14; SPM*
Presentation of final order on 5/26/14.

1.2 The following persons appeared:

- | | |
|----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------|
| <input type="checkbox"/> Child | <input type="checkbox"/> Child's Lawyer |
| <input checked="" type="checkbox"/> Mother – Edelyn Saint-Louis aka Adeline Saint Louis | <input checked="" type="checkbox"/> Mother's Lawyer – Sacha Marley |
| <input type="checkbox"/> Father | <input type="checkbox"/> Father's Lawyer |
| <input type="checkbox"/> Guardian or Legal Custodian | <input type="checkbox"/> Guardian's or Legal Custodian's Lawyer |
| <input checked="" type="checkbox"/> Child's CASA – Julie Hills | <input checked="" type="checkbox"/> GAL's Lawyer – April Rivera |
| <input checked="" type="checkbox"/> DSHS/Supervising Agency Worker – Alyssa Livingston | <input checked="" type="checkbox"/> Agency's Lawyer – Joel J. Delman |
| <input type="checkbox"/> Tribal Representative | <input type="checkbox"/> Current Caregiver |
| <input type="checkbox"/> Interpreter for <input type="checkbox"/> mother <input type="checkbox"/> father | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> other _____ | |

1.3 The court heard testimony and received exhibits.

II. Findings

2.1 The following received adequate service:

- Mother Legal Guardian
 Father Other

2.2 Child's Indian status:

The petitioner has made a good faith effort to determine whether the child is an Indian Child.

- Based upon the following, the child is not an Indian child as defined in Laws of 2011, ch. 309, § 4, and the federal and Washington State Indian Child Welfare Acts do not apply to these proceedings:
- The child is an Indian child as defined in Laws of 2011, ch. 309, § 4, and the federal and Washington State Indian Child Welfare Acts apply to these proceedings:
- The petitioner has has not provided notice of these proceedings as required by Laws of 2011, ch. 309, §7 and the federal Indian Child Welfare Act to all tribes to which the petitioner or court knows or has reason to know the child may be a member or eligible for membership.

2.3 _____ was born on November 1, 2008. A dependency petition was filed on his behalf on March 9, 2012, under King County Cause number 12-7-00623-5 SEA.

2.4 The child was declared dependent under RCW 13.34.030 as to the parents on May 11, 2012, following a contested hearing with neither parent appearing. The following facts were proven as to both mother and father:

1. The department is requesting dependency of the child based upon the facts investigated by social worker Justin Matts. On 1/18/2012, the department received an intake regarding concerns of Domestic Violence between the mother and her boyfriend. The referent reports that the police have been called to this residence multiple times for similar concerns of Domestic Violence. Also noted were concerns of Physical Abuse by the mother onto the child. Yelling, screaming, and vulgar language is frequently heard throughout the complex directed towards the child. It has also been reported that the sounds of "loud slaps" and a child screaming "No mommy! Don't!" followed again by the slapping sound. Another concern was that of substance abuse. The mother has been seen to show visible indications of marijuana, alcohol and possibly other drugs while met face to face. On 2/08/2012 a second intake screened in for investigation in the midst of this current investigation noted above. The child was placed into Protective Custody by a Seattle Police officer. The mother had been arrested for leaving her child alone for several hours unattended.

2. Currently the child is on a 30 day Voluntary Placement Agreement that expires on 3/09/2012. The department has been attempting to make efforts to engage the mother in Voluntary Services, but she has been indicating to the department that her cooperation is minimal. Unaddressed domestic violence issues, unaddressed substance abuse

issues, lack of safe judgment by leaving the child alone and attempting to send the child back with the father regardless of the domestic violence history between them, and the lifetime no-contact order between the mother and father.

3. On 2/08/2012, an intake screened for investigation. The Mother had been arrested for leaving her three year old son alone for several hours unattended. The child was then placed into protective custody.

4. On 2/09/2012, social worker spoke with the mother and she admitted to leaving the child unattended prior to being arrested. The mother also admitted to leaving the child unattended on multiple other occasions while doing her laundry.

5. On 2/09/2012, the mother stated that she had intended to move to Chicago with the paternal aunt and the father of the child. The mother and father were asked if they had any kind of no-contact orders against each other that would not allow them to live together, both mother and father said no.

6. On 2/09/2012, social worker asked the mother about the previous allegations of child abuse and neglect from the intake that screened in for investigation on 1/18/2012. The mother stated that the domestic violence incident was not between her and her boyfriend, but rather her and her brother. Indicating that there is current domestic violence within her family system.

7. On 2/09/2012, the foster parents called social worker to speak about his behavior. They stated that the child frequently has night terrors or nightmares almost every night and is constantly saying No!!! Stop!!! No, Don't!!!! That may be an indicator of child abuse or neglect.

8. On 2/14/2012, a background check was done on the mother and father of the child. The results showed that there is a lifetime no-contact order between the mother and father and their child in common. The no-contact order is valid until 2099. Social worker asked the father again if he knew about a no-contact order between him and the mother and he stated that he believed that he knew about the one between him and the mother, but wasn't aware of the one between him and the child. The mother admitted that she had some idea there was an order in place.

9. On 2/24/2012, the Family Voluntary Services worker made contact with the mother and offered her services such as; DV services, housing assistance, U.A.'s and parenting classes. The mother stated that she does not want to do any more DV services and that she has already taken classes for that issues. She also reports that she does not want to take any further parenting classes because she had already taken them while in the YWCA program.

10. On 3/01/2012, another Family Team Decision Making Meeting was held. Multiple collateral contacts all confirmed that the mother has made numerous contacts to the father via telephone and also has allowed the child to see the father year or two ago when he was in Washington in person breaking the no-contact order.

11. On 3/01/2012, during the FTDM, a collateral contact indicated that there are concerns that the child appears to have some developmental disabilities or possibly a learning disability that has been untreated or unaddressed. The child was said to also be

very independent and acts older than his young age of 3: The child wakes up on his own, gets dressed, makes breakfast, and sits and watches T.V. until everyone else wakes up. The child also frequently has night terrors or nightmares almost every night and is constantly saying No!!! Stop!!! No, Don't!!!

12. On 3/01/2012, a collateral contact stated that there are concerns that they did not feel comfortable voicing in the FTDM. The contact stated that the mother has openly admitted recent marijuana use. The contact also stated that the domestic violence incident that social worker mentioned from 1/18/2012, actually involved her boyfriend and their fighting and constant domestic violence incidents were a large contributing factor for the mother being kicked out of her housing.

13. On 3/01/2012, the same collateral contact stated that they are aware of numerous other domestic violence incidents between the mother and this 'boyfriend'. The contact also states that this 'boyfriend' of the mothers is a very bad guy and is frequently in and out of jail and may even have an active warrant for his arrest. The contact stated that the 'boyfriend' is involved in not only domestic violence with the mother, but also theft and drug related issues. The collateral contact states that they do not feel comfortable with the child being returned to the mother without the department keeping a close eye on the mother and making sure to monitor child safely and to monitor the mother's participation in recommended services.

14. On 3/08/2012, The mother admitted in a subsequent on Family Team Decision Making Meeting (FTDM) that in the intake from 1/18/2012, the perpetrator was not actually her brother, but rather her boyfriend or "friend" that broke her window and was the catalyst to the domestic violence incident. Social worker ran a criminal history check on the mother's "friend" and a long criminal history was discovered. An active warrant, a multitude of recent charges including drugs, theft, and domestic violence.

15. On 3/08/2012, the Homebuilders therapist states that she is not convinced that the mother is fully aware of domestic violence relationships and how those affect herself as well as the child. The therapist states that the mother is clearly involved in a domestic violence relationship with her 'friend' and the mother neglects to recognize this.

16. On 3/08/2012, the mother admitted that she was fully aware of her "friend's" past domestic violence, criminal, and drug history because she ran a background check on him before becoming friends with him. The mother admitted that there has been domestic violence between her and her boyfriend or 'friend' "but nothing has been proven and that has reached the point of police getting involved".

17. On 3/08/2012, collateral contacts confirmed that the domestic violence incident that occurred in January and reported on 1/18/2012 was actually the mother's "friend". The mother stated to the department in an earlier FTDM that it was not the "friend" but rather "her brother".

18. On 3/08/2012, the mother stated that she had witnessed much domestic violence in her childhood and that the domestic violence perpetrator frequently comes back to the home she resides in and is around her and the child.

19. The mother currently resides with the maternal grandmother whom has a multitude of intakes screened in for investigation. The mother was involved in many of those

intakes as a victim of Negligent Treatment or Maltreatment and Physical Abuse. Including a Founded for Physical Abuse by the maternal grandfather, and a Founded for Negligent Treatment or Maltreatment in 1996, 1997. The maternal grandfather also visits regularly with the mother and child.

CPS History: Child is placed in foster care as of 4/17/12 both at mother's request and due to mother's deteriorating mental health condition as noted by professionals.

On 4/12/2012, A intake screened in for investigation. The father Kendrick Bryant was the subject of the Physical Abuse intake. The conclusion was Unfounded. The subject is not living in the state anymore and will not be returning to this state for at least nine more months. The subject has been out of the home since December. The child's mother denies the allegations of abuse of the child by the subject. The child appeared to be well and had no marks or bruises when the child was seen by this social worker and the Kent Police Department.

2.5 Dispositional orders were entered pursuant to RCW 13.34.130 on May 11, 2012, as to both parents. The dispositional order provided for the mother to complete random urinalysis testing, a psychological evaluation with parenting component and any treatment recommended, a domestic violence support group, intensive family preservation services and a drug/alcohol evaluation and any treatment recommended.

2.6 The child was removed from the custody of the mother on February 8, 2012, by voluntary agreement, and later by court order on March 9, 2012. He was returned to the mother's care by the court on March 15, 2012, and was placed back into foster care on April 17, 2012 "at the mother's request and due to her deteriorating mental health condition". *Exhibit 1*.

2.7 The mother was informed at a May, 2013 planning meeting that she would need to demonstrate significant progress in services in order to avoid the potential termination of her parental rights to D.L.E.

2.8 The mother was referred to Sound Mental Health by the Department and completed a drug/alcohol evaluation there on July 23, 2012. She reported to the evaluator, Amy Plumb, that her current mental health diagnosis is bipolar disorder and advised she uses marijuana. She was diagnosed with cannabis abuse and the evaluator recommended she engage in Level I outpatient treatment. She did not follow through with this recommendation.

2.9 The Department referred the mother to Dr. Steve Tutty for a psychological and parenting evaluation in July 2012. The mother completed this evaluation in October 2012. All of her personality test results were invalid, including the MMPI and Personality Assessment Inventory (PAI), due to a random pattern of answers. Her Child Abuse Potential Inventory (CAPI) scores were marginally valid (based on measure of defensiveness). Her total abuse score (394) placed her well above the primary cut-off score (215) for reliable prediction of child abuse and/or neglect. The mother also disclosed she continues use of marijuana and alcohol. Based upon her presentation, testing outcomes and clinical/CPS history, Dr. Tutty diagnosed the mother with Bipolar II disorder, alcohol and cannabis abuse, a panic disorder (by history) and a rule out of Attention Deficit Hyperactivity disorder on Axis I. In addition, on Axis II, the mother is diagnosed with a learning disorder (by history) with a rule out of Histrionic personality disorder.

Dr. Tutty did not recommend reunification and cautioned that any consideration of reunification should be closely monitored. Dr. Tutty stated the mother should show significant

progress in the aforementioned areas (mood regulation, sobriety, parenting skills, and stable housing) before reunification is considered by the Department.' *Exhibit 16.*

2.10 The mother entered inpatient drug/alcohol treatment at Recovery Centers King County in November 2012. She completed 28 days of inpatient treatment in early December 2012. Upon discharge, RCKC referred her to Sound Mental Health for outpatient treatment to begin December 12, 2012. She engaged in outpatient treatment at Sound Mental Health throughout early 2013, and completed this program in April 2013. *Exhibits 15 and 33.*

2.11 The mother has been referred for random urinalysis testing consistently since July 2012. These referrals have been provided in person and via email. She has tested positive for marijuana and alcohol. She has had some negative test results; however, she has been unable or unwilling to complete ninety days of clean, unadulterated and consistent urinalysis tests. After a positive urinalysis test for alcohol on May 27, 2013, the Department recommended the mother complete relapse prevention. She was again referred to Sound Mental Health and began a relapse prevention program; however, she did not complete this program due to being arrested in July 2013. She has begun this program again as of July 23, 2014, the week before this trial commenced. *When confronted by the Dept. with the positive UA noted above, the mother initially denied a relapse before admitting alcohol use at a wedding.*

2.12 She has been referred to the Incredible Years parenting program numerous times (on December 27, 2012, January 2, 2013, May 16, 2013 and after her June, 2014 release from incarceration) via email, in person and via telephone. The mother began the Incredible Years program in late 2013, however, she missed several classes and was discharged. She has begun this 18 week program again as of July 29, 2014. *As required by the program, the mother has had to re-start this parenting course.*

2.13 The mother began services through Sound Mental Health in December 2012, for chemical dependency issues. In May 2013, the Court ordered (upon agreement of parties) that the mother engage in the MEDS program through Sound Mental Health. *Exhibit 5.* This program provided both mental health treatment and a medication management program. The mother was incarcerated from July 2013 to August 2013, and again since November 21, 2013 until June, 2014. She was to begin mental health treatment there again as of July 31, 2014.

2.14 Intensive Family Preservation Services (IFPS) was required as a condition of placement at Shelter Care. This service ended upon removal of the child in April 2012. The Department has not referred this service since dependency was established because reunification has not been imminent. IFPS ended when the mother requested that ~~D.L.B.~~ be returned to foster care.

2.15 The mother has been provided referrals to domestic violence support programs and domestic violence shelters/housing.

2.16 Despite having participated in three (3) domestic violence support programs, including one where she participated during her recent incarceration at the RJC, upon her release Ms. Saint-Louis moved in with Michael Conley. Mr. Conley has at least three (3) domestic violence assault incidents dating back to 1988 and as recently as 2010. Mr. Conley has a protection order issued against him as to a former spouse and violated that order in 2012. *Exhibits 26-29.*

2.17 Ms. Saint-Louis and Mr. Conley are now expecting a child. Mr. Conley is 54 years old and Ms. Saint-Louis is 25. She is unemployed and lives at his home. Mr., Conley does not have children. This situation raises concerns regarding control issues and the potential for stress in the home as Ms. Saint-Louis plans for both ~~D.L.B.~~ and the expected newborn to be raised in Mr. Conley's home.

Hrg/Find/Or Re Term Parent-Child Rel (ORTPCR, ORDSM) - Page 6 of 11
WPF JU 04.0110 (06/2014) - RCW 13.34.190 - .210

2.18 This concern is exacerbated by the testimony of Ms. Chanae Rogers, the child's paternal aunt. Ms. Saint-Louis and D.L.B. lived with her in Chicago for a brief time in 2010-11. While living with Ms. Rogers the mother was repeatedly harassed, assaulted and threatened by D.L.B.'s father. Despite the issuance of a lifetime no-contact order between the father and both the mother and D.L.B., Ms. Rogers had to encourage and instruct the mother to call the police in order to protect herself and D.L.B.

2.19 Ms. Saint-Louis' credibility is minimal. Credibility is judged on a variety of factors observed including the witnesses' memory, how forthcoming or reticent the witness is to questioning, consistency of answers, impeachment, motive to "spin" or misrepresent the facts, perspective, demeanor and corroboration by other evidence.

2.20 Ms. Saint-Louis began her testimony by stating she had resided at her mother's home for the past 12 years and that she lived there with her two sisters. Only after testimony came out that she was pregnant did she then correct this information by stating that this was her mailing address. She did not disclose either her relationship with Mr. Conley or that she was residing with him until subsequent cross-examination.

2.21 Having participated in multiple domestic violence support programs, both her relationship with Mr. Conley and her subsequent decision to hide this information from the Court damage her credibility and indicate an inability to put into practice what was taught/discussed at these programs.

2.22 The mother has been provided information on numerous transitional housing programs by the Department and other service providers. At this time she has not established her own housing, and is not employed.

2.23 As stated above, the mother was arrested in July 2013. The mother was charged with Vehicular Assault, Felony Hit and Run and Taking a Motor Vehicle without Permission under King County Cause No. 13-1-11771-8 SEA. On August 15, 2013, while this case was pending trial, the mother was released under the condition she engage in the CCAP program. Due to her poor attendance and failure to call or appear twice in October 2013, a bench warrant was issued on October 24, 2013. She was arrested on November 21, 2013. The mother was previously arrested for Forgery in April 2013, and this charge was filed in November 2013, in Everett District Court. On December 16, 2013, the mother pled guilty in King County Superior Court to Felony charges of Vehicular Assault and Taking a Motor Vehicle, along with non-Felony charge of Hit and Run (Attended). On January 3, 2014, she was sentenced to 364 days, suspended and 24 months of probation for the Hit and Run and 12 months (work release) and 12 months community custody on the Felony charges.

2.24 Throughout the Department's involvement with this family, assigned social workers have met with and provided the mother with numerous verbal and written service referrals to providers for psychological assessment, mental health assessment and treatment, chemical dependency assessment and treatment, parenting classes, random urinalysis testing, domestic violence advocacy and groups and housing resources. The mother has also been provided with transportation assistance including bus tickets and an Orca card.

2.25 In 2012, Dr. Tutty did not recommend reunification, and stated, "It is unlikely that she can remediate her psychological and parenting skills in the time frame established for permanency in the foreseeable future."

2.26 In order to better understand D.L.B.'s needs, the Department made a Foster Care Assessment Program (FCAP) referral in October 2012. This assessment was completed in December 2012, by Carol Prigge. Exhibit 17. The mother participated in this assessment. Ms. Prigge stated,

It is unlikely that D.L.B.'s mother will be able to create the safety he needs live with her. Ms. Saint-Louis has an unresolved trauma history. ...Ms. Saint-Louis seems to have an expectation or view of D.L.B. as her partner against a world that has abused and abandoned her. When D.L.B. is not supportive of her, that is, when he exhibits defiance or aggression, Ms. Saint-Louis is likely to become angry and combative with him. His defiance is likely to trigger her domestic violence history.

Ms. Prigge recommended visitation be closely supervised due to the mother's inappropriate conversations with D.L.B.. The FCAP evaluator recommended D.L.B. be offered cognitive processing therapy and trauma focused cognitive behavioral therapy with a parent component.

2.27 The mother has long-standing mental health issues for which she has been unable or unwilling to fully engage in treatment. She has not completed ninety days of urinalysis testing without either missing a test or testing positive. She has not yet completed the recommended Incredible Years parenting course. She has not consistently engaged in any mental health therapy and there is not evidence that she has made progress in correcting this deficiency that directly impacts her ability to parent D.L.B.

2.28 D.L.B. has experienced traumas while living with his mother. She was a victim of domestic violence repeatedly. D.L.B. was also removed from his mother's care twice, the last time at her request. He has now been placed in a different home for two years and four months, to which he is bonded.

2.29 D.L.B. participated in trauma focused cognitive behavioral therapy with a parent component. He made great progress and his acting out and tantrum behaviors diminished considerably. These behaviors were noted to escalate when he had past visits with his mother. This has occurred again since visits resumed following the mother's release from jail in June, 2014.

SRM

2.30 ~~D.L.B.'s visits with his mother mostly consist of his playing games on her cell phone. Ms. Saint-Louis has been repeatedly encouraged to participate in interactive activities with her son and has not done so. These visits and their time together are described more as "playdates" than as a parent-child interaction.~~

2.31 Services ordered under RCW 13.34.130 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, including drug and alcohol evaluations and recommended treatment; UA's; mental health services; a psychological evaluation and recommended treatment. DCFS has made multiple offers of services both in person and in writing.

2.32 There is little likelihood that conditions will be remedied so that the child can be returned to the mother within the near future because throughout the dependency the mother has demonstrated an unwillingness to participate in and/or successfully complete series offered to correct parental deficiencies.

2.33 Continuation of the parent-child relationship between the above-named minor child and the mother clearly diminishes the child's prospects for early integration into a stable and permanent home.

2.34 Ms. Saint-Louis' turbulent lifestyle and her current relationship and living situation are not a beneficial prospective plan for ~~D.L.B.~~

2.35 ~~D.L.B.~~ is both adoptable and has prospects for adoption. He would be at risk if placed in the mother's care at this time.

2.36 Ms. Saint-Louis has been repeatedly asked about her plans for the return of ~~D.L.B.~~ to her care. She initially responded that he should be returned immediately. She then stated that there should be some overnight visits. Ms. Saint-Louis does not consider that ~~D.L.B.~~ has lived in another home for more than two years and that she is proposing that he move into the home of a man he has never met and who has never parented. When asked, Ms. Saint-Louis did not believe that adding ~~D.L.B.~~ and a newborn to Mr. Conley's home would be stressful. This plan is not in ~~D.L.B.'s~~ best interest.

2.37 The mother is not a member of the Armed Forces and the Servicemembers Civil Relief Act does not apply to these proceedings.

2.38 The child's mother is unfit to parent this child.

2.39 Termination of the parent-child relationship between the child and the mother is in the child's best interest.

2.40 CASA Julie Hills provided an opinion supporting the above Findings of Fact.

III. Conclusions of Law

3.1 The court has jurisdiction over the parties and subject matter herein.

3.2 Termination of the parent-child relationship between the above-named minor child and the mother is in the child's best interest.

3.3 The foregoing findings of fact and the allegations of RCW 13.34.180 and .190 have been proven by clear, cogent and convincing evidence unless otherwise noted.

Having heretofore entered Findings of Fact and Conclusions of Law, the court hereby makes the following:

IV. Order

4.1 The petition is denied and the termination action is dismissed with without prejudice.

4.2 The petition is granted.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 92448-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Kelly Taylor, Assistant Attorney General
[SHSSeaEF@atg.wa.gov] [kellyt1@atg.wa.gov]
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MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: March 17, 2016

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: SHSSeaEF@atg.wa.gov; kellyt1@atg.wa.gov; AnneE1@atg.wa.gov; april.rivera@kingcounty.gov; Stebbins@ABCLawGroup.Net; emily.p.henry@gmail.com; lillian@defensenet.org; dward@legalvoice.org; Knowles, Devon
Subject: RE: FILING IN 92448-1, E.S., Petitioner Mother

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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: Maria Riley [mailto:maria@washapp.org]
Sent: Thursday, March 17, 2016 4:11 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: SHSSeaEF@atg.wa.gov; kellyt1@atg.wa.gov; AnneE1@atg.wa.gov; april.rivera@kingcounty.gov; Stebbins@ABCLawGroup.Net; emily.p.henry@gmail.com; lillian@defensenet.org; dward@legalvoice.org; Knowles, Devon <knowlesd@seattleu.edu>
Subject: FILING IN 92448-1, E.S., Petitioner Mother

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Revised Appendix to the Opening Brief

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Appendix B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1284

Chapter 173, Laws of 2013

63rd Legislature
2013 Regular Session

INCARCERATED PERSONS--PARENTS--PROCEEDINGS INVOLVING CHILDREN

EFFECTIVE DATE: 07/28/13

Passed by the House April 22, 2013
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 17, 2013
Yeas 47 Nays 1

BRAD OWEN

President of the Senate

Approved May 8, 2013, 2:21 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1284** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 8, 2013

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1284

AS AMENDED BY THE SENATE

Passed Legislature - 2013 Regular Session

State of Washington 63rd Legislature 2013 Regular Session

By House Early Learning & Human Services (originally sponsored by Representatives Roberts, Walsh, Kagi, Sawyer, Goodman, Freeman, Farrell, Appleton, Ryu, Reykdal, Santos, and Habib)

READ FIRST TIME 02/20/13.

1 AN ACT Relating to the rights of parents who are incarcerated;
2 amending RCW 13.34.067, 13.34.136, and 13.34.145; and reenacting and
3 amending RCW 13.34.180.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 13.34.067 and 2009 c 520 s 23 are each amended to read
6 as follows:

7 (1)(a) Following shelter care and no later than thirty days prior
8 to fact-finding, the department or supervising agency shall convene a
9 case conference as required in the shelter care order to develop and
10 specify in a written service agreement the expectations of both the
11 department or supervising agency and the parent regarding voluntary
12 services for the parent.

13 (b) The case conference shall include the parent, counsel for the
14 parent, caseworker, counsel for the state, guardian ad litem, counsel
15 for the child, and any other person agreed upon by the parties. Once
16 the shelter care order is entered, the department or supervising agency
17 is not required to provide additional notice of the case conference to
18 any participants in the case conference.

1 (c) The written service agreement expectations must correlate with
2 the court's findings at the shelter care hearing. The written service
3 agreement must set forth specific services to be provided to the
4 parent.

5 (d) The case conference agreement must be agreed to and signed by
6 the parties. The court shall not consider the content of the
7 discussions at the case conference at the time of the fact-finding
8 hearing for the purposes of establishing that the child is a dependent
9 child, and the court shall not consider any documents or written
10 materials presented at the case conference but not incorporated into
11 the case conference agreement, unless the documents or written
12 materials were prepared for purposes other than or as a result of the
13 case conference and are otherwise admissible under the rules of
14 evidence.

15 (2) At any other stage in a dependency proceeding, the department
16 or supervising agency, upon the parent's request, shall convene a case
17 conference.

18 (3) If a case conference is convened pursuant to subsection (1) or
19 (2) of this section and the parent is unable to participate in person
20 due to incarceration, the parent must have the option to participate
21 through the use of a teleconference or videoconference.

22 **Sec. 2.** RCW 13.34.136 and 2011 c 309 s 29 are each amended to read
23 as follows:

24 (1) Whenever a child is ordered removed from the home, a permanency
25 plan shall be developed no later than sixty days from the time the
26 supervising agency assumes responsibility for providing services,
27 including placing the child, or at the time of a hearing under RCW
28 13.34.130, whichever occurs first. The permanency planning process
29 continues until a permanency planning goal is achieved or dependency is
30 dismissed. The planning process shall include reasonable efforts to
31 return the child to the parent's home.

32 (2) The agency supervising the dependency shall submit a written
33 permanency plan to all parties and the court not less than fourteen
34 days prior to the scheduled hearing. Responsive reports of parties not
35 in agreement with the department's or supervising agency's proposed
36 permanency plan must be provided to the department or supervising

1 agency, all other parties, and the court at least seven days prior to
2 the hearing.

3 The permanency plan shall include:

4 (a) A permanency plan of care that shall identify one of the
5 following outcomes as a primary goal and may identify additional
6 outcomes as alternative goals: Return of the child to the home of the
7 child's parent, guardian, or legal custodian; adoption, including a
8 tribal customary adoption as defined in RCW 13.38.040; guardianship;
9 permanent legal custody; long-term relative or foster care, until the
10 child is age eighteen, with a written agreement between the parties and
11 the care provider; successful completion of a responsible living skills
12 program; or independent living, if appropriate and if the child is age
13 sixteen or older. The department or supervising agency shall not
14 discharge a child to an independent living situation before the child
15 is eighteen years of age unless the child becomes emancipated pursuant
16 to chapter 13.64 RCW;

17 (b) Unless the court has ordered, pursuant to RCW 13.34.130(~~(+6)~~)
18 (8), that a termination petition be filed, a specific plan as to where
19 the child will be placed, what steps will be taken to return the child
20 home, what steps the supervising agency or the department will take to
21 promote existing appropriate sibling relationships and/or facilitate
22 placement together or contact in accordance with the best interests of
23 each child, and what actions the department or supervising agency will
24 take to maintain parent-child ties. All aspects of the plan shall
25 include the goal of achieving permanence for the child.

26 (i) The department's or supervising agency's plan shall specify
27 what services the parents will be offered to enable them to resume
28 custody, what requirements the parents must meet to resume custody, and
29 a time limit for each service plan and parental requirement. If the
30 parent is incarcerated, the plan must address how the parent will
31 participate in the case conference and permanency planning meetings
32 and, where possible, must include treatment that reflects the resources
33 available at the facility where the parent is confined. The plan must
34 provide for visitation opportunities, unless visitation is not in the
35 best interests of the child.

36 (ii) Visitation is the right of the family, including the child and
37 the parent, in cases in which visitation is in the best interest of the
38 child. Early, consistent, and frequent visitation is crucial for

1 maintaining parent-child relationships and making it possible for
2 parents and children to safely reunify. The supervising agency or
3 department shall encourage the maximum parent and child and sibling
4 contact possible, when it is in the best interest of the child,
5 including regular visitation and participation by the parents in the
6 care of the child while the child is in placement. Visitation shall
7 not be limited as a sanction for a parent's failure to comply with
8 court orders or services where the health, safety, or welfare of the
9 child is not at risk as a result of the visitation. Visitation may be
10 limited or denied only if the court determines that such limitation or
11 denial is necessary to protect the child's health, safety, or welfare.
12 The court and the department or supervising agency should rely upon
13 community resources, relatives, foster parents, and other appropriate
14 persons to provide transportation and supervision for visitation to the
15 extent that such resources are available, and appropriate, and the
16 child's safety would not be compromised.

17 (iii) A child shall be placed as close to the child's home as
18 possible, preferably in the child's own neighborhood, unless the court
19 finds that placement at a greater distance is necessary to promote the
20 child's or parents' well-being.

21 (iv) The plan shall state whether both in-state and, where
22 appropriate, out-of-state placement options have been considered by the
23 department or supervising agency.

24 (v) Unless it is not in the best interests of the child, whenever
25 practical, the plan should ensure the child remains enrolled in the
26 school the child was attending at the time the child entered foster
27 care.

28 (vi) The supervising agency or department shall provide all
29 reasonable services that are available within the department or
30 supervising agency, or within the community, or those services which
31 the department has existing contracts to purchase. It shall report to
32 the court if it is unable to provide such services; and

33 (c) If the court has ordered, pursuant to RCW 13.34.130(~~(+6)~~) (8),
34 that a termination petition be filed, a specific plan as to where the
35 child will be placed, what steps will be taken to achieve permanency
36 for the child, services to be offered or provided to the child, and, if
37 visitation would be in the best interests of the child, a
38 recommendation to the court regarding visitation between parent and

1 child pending a fact-finding hearing on the termination petition. The
2 department or supervising agency shall not be required to develop a
3 plan of services for the parents or provide services to the parents if
4 the court orders a termination petition be filed. However, reasonable
5 efforts to ensure visitation and contact between siblings shall be made
6 unless there is reasonable cause to believe the best interests of the
7 child or siblings would be jeopardized.

8 (3) Permanency planning goals should be achieved at the earliest
9 possible date. If the child has been in out-of-home care for fifteen
10 of the most recent twenty-two months, and the court has not made a good
11 cause exception, the court shall require the department or supervising
12 agency to file a petition seeking termination of parental rights in
13 accordance with RCW 13.34.145(3)(b)(vi). In cases where parental
14 rights have been terminated, the child is legally free for adoption,
15 and adoption has been identified as the primary permanency planning
16 goal, it shall be a goal to complete the adoption within six months
17 following entry of the termination order.

18 (4) If the court determines that the continuation of reasonable
19 efforts to prevent or eliminate the need to remove the child from his
20 or her home or to safely return the child home should not be part of
21 the permanency plan of care for the child, reasonable efforts shall be
22 made to place the child in a timely manner and to complete whatever
23 steps are necessary to finalize the permanent placement of the child.

24 (5) The identified outcomes and goals of the permanency plan may
25 change over time based upon the circumstances of the particular case.

26 (6) The court shall consider the child's relationships with the
27 child's siblings in accordance with RCW 13.34.130(~~((4))~~) (6). Whenever
28 the permanency plan for a child is adoption, the court shall encourage
29 the prospective adoptive parents, birth parents, foster parents,
30 kinship caregivers, and the department or other supervising agency to
31 seriously consider the long-term benefits to the child adoptee and his
32 or her siblings of providing for and facilitating continuing
33 postadoption contact between the siblings. To the extent that it is
34 feasible, and when it is in the best interests of the child adoptee and
35 his or her siblings, contact between the siblings should be frequent
36 and of a similar nature as that which existed prior to the adoption.
37 If the child adoptee or his or her siblings are represented by an
38 attorney or guardian ad litem in a proceeding under this chapter or in

1 any other child custody proceeding, the court shall inquire of each
2 attorney and guardian ad litem regarding the potential benefits of
3 continuing contact between the siblings and the potential detriments of
4 severing contact. This section does not require the department of
5 social and health services or other supervising agency to agree to any
6 specific provisions in an open adoption agreement and does not create
7 a new obligation for the department to provide supervision or
8 transportation for visits between siblings separated by adoption from
9 foster care.

10 (7) For purposes related to permanency planning:

11 (a) "Guardianship" means a dependency guardianship or a legal
12 guardianship pursuant to chapter 11.88 RCW or equivalent laws of
13 another state or a federally recognized Indian tribe.

14 (b) "Permanent custody order" means a custody order entered
15 pursuant to chapter 26.10 RCW.

16 (c) "Permanent legal custody" means legal custody pursuant to
17 chapter 26.10 RCW or equivalent laws of another state or a federally
18 recognized Indian tribe.

19 **Sec. 3.** RCW 13.34.145 and 2011 c 330 s 6 are each amended to read
20 as follows:

21 (1) The purpose of a permanency planning hearing is to review the
22 permanency plan for the child, inquire into the welfare of the child
23 and progress of the case, and reach decisions regarding the permanent
24 placement of the child.

25 (a) A permanency planning hearing shall be held in all cases where
26 the child has remained in out-of-home care for at least nine months and
27 an adoption decree, guardianship order, or permanent custody order has
28 not previously been entered. The hearing shall take place no later
29 than twelve months following commencement of the current placement
30 episode.

31 (b) Whenever a child is removed from the home of a dependency
32 guardian or long-term relative or foster care provider, and the child
33 is not returned to the home of the parent, guardian, or legal custodian
34 but is placed in out-of-home care, a permanency planning hearing shall
35 take place no later than twelve months, as provided in this section,
36 following the date of removal unless, prior to the hearing, the child
37 returns to the home of the dependency guardian or long-term care

1 provider, the child is placed in the home of the parent, guardian, or
2 legal custodian, an adoption decree, guardianship order, or a permanent
3 custody order is entered, or the dependency is dismissed. Every effort
4 shall be made to provide stability in long-term placement, and to avoid
5 disruption of placement, unless the child is being returned home or it
6 is in the best interest of the child.

7 (c) Permanency planning goals should be achieved at the earliest
8 possible date, preferably before the child has been in out-of-home care
9 for fifteen months. In cases where parental rights have been
10 terminated, the child is legally free for adoption, and adoption has
11 been identified as the primary permanency planning goal, it shall be a
12 goal to complete the adoption within six months following entry of the
13 termination order.

14 (2) No later than ten working days prior to the permanency planning
15 hearing, the agency having custody of the child shall submit a written
16 permanency plan to the court and shall mail a copy of the plan to all
17 parties and their legal counsel, if any.

18 (3) At the permanency planning hearing, the court shall conduct the
19 following inquiry:

20 (a) If a goal of long-term foster or relative care has been
21 achieved prior to the permanency planning hearing, the court shall
22 review the child's status to determine whether the placement and the
23 plan for the child's care remain appropriate.

24 (b) In cases where the primary permanency planning goal has not
25 been achieved, the court shall inquire regarding the reasons why the
26 primary goal has not been achieved and determine what needs to be done
27 to make it possible to achieve the primary goal. The court shall
28 review the permanency plan prepared by the agency and make explicit
29 findings regarding each of the following:

30 (i) The continuing necessity for, and the safety and
31 appropriateness of, the placement;

32 (ii) The extent of compliance with the permanency plan by the
33 department or supervising agency and any other service providers, the
34 child's parents, the child, and the child's guardian, if any;

35 (iii) The extent of any efforts to involve appropriate service
36 providers in addition to department or supervising agency staff in
37 planning to meet the special needs of the child and the child's
38 parents;

1 (iv) The progress toward eliminating the causes for the child's
2 placement outside of his or her home and toward returning the child
3 safely to his or her home or obtaining a permanent placement for the
4 child;

5 (v) The date by which it is likely that the child will be returned
6 to his or her home or placed for adoption, with a guardian or in some
7 other alternative permanent placement; and

8 (vi) If the child has been placed outside of his or her home for
9 fifteen of the most recent twenty-two months, not including any period
10 during which the child was a runaway from the out-of-home placement or
11 the first six months of any period during which the child was returned
12 to his or her home for a trial home visit, the appropriateness of the
13 permanency plan, whether reasonable efforts were made by the department
14 or supervising agency to achieve the goal of the permanency plan, and
15 the circumstances which prevent the child from any of the following:

16 (A) Being returned safely to his or her home;

17 (B) Having a petition for the involuntary termination of parental
18 rights filed on behalf of the child;

19 (C) Being placed for adoption;

20 (D) Being placed with a guardian;

21 (E) Being placed in the home of a fit and willing relative of the
22 child; or

23 (F) Being placed in some other alternative permanent placement,
24 including independent living or long-term foster care.

25 (~~At this~~) (4) Following this inquiry, at the permanency planning
26 hearing, the court shall order the department or supervising agency to
27 file a petition seeking termination of parental rights if the child has
28 been in out-of-home care for fifteen of the last twenty-two months
29 since the date the dependency petition was filed unless the court makes
30 a good cause exception as to why the filing of a termination of
31 parental rights petition is not appropriate. Any good cause finding
32 shall be reviewed at all subsequent hearings pertaining to the child.

33 (a) For purposes of this (~~section~~) subsection, "good cause
34 exception" includes but is not limited to the following:

35 (i) The child is being cared for by a relative;

36 (ii) The department has not provided to the child's family such
37 services as the court and the department have deemed necessary for the
38 child's safe return home; (~~or~~)

1 (iii) The department has documented in the case plan a compelling
2 reason for determining that filing a petition to terminate parental
3 rights would not be in the child's best interests; or

4 (iv) The parent is incarcerated, or the parent's prior
5 incarceration is a significant factor in why the child has been in
6 foster care for fifteen of the last twenty-two months, the parent
7 maintains a meaningful role in the child's life, and the department has
8 not documented another reason why it would be otherwise appropriate to
9 file a petition pursuant to this section.

10 (b) The court's assessment of whether a parent who is incarcerated
11 maintains a meaningful role in the child's life may include
12 consideration of the following:

13 (i) The parent's expressions or acts of manifesting concern for the
14 child, such as letters, telephone calls, visits, and other forms of
15 communication with the child;

16 (ii) The parent's efforts to communicate and work with the
17 department or supervising agency or other individuals for the purpose
18 of complying with the service plan and repairing, maintaining, or
19 building the parent-child relationship;

20 (iii) A positive response by the parent to the reasonable efforts
21 of the department or the supervising agency;

22 (iv) Information provided by individuals or agencies in a
23 reasonable position to assist the court in making this assessment,
24 including but not limited to the parent's attorney, correctional and
25 mental health personnel, or other individuals providing services to the
26 parent;

27 (v) Limitations in the parent's access to family support programs,
28 therapeutic services, and visiting opportunities, restrictions to
29 telephone and mail services, inability to participate in foster care
30 planning meetings, and difficulty accessing lawyers and participating
31 meaningfully in court proceedings; and

32 (vi) Whether the continued involvement of the parent in the child's
33 life is in the child's best interest.

34 (c) The constraints of a parent's current or prior incarceration
35 and associated delays or barriers to accessing court-mandated services
36 may be considered in rebuttal to a claim of aggravated circumstances
37 under RCW 13.34.132(4) (g) for a parent's failure to complete available
38 treatment.

1 ~~((e)(i))~~ (5)(a) If the permanency plan identifies independent
2 living as a goal, the court at the permanency planning hearing shall
3 make a finding that the provision of services to assist the child in
4 making a transition from foster care to independent living will allow
5 the child to manage his or her financial, personal, social,
6 educational, and nonfinancial affairs prior to approving independent
7 living as a permanency plan of care. The court will inquire whether
8 the child has been provided information about extended foster care
9 services.

10 ~~((ii))~~ (b) The permanency plan shall also specifically identify
11 the services, including extended foster care services, where
12 appropriate, that will be provided to assist the child to make a
13 successful transition from foster care to independent living.

14 ~~((iii))~~ (c) The department or supervising agency shall not
15 discharge a child to an independent living situation before the child
16 is eighteen years of age unless the child becomes emancipated pursuant
17 to chapter 13.64 RCW.

18 ~~((d))~~ (6) If the child has resided in the home of a foster parent
19 or relative for more than six months prior to the permanency planning
20 hearing, the court shall:

21 ~~((i))~~ (a) Enter a finding regarding whether the foster parent or
22 relative was informed of the hearing as required in RCW 74.13.280,
23 13.34.215(6), and 13.34.096; and

24 ~~((ii))~~ (b) If the department or supervising agency is
25 recommending a placement other than the child's current placement with
26 a foster parent, relative, or other suitable person, enter a finding as
27 to the reasons for the recommendation for a change in placement.

28 ~~((4))~~ (7) In all cases, at the permanency planning hearing, the
29 court shall:

30 (a) (i) Order the permanency plan prepared by the supervising agency
31 to be implemented; or

32 (ii) Modify the permanency plan, and order implementation of the
33 modified plan; and

34 (b) (i) Order the child returned home only if the court finds that
35 a reason for removal as set forth in RCW 13.34.130 no longer exists; or

36 (ii) Order the child to remain in out-of-home care for a limited
37 specified time period while efforts are made to implement the
38 permanency plan.

1 (~~(5)~~) (8) Following the first permanency planning hearing, the
2 court shall hold a further permanency planning hearing in accordance
3 with this section at least once every twelve months until a permanency
4 planning goal is achieved or the dependency is dismissed, whichever
5 occurs first.

6 (~~(6)~~) (9) Prior to the second permanency planning hearing, the
7 agency that has custody of the child shall consider whether to file a
8 petition for termination of parental rights.

9 (~~(7)~~) (10) If the court orders the child returned home, casework
10 supervision by the department or supervising agency shall continue for
11 at least six months, at which time a review hearing shall be held
12 pursuant to RCW 13.34.138, and the court shall determine the need for
13 continued intervention.

14 (~~(8)~~) (11) The juvenile court may hear a petition for permanent
15 legal custody when: (a) The court has ordered implementation of a
16 permanency plan that includes permanent legal custody; and (b) the
17 party pursuing the permanent legal custody is the party identified in
18 the permanency plan as the prospective legal custodian. During the
19 pendency of such proceeding, the court shall conduct review hearings
20 and further permanency planning hearings as provided in this chapter.
21 At the conclusion of the legal guardianship or permanent legal custody
22 proceeding, a juvenile court hearing shall be held for the purpose of
23 determining whether dependency should be dismissed. If a guardianship
24 or permanent custody order has been entered, the dependency shall be
25 dismissed.

26 (~~(9)~~) (12) Continued juvenile court jurisdiction under this
27 chapter shall not be a barrier to the entry of an order establishing a
28 legal guardianship or permanent legal custody when the requirements of
29 subsection (~~(8)~~) (11) of this section are met.

30 (~~(10)~~) (13) Nothing in this chapter may be construed to limit the
31 ability of the agency that has custody of the child to file a petition
32 for termination of parental rights or a guardianship petition at any
33 time following the establishment of dependency. Upon the filing of
34 such a petition, a fact-finding hearing shall be scheduled and held in
35 accordance with this chapter unless the department or supervising
36 agency requests dismissal of the petition prior to the hearing or
37 unless the parties enter an agreed order terminating parental rights,
38 establishing guardianship, or otherwise resolving the matter.

1 (~~(11)~~) (14) The approval of a permanency plan that does not
2 contemplate return of the child to the parent does not relieve the
3 supervising agency of its obligation to provide reasonable services,
4 under this chapter, intended to effectuate the return of the child to
5 the parent, including but not limited to, visitation rights. The court
6 shall consider the child's relationships with siblings in accordance
7 with RCW 13.34.130.

8 (~~(12)~~) (15) Nothing in this chapter may be construed to limit the
9 procedural due process rights of any party in a termination or
10 guardianship proceeding filed under this chapter.

11 **Sec. 4.** RCW 13.34.180 and 2009 c 520 s 34 and 2009 c 477 s 5 are
12 each reenacted and amended to read as follows:

13 (1) A petition seeking termination of a parent and child
14 relationship may be filed in juvenile court by any party, including the
15 supervising agency, to the dependency proceedings concerning that
16 child. Such petition shall conform to the requirements of RCW
17 13.34.040, shall be served upon the parties as provided in RCW
18 13.34.070(8), and shall allege all of the following unless subsection
19 (~~(2) or~~) (3) or (4) of this section applies:

20 (a) That the child has been found to be a dependent child;

21 (b) That the court has entered a dispositional order pursuant to
22 RCW 13.34.130;

23 (c) That the child has been removed or will, at the time of the
24 hearing, have been removed from the custody of the parent for a period
25 of at least six months pursuant to a finding of dependency;

26 (d) That the services ordered under RCW 13.34.136 have been
27 expressly and understandably offered or provided and all necessary
28 services, reasonably available, capable of correcting the parental
29 deficiencies within the foreseeable future have been expressly and
30 understandably offered or provided;

31 (e) That there is little likelihood that conditions will be
32 remedied so that the child can be returned to the parent in the near
33 future. A parent's failure to substantially improve parental
34 deficiencies within twelve months following entry of the dispositional
35 order shall give rise to a rebuttable presumption that there is little
36 likelihood that conditions will be remedied so that the child can be
37 returned to the parent in the near future. The presumption shall not

1 arise unless the petitioner makes a showing that all necessary services
2 reasonably capable of correcting the parental deficiencies within the
3 foreseeable future have been clearly offered or provided. In
4 determining whether the conditions will be remedied the court may
5 consider, but is not limited to, the following factors:

6 (i) Use of intoxicating or controlled substances so as to render
7 the parent incapable of providing proper care for the child for
8 extended periods of time or for periods of time that present a risk of
9 imminent harm to the child, and documented unwillingness of the parent
10 to receive and complete treatment or documented multiple failed
11 treatment attempts;

12 (ii) Psychological incapacity or mental deficiency of the parent
13 that is so severe and chronic as to render the parent incapable of
14 providing proper care for the child for extended periods of time or for
15 periods of time that present a risk of imminent harm to the child, and
16 documented unwillingness of the parent to receive and complete
17 treatment or documentation that there is no treatment that can render
18 the parent capable of providing proper care for the child in the near
19 future; or

20 (iii) Failure of the parent to have contact with the child for an
21 extended period of time after the filing of the dependency petition if
22 the parent was provided an opportunity to have a relationship with the
23 child by the department or the court and received documented notice of
24 the potential consequences of this failure, except that the actual
25 inability of a parent to have visitation with the child including, but
26 not limited to, mitigating circumstances such as a parent's current or
27 prior incarceration or service in the military does not in and of
28 itself constitute failure to have contact with the child; and

29 (f) That continuation of the parent and child relationship clearly
30 diminishes the child's prospects for early integration into a stable
31 and permanent home. If the parent is incarcerated, the court shall
32 consider whether a parent maintains a meaningful role in his or her
33 child's life based on factors identified in RCW 13.34.145(4)(b);
34 whether the department or supervising agency made reasonable efforts as
35 defined in this chapter; and whether particular barriers existed as
36 described in RCW 13.34.145(4)(b) including, but not limited to, delays
37 or barriers experienced in keeping the agency apprised of his or her

1 location and in accessing visitation or other meaningful contact with
2 the child.

3 (2) As evidence of rebuttal to any presumption established pursuant
4 to subsection (1)(e) of this section, the court may consider the
5 particular constraints of a parent's current or prior incarceration.
6 Such evidence may include, but is not limited to, delays or barriers a
7 parent may experience in keeping the agency apprised of his or her
8 location and in accessing visitation or other meaningful contact with
9 the child.

10 (3) In lieu of the allegations in subsection (1) of this section,
11 the petition may allege that the child was found under such
12 circumstances that the whereabouts of the child's parent are unknown
13 and no person has acknowledged paternity or maternity and requested
14 custody of the child within two months after the child was found.

15 (~~(3)~~) (4) In lieu of the allegations in subsection (1)(b) through
16 (f) of this section, the petition may allege that the parent has been
17 convicted of:

18 (a) Murder in the first degree, murder in the second degree, or
19 homicide by abuse as defined in chapter 9A.32 RCW against another child
20 of the parent;

21 (b) Manslaughter in the first degree or manslaughter in the second
22 degree, as defined in chapter 9A.32 RCW against another child of the
23 parent;

24 (c) Attempting, conspiring, or soliciting another to commit one or
25 more of the crimes listed in (a) or (b) of this subsection; or

26 (d) Assault in the first or second degree, as defined in chapter
27 9A.36 RCW, against the surviving child or another child of the parent.

28 (~~(4)~~) (5) When a parent has been sentenced to a long-term
29 incarceration and has maintained a meaningful role in the child's life
30 considering the factors provided in RCW 13.34.145(4)(b), and it is in
31 the best interest of the child, the department should consider a
32 permanent placement that allows the parent to maintain a relationship
33 with his or her child, such as, but not limited to, a guardianship
34 pursuant to chapter 13.36 RCW.

35 (6) Notice of rights shall be served upon the parent, guardian, or
36 legal custodian with the petition and shall be in substantially the
37 following form:

38 "NOTICE

1 A petition for termination of parental rights has been filed
2 against you. You have important legal rights and you must take
3 steps to protect your interests. This petition could result in
4 permanent loss of your parental rights.

5 1. You have the right to a fact-finding hearing before
6 a judge.

7 2. You have the right to have a lawyer represent you at
8 the hearing. A lawyer can look at the files in your case, talk
9 to the department of social and health services or the
10 supervising agency and other agencies, tell you about the law,
11 help you understand your rights, and help you at hearings. If
12 you cannot afford a lawyer, the court will appoint one to
13 represent you. To get a court-appointed lawyer you must
14 contact: (explain local procedure).

15 3. At the hearing, you have the right to speak on your
16 own behalf, to introduce evidence, to examine witnesses, and to
17 receive a decision based solely on the evidence presented to
18 the judge.

19 You should be present at this hearing.

20 You may call (insert agency) for more information
21 about your child. The agency's name and telephone number are
22 (insert name and telephone number)."

Passed by the House April 22, 2013.

Passed by the Senate April 17, 2013.

Approved by the Governor May 8, 2013.

Filed in Office of Secretary of State May 8, 2013.

Appendix C

FINAL BILL REPORT

SHB 1284

C 173 L 13

Synopsis as Enacted

Brief Description: Concerning the rights of parents who are incarcerated.

Sponsors: House Committee on Early Learning & Human Services (originally sponsored by Representatives Roberts, Walsh, Kagi, Sawyer, Goodman, Freeman, Farrell, Appleton, Ryu, Reykdal, Santos and Habib).

House Committee on Early Learning & Human Services

Senate Committee on Human Services & Corrections

Senate Committee on Ways & Means

Background:

Dependent Child.

A dependent child is any child who has been abandoned, abused, or neglected by a person who is legally responsible for the care of the child. A dependent child is also a child who has no parent, guardian, or person capable of adequately caring for the child, such that the child is in danger of substantial damage to his or her psychological or physical development.

A court may order law enforcement, a probation counselor, or a child protective services official to take a child into custody if a petition is filed alleging that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if the child is not taken into custody. In support of the petition, the Department of Social and Health Services (DSHS) must file an affidavit that sets forth specific factual information that is the basis for the petition. To order that the child be taken into custody, the court must find, after reviewing the petition and affidavit, reasonable grounds to believe that the child is dependent and that the child's health, safety and welfare will be seriously endangered if the child is not taken into custody.

Shelter Care Hearing.

When a child is taken into custody, the court is to hold a shelter care hearing within 72 hours. The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the dependency case is being resolved.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Case Conference.

A case conference must be convened after a shelter care hearing to develop a written agreement regarding the expectations of the DSHS and the parent regarding voluntary services for the parent.

Dependency Trial.

The court must conduct a trial to determine whether the allegations that a child is dependent can be shown by a preponderance of the evidence. If at the end of the dependency trial the burden of proof is met, the court's findings form the basis for the case plan, which includes services, placement of the child, and visitation. The content of the case plan is the basis for determining what steps need to be taken before a child may return safely home. If the burden of proof is not met, the dependency is dismissed and the child is returned to the custody of the parent.

Disposition Orders.

If the child is found to be dependent, the court must issue a disposition order directing the service plan for the parents and the child, a visitation plan, and, eventually, a permanent plan. The court's order sets the benchmarks and expectations for the parties. If the court determines that reunifying the family is not in the best interests of the child, the child may be placed with a relative, a foster family, group home, or other suitable place.

After the court issues a disposition order, review hearings are held. The court then makes findings regarding compliance and progress by the parents, child, and other parties to the dependency. If after a review hearing, a child remains out of the home, the court must establish a date by which the child will have a permanent plan for care. The court must also determine whether reasonable efforts have been made to provide services to the family, whether there has been compliance with the case plan, whether progress has been made toward correcting the problems that led to the removal of the child from the parents' home, and whether the parents have visited the child.

Termination of Parental Rights.

The court, under certain circumstances, may order the filing of a petition for the termination of parental rights. The court may exercise this discretion if it finds that "aggravated circumstances" exist, including the failure of a parent to complete available treatment ordered where such failure resulted in the prior termination of parental rights, and the parent has failed to effect change in the interim. A party to the dependency action may also file a petition for the termination of parental rights.

If a child has been in out-of-home care for 15 of the most recent 22 months, the court must order the DSHS to file a petition for termination of parental rights, unless the court finds a "good cause exception." Good cause exists if: (1) the DSHS has failed to provide the child's family with services that the DSHS and the court have determined are necessary for the child's safe return home; or (2) the DSHS has documented compelling reasons that filing a petition to terminate parental rights would not be in the child's best interest.

Summary:

Case Conference.

A parent who is unable to participate in a case conference in person because he or she is incarcerated must be afforded the option to participate by a telephone conference or a videoconference.

Permanency Planning.

The requirements in a permanency plan that a parent must meet to resume custody of a child must address the special circumstances of a parent who is incarcerated. This includes addressing how the parent will participate in the case conference and permanency planning meetings. Where possible, treatment must reflect the resources available at the facility where the parent is confined. Visitation must be provided for unless it is not in the best interest of the child.

Discretionary Petition for Termination of Parental Rights.

In determining whether a parent has failed to complete court-ordered treatment, the court must consider constraints that a parent experienced by a current or prior incarceration. The constraints considered may include delays or barriers experienced by the parent. The court may also consider whether the parent has maintained a meaningful role in the child's life and whether the DSHS has made reasonable efforts to assist the parent. Where there has been a claim of aggravated circumstances, the court may consider rebuttal evidence of whether barriers existed for the parent.

When a parent who is sentenced to long-term incarceration has maintained a meaningful role in his or her child's life, the DSHS should, but is not required to, seek a permanent placement that allows the parent to maintain a relationship with his or her child, such as a guardianship.

Mandatory Petition for Termination of Parental Rights.

Good cause exceptions to filing a mandatory petition for termination of parental rights include circumstances where a current or prior incarceration is a significant factor in why a child has been in foster care for 15 of the last 22 months, as long as the parent has maintained a meaningful role in the child's life. In determining whether the parent has maintained a meaningful role in a child's life, the court may consider the parent's lack of access to programs, services, treatment, legal counsel, or court proceedings. The court may also consider as a good cause exception any delays or barriers to completion of court-mandated treatment caused by incarceration.

Votes on Final Passage:

House	96	1	
Senate	47	1	(Senate amended)
House	95	0	(House concurred)

Effective: July 28, 2013

Appendix D

Multiple Agency Fiscal Note Summary

Bill Number: 1284 S HB	Title: Incarcerated parents' rights
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Estimated Cash Receipts

NONE

Estimated Expenditures

Agency Name	2013-15			2015-17			2017-19		
	FTEs	GF-State	Total	FTEs	GF-State	Total	FTEs	GF-State	Total
Administrative Office of the Courts	Non-zero but indeterminate cost and/or savings. Please see discussion.								
Department of Social and Health Services	.0	0	0	.0	0	0	.0	0	0
Total	0.0	\$0	\$0	0.0	\$0	\$0	0.0	\$0	\$0

Local Gov. Courts *	Non-zero but indeterminate cost. Please see discussion.								
Local Gov. Other **									
Local Gov. Total									

Estimated Capital Budget Impact

NONE

Prepared by: Carl Yanagida, OFM	Phone: (360) 902-0553	Date Published: Final 3/13/2013
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* See Office of the Administrator for the Courts judicial fiscal note

** See local government fiscal note

FNPID 35057

Judicial Impact Fiscal Note

Bill Number: 1284 S HB	Title: Incarcerated parents' rights	Agency: 055-Admin Office of the Courts
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Part I: Estimates

No Fiscal Impact

Estimated Cash Receipts to:

Account	FY 2014	FY 2015	2013-15	2015-17	2017-19
Counties					
Cities					
Total \$					

Estimated Expenditures from:

Non-zero but indeterminate cost. Please see discussion.

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.

Legislative Contact: Kevin Black	Phone: (360) 786-7747	Date: 03/07/2013
Agency Preparation: David Elliott	Phone: 360-705-5229	Date: 03/08/2013
Agency Approval: Dirk Marler	Phone: 360-705-5211	Date: 03/08/2013
OFM Review: David Dula	Phone: (360) 902-0547	Date: 03/08/2013

Request # CJ-1
Bill # 1284 S HB

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

Changes from the previous version of the bill (HB 1284):

Language and definitions are modified and one section of statute is no longer proposed for amendment (13.34.132).

Summary of this version of the bill:

This bill relates to parental rights for parents that are incarcerated or in residential treatment.

Sections with potential court impact:

Section 4 would amend RCW 13.34.145 related to permanency hearings to add an element to the "good cause exception" for parents whose contact with a child has been limited by incarceration or residence in a treatment program.

Section 5 would amend RCW 13.34.180 related to petitions seeking termination of a parent/child relationship to instruct the court to consider additional factors.

II. B - Cash Receipts Impact

None

II. C - Expenditures

The expected expenditure impacts resulting from the bill are unchanged.

There are expected to be expenditure impacts on the courts resulting from the provisions of the bill. The bill provides additional direction to the courts to consider circumstances prior to ruling on termination and permanency proceedings. The judiciary expects that this will result in additional hearings and motions and longer hearings.

Presentation of additional evidence, exhibits and testimony by the Department will be required to address the new factors added to RCW section 13.34.180 (Section 5 of the bill). This will add an estimated two to three hours per trial. It is not known how often this section will come into use in court each year.

In order to provide scale, an estimate was created using 2.5 hours of additional court time per trial for trials with elements changed by the bill. Up to 35 cases could be affected prior to expending \$50,000 per year, this estimate includes judicial time, and staff support costs. The Department of Social and Health Services (DSHS) is not able to estimate the possible number of affected cases, however the DSHS fiscal note shows that there are 1,712 parents of children incarcerated and an unknown number participating in residential substance abuse treatment programs.

A note about Superior Court impacts:

Fiscal impact is calculated on a statewide basis. Even though this may result in the need for a fraction of an additional judge FTE statewide when the impact of a particular bill is minimal, the goal is to provide an estimate of projected costs for a given piece of proposed legislation.

There is a finite amount of superior court judicial officer time available to hear cases throughout the state. Superior court judicial officers preside over all juvenile cases. Whenever additional caseload creates a need for additional judicial officers the system absorbs that need. The system accommodates such changes partially by delaying criminal and juvenile cases and partly by lengthening the backlog for civil trials. Small increases in FTE need may be absorbed by the system, but there is a cumulative effect from multiple bills in a session or over a series of years that can result in a shortage of judges and commissioners relative to the judicial need expressed in caseload.

There are currently 189 superior court judge positions. The statutorily mandated (RCW 2.56.030) objective workload methodology estimates a need for 249 superior court judges. This is a gap of 60 judicial FTE. Thus, only 76% of the superior court judge need is currently being met by elected full-time superior court judges. Some jurisdictions have chosen to establish and fund court commissioner

positions instead of elected judge positions. There are currently 56 FTE court commissioner positions.

One way that insufficient capacity manifests is in court backlog. Court rules control delay for criminal matters and matters involving juveniles to some extent, so delays are shifted to civil and domestic calendars. Statewide court timeliness statistics collected in 2009 show that only 73 percent of domestic cases are resolved in less than 10 months and 92 percent of civil cases are resolved in less than one year.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

SOURCES:

Judicial input

Juvenile court administrator input

DSHS fiscal note for HB 1284

Individual State Agency Fiscal Note

Bill Number: 1284 S HB	Title: Incarcerated parents' rights	Agency: 300-Dept of Social and Health Services
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Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact: Kevin Black	Phone: (360) 786-7747	Date: 03/07/2013
Agency Preparation: Edward Giger	Phone: 360-902-8067	Date: 03/13/2013
Agency Approval: Kelci Karl-Robinson	Phone: 360-902-8174	Date: 03/13/2013
OFM Review: Carl Yanagida	Phone: (360) 902-0553	Date: 03/13/2013

Request # 13SHB1284R-2

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

This bill does not impact the Department as the Department currently provides the services and opportunities described in the bill.

Compared to previous versions of this bill, the following are changes in this bill that reduce the impact of the fiscal note:

- The Department or a Supervising Agency is no longer required to notify a parent of his other legal rights and obligations and of services available in the community that the parent resides in or will reside in upon release if a current or prior incarceration or participation in a residential treatment program has prevented a parent from accessing services.
- The Department is not required to aid the Court in gathering information on behalf of the parent when the Court assesses whether the parent has maintained a meaningful relationship with his or her child.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

NONE

None

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

None

