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Supreme Court No. 92448-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF D.L.B.,

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

EDELYN SAINT-LOUIS,

Petitioner.

**AMICI CURIAE MEMORANDUM IN SUPPORT OF REVIEW OF
WASHINGTON DEFENDER ASSOCIATION, INCARCERATED
PARENTS ADVOCACY CLINIC, LEGAL VOICE, ACLU OF
WASHINGTON, WASHINGTON STATE COALITION AGAINST
DOMESTIC VIOLENCE, AND INCARCERATED MOTHERS
ADVOCACY PROJECT**

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I. INTRODUCTION

Amici Washington Defender Association, Incarcerated Parents Advocacy Clinic, Legal Voice, ACLU of Washington, Washington State Coalition Against Domestic Violence, and Incarcerated Mothers Advocacy Project respectfully request that the Court grant the Motion for Discretionary Review filed by Edelyn Saint-Louis. This case presents unsettled questions with great impact on Washington families regarding the proper interpretation of SHB 1284, a law passed by the Legislature in 2013 to help prevent the loss of parent-child relationships due to a parent's incarceration. Additionally, this case raises important issues concerning whether a parent's status as a domestic violence victim is a proper basis for terminating her or his parental rights.

When the Legislature passed SHB 1284, it made sweeping changes to Washington's dependency and termination statutes. As advocates for this legislation, *amici* have a strong interest in ensuring that the law is properly interpreted to reflect the Legislature's clear intent to ensure, where possible, that a parent's incarceration during a child's dependency does not result in the unnecessary termination of the parent-child relationship. Here, both the trial court and the Department of Social and Health Services ("the Department") failed to comply with the requirements and the intent of the new law. The Court of Appeals' decision misinterpreted the law and *amici* request reversal by this Court.

In addition, *amici* are deeply concerned that Ms. Saint-Louis's status as a victim of domestic violence was regarded as a parenting deficiency to

justify termination of her parental rights. To base a termination decision, even in part, on the fact that a parent has been a victim of domestic violence is contrary to Washington's strong public policy of protecting and supporting domestic violence survivors.

These issues raise fundamental questions regarding the interpretation of SHB 1284 and the grounds for terminating the parent-child relationship; *amici* urge the Court to accept this case for review.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *amici* are set forth in the motion for leave to file an amicus brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Motion for Discretionary Review, previously filed with the Court.

IV. ARGUMENT

A. **The Legislature Intended that SHB 1284 Would Help Reunify Families and Reduce the Termination of Parent-Child Relationships Due to a Parent's Incarceration, Demonstrating the Need for this Court's Guidance in Interpreting the Statute**

When the Washington Legislature passed SHB 1284 in 2013, it made fundamental and comprehensive changes to Washington's dependency and termination statutes with regard to incarcerated parents and their children. *See* Substitute H.B. 1284, 63rd Leg., Reg. Sess. (Wash.

2013). This legislation became effective July 28, 2013, before Ms. Saint-Louis was incarcerated and before the termination petition and trial.

By its clear terms, the Legislature's intent in passing SHB 1284 was to promote reunification of families, and specifically, to protect the rights of children and their parents against termination when parents experienced barriers to reunification due to incarceration during their dependency proceedings. The floor debate on SHB 1284 reflects the Legislature's intent. In his remarks introducing the bill for Senate floor debate, Senator Kirk Pearson stated that "[t]he intent of this bill is to help parents with successful reentry back into society, bringing parents back with their children."¹ He further noted that "the intent of this bill is good, it is trying to bring families back together, and that was . . . the main focus of the prime sponsor."²

The Legislature recognized that both incarcerated *and* formerly incarcerated parents face unique barriers in reunifying with their children that are a direct result from incarceration, such as barriers in accessing services, visitation, and meaningful participation in dependency proceedings. Testimony offered by the bill's sponsor and advocates during legislative hearings underscores those points.³ The House bill report's summary of public testimony in favor of the bill notes:

¹ Sen. Kirk Pearson, Washington State Senate floor debate on SHB 1284, Apr. 17, 2013, available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013040113B (remarks at 2:22:22 – 34).

² *Id.* at 2:23:15 – 28.

³ See, e.g., public testimony by Lillian Hewko of Legal Voice, Shayne Rochester (a formerly incarcerated parent) and bill sponsor Rep. Mary Helen Roberts at the Senate hearings on SHB 1284 on March 14 and April 8, 2013, available under "Available Videos" at: <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1284&year=2013>

When the parent and child connections are kept, a child's chances for a positive outcome in his or her own life are improved. . . . When families get involved in the criminal justice system, however, the law often tips the balance towards termination, even when it is not in the best interests of the child and the family. It takes more time for parents to navigate two systems. This bill will make laws more responsive to meet the challenges facing the families in the child welfare and criminal justice systems.

House Bill Report on Substitute H.B. 1284, 63rd Leg., Reg. Sess. (Wash. 2013).⁴

To help remedy these barriers, the bill created explicit rights for parents to increase incarcerated parent's involvement in dependency proceedings and their ability to maintain relationships with their children during a dependency, responsibilities for the Department to engage with incarcerated parents, as well as protections at the termination stage to prevent termination due to a parent's incarceration during the dependency.

The bill added numerous provisions throughout RCW 13.34 to accomplish these goals, including but not limited to:

- Providing that permanency plans must address how incarcerated parents will participate in case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available where the parent is confined. RCW 13.34.136(2)(b)(i).
- Requiring that permanency plans for incarcerated parents provide for visitation opportunities, unless visitation is not in the best interests of the child. *Id.*

A key question concerns the interpretation of a mandatory provision that SHB 1284 added to RCW 13.34.180(1)(f), which is one of the six factors that the Department must allege in the termination petition and prove by

⁴ Available at <http://lawfilesexternal.wa.gov/biennium/2013-14/Pdf/Bill%20Reports/House/1284%20HBR%20ELHS%2013.pdf>

clear, cogent, and convincing evidence in order to terminate a parent's rights.

Before the enactment of SHB 1284, RCW 13.34.180(1)(f) provided only that the Department was required to allege and to prove "[t]hat continuation of the parent and children relationship clearly diminishe[d] the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f) (2009). SHB 1284 added the following new requirements to RCW 13.34.180(1)(f):

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 the factors identified in RCW 13.34.145; 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(4)(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.

Laws of 2013, ch. 173, § 4 (emphasis added).

Thus, the Act modified the Department's obligations to incarcerated parents throughout the dependency proceeding, *and then* required a deeper assessment at the termination stage as to how incarceration impacted the parent's ability to remedy parenting deficiencies and to maintain a bond with his or her child during the dependency proceeding, not simply or solely at the time of trial. To limit the court's application of the provisions only to parents who are incarcerated at the time of the termination trial would frustrate the administration of justice and the plain intent of the law.

Amici fully agree with Ms. Saint-Louis's arguments that SHB 1284 must be interpreted to require trial courts to consider the new requirements added to RCW 13.34.180(1)(f) if a parent is incarcerated during a child's dependency, particularly when viewed in light of the bill as a whole. To interpret the amendment to RCW 13.34.180(1)(f) to apply only if a parent is incarcerated at the time of a termination trial would lead to absurd results and would be contrary to legislative intent of helping to ensure that the barriers resulting from a parent's incarceration do not result in the termination of the parent-child relationship. *Amici* request the Court properly interpret the statute and reverse the Court of Appeals decision.

B. The Decision Impacts Many Parents and Children and Raises Important Public Policy Concerns, Justifying Review Under RAP 13.4(b)(4)

Incarceration is not a constant for most individuals. At least 95 percent of state prisoners will be released back to their communities at some point. T. Hughes & D.J. Wilson, *Reentry Trends in the United States*, U.S. Dep't of Justice, Bureau of Justice Assistance (2002).⁵ To interpret SHB 1284 to include only parents who are incarcerated at the time of the termination trial will negatively impact many families in the child welfare system, leading to absurd results and disregard for legislative intent. The Court should consider the background facts available to the Legislature at

⁵ Available at bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf.

the time of passage and which underlay these public policy changes enhancing rights of children and their incarcerated parents.

The method the Court has established for statutory interpretation implies that legislative intent should be first ascertained through language *and* context of the particular statute. *Dep't of Ecology v. Campbell Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This expansive view of plain meaning has been defined to incorporate more than simply the text in question; "context" may include matters outside of the code and session laws such as "background facts of which judicial notice can be taken . . . because presumably the legislature was also familiar with them when it passed the statute." *Id.* at 11, citing 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000).

SHB 1284 was the legislature's response to the mounting social science research and evidence that maintaining contact with one's incarcerated parent improves a child's emotional response to their parent's incarceration and supports parent-child attachment, while lowering the likelihood of recidivism among incarcerated parents and reducing chances of intergenerational incarceration. *See e.g.*, Nancy G. La Vigne *et al.*, *Examining the effect of incarceration and in-prison family contact on prisoners' family relationships*, 21 J. Contemp. Crim. Justice 314 (2005). Additionally, the Legislature was aware of the evidence that preserving and strengthening the relationship between child and parent while a parent is

incarcerated promotes permanency and reduces the potentially damaging effects of separation. *Id.*

In adopting SHB 1284, the Legislature recognized that the loss of the parent-child relationship harms families and has a particularly acute impact on women who have been incarcerated. The Legislature was aware that from 1995-2005 alone, the rate of women in prison in Washington State increased threefold, and during the same time, increases in DSHS involvement rose in tandem. Miriam L. Bearnse, Wash. Dep't of Soc. & Health Servs., *Children and Families of Incarcerated Parents: Understanding the Challenges and Addressing the Needs*, 19-21 (2008).⁶ In Washington state facilities alone, 15,000 of the 18,000 offenders who are in confinement are parents, leaving approximately 30,000 dependent children. *Id.* at 4. This does not account for the number of children with parents in and out of federal and local jail systems. *Id.* Many are children of color, because of racial disparities in the criminal justice system. Drug Policy Alliance, *Fact Sheet: The Drug War, Mass Incarceration and Race* (2014).⁷ Legislation was necessary, as it was estimated that families involved in both the criminal justice and the child welfare system were twice as likely to lose their rights than parents who are not criminal justice involved. Marilyn C.

⁶ Available at https://www.prisonlegalnews.org/media/publications/children_and_families_of_incarcerated_parents_report_miriam_bearnse_2008.pdf

⁷ Available at http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf

Moses, *Correlating Incarcerated Mothers, Foster Care and Mother-Child Reunification*, Corrections Today (2006).⁸

In sum, interpretation cannot leave out parents incarcerated during a dependency and released by the time of a termination trial. Such an interpretation would not only go against legislative intent, but also harm Washington's most vulnerable families. It is important that the Court review this case to ensure proper interpretation of SHB 1284.

C. The Court Should Provide Guidance To Ensure that a Parent's Status as a Victim of Domestic Violence Is Not Considered a Parenting Deficiency

Finally, *amici* are also concerned that Ms. Saint-Louis's history as a victim of domestic violence was regarded as a parenting deficiency to justify the termination of her parental rights. For example, the Court of Appeals stated that she had "unresolved domestic violence issues," which it cited as an "uncorrected parenting deficienc[y]." Slip Op. at 16. However, nothing in the Court of Appeals decision or the State's response to the Motion for Discretionary Review suggest that Ms. Saint-Louis had herself committed acts of domestic violence in any relationship.

It should be beyond question that a domestic violence survivor is not to blame for abuse committed against her. *See, e.g., Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002) ("[i]t desecrates fundamental precepts of justice to blame a crime on the victim."). Our child abuse and neglect statutes similarly recognize that "exposure to domestic violence as

⁸ Available at <https://www.ncjrs.gov/pdffiles1/nij/216276.pdf>

defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.” RCW 26.44.020(16).

The Court of Appeals expressed concern that at the time of the termination trial, Ms. Saint-Louis was in a relationship with another man who had a history of domestic violence against his former spouse. Slip Op. at 15. However, the Court did not cite evidence that Ms. Saint-Louis’s current partner had committed domestic violence against her. The fact that Ms. Saint-Louis’s current partner had a prior history of domestic violence should not lead to a conclusion that Ms. Saint-Louis was an unfit parent or would be unable to take appropriate protective action should she become a victim of domestic violence in the future. This is an issue that requires guidance by the Court.

V. CONCLUSION

Given the significant public interests, *amici* respectfully request that the Court grant Ms. Saint-Louis’s Motion for Discretionary Review.

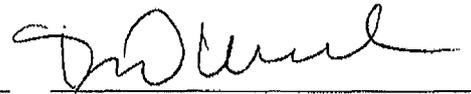
DATED this 30th day of November, 2015.

Respectfully submitted,

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