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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Welfare of:

D.H., S.T., L.L., and T.L.

Minor Children.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves the welfare of nine-year-old D.H., seven-year-old S.T., five-year-old T.L., and three-year-old L.L.¹ In July 2018, the trial court terminated the parental rights of B.B., the mother of these children. Ms. B. appeals the trial court's ruling, claiming insufficiency of the evidence. The evidence supporting the termination orders was sufficient, and the orders should be affirmed.

Over the course of a three-year dependency proceeding, the Department of Social and Health Services (the Department) provided, and Ms. B. participated in, services tailored to her particular needs. The Department provided Ms. B. a psychological evaluation and a neuropsychological evaluation to determine Ms. B.'s mental health needs and cognitive ability. Ms. B. engaged in mental health counseling throughout the dependency case.

The Department offered Ms. B. several parenting education programs, including three separate hands-on programs which provided parenting instruction to Ms. B. in the manner recommended by her

¹ In order to protect confidentiality, and in compliance with Division Two General Order 2006-1 and this Court's September 24, 2018, Perfection Letter, the three dependent children and their parents are referred to by their initials. The mother is referred to as B.B. or Ms. B. The children are referred to as D.H. (01/2009), S.T. (09/2011), T.L. (05/2013) and L.L. (08/2015).

neuropsychological evaluation. Ms. B. has not demonstrated an ability to retain or apply the lessons taught by the parenting educators.

At the time of trial, Ms. B.'s visits with the children were significantly limited to protect the children's wellbeing during visits. Each visit was limited to two hours in a closed room at a visitation facility and were supervised by a visit supervisor. Further, the visits were divided so that only two of Ms. B.'s four children participated in each visit with the mother. Despite these precautions, Ms. B. was still unable to safely care for the children during visits.

Substantial evidence in the record supports the trial court's findings. The termination orders should be affirmed.

II. STATEMENT OF ISSUES

1. Does substantial evidence support the trial court's finding that the Department provided all necessary services, reasonably available, that were capable of correcting the mother's parental deficiencies in the foreseeable future when:

- a. The Department timely offered the neuropsychological evaluation more than two years prior to the commencement of the termination trial;
- b. Dialectical Behavioral Therapy was not a necessary, reasonably available service because no Department contracted providers were able to provide the specific therapy, and alternate mental health therapy was offered until Dialectical Behavioral Therapy became available; and

c. The Department referred the mother to three one-on-one parent education courses that provided parenting instruction in the form recommended by the mother's neuropsychological evaluation.

III. COUNTERSTATEMENT OF FACTS

The Department of Social and Health Services has been involved in Ms. B.'s life for many years.² As a child, Ms. B. and her siblings were removed from their parents and placed in foster care. Exhibit (Ex.) 77 at 5, RP at 489. As an adult, the Department received fifteen intakes regarding Ms. B. and her children, dating back to 2009. RP at 185. In 2014, the Department referred Ms. B. for several services designed to prevent the need for out of home placement of her children. Exs. 79-86.

On June 12, 2015, the Department filed dependency petitions for nine-year-old D.H., seven-year-old S.T., and five-year-old T.L. Exs. 5-7. Pursuant to court order, the three children were taken into state custody on that same date. Exs. 11-13. Ms. B. agreed to a finding of dependency for D.H., T.L. and S.T. on July 23, 2015. The Department filed a dependency petition for three-year-old L.L. on August 11, 2015. Ex. 27. Pursuant to court order, L.L. was taken into Department custody, on that same day. Ex. 29. Ms. B. agreed to a finding of dependency for L.L. on

² As of July 1, 2018, the Department of Social and Health Services' duties related to child welfare services transferred to the Department of Children, Youth, and Families (DCYF). Laws of 2017, 3rd Spec. Sess., ch. 6, §§ 321-22. In this brief, both agencies will be referred to as "the Department."

September 24, 2015. Ex. 33. Ms. B. agreed to participate in the following services: (1) psychological evaluation and follow recommendations; (2) parenting education; (3) mental health treatment: individual counseling. *Id.* at 7.

A. The Department Offered-and Ms. B. Engaged in-Mental Health Services During the Dependency Case.

Ms. B. engaged in mental health counseling with Cynthia Dyrness, from July through September of 2015. Ex. 87. Ms. Dyrness was familiar with Ms. B.'s needs; she had a preexisting professional relationship with Ms. B. and had also previously counseled Ms. B.'s mother. RP at 73-74. Issues with Ms. B.'s insurance caused this service to lapse between September 2015 and April 2016. Ex. 87, RP at 84. Ms. B. was continuously engaged in counseling with Ms. Dyrness from April 2016, through the date of trial. RP at 84, 290. During the lapse in counseling, Ms. B. continued to work with Ms. Dyrness on Parenting Protection Group parenting education, a parenting class that Ms. Dyrness described as having elements similar to therapy. *Id.* at 84-85.

Ms. Dyrness engaged Ms. B. in Cognitive Behavioral Therapy. *Id.* at 78. Ms. B. was able to understand the material. *Id.* at 86. Cognitive Behavioral Therapy helps to change patient's thoughts, which

changes behavior, which in turn changes moods, which changes actions.

Id. at 94.

The therapy focused on helping Ms. B. with techniques for reducing her stress and anxiety, and improving her focus, concentration, and organizational ability. *Id.* The main focus was on treating the post-traumatic stress disorder which underlied all her symptoms. *Id.* When Ms. B. feels anxious, her cognitive ability drops to a lower level and Ms. B. will shut down. *Id.* at 78-79. After nearly two years of counseling Ms. B. was only able to reduce her anxiety from between a six and seven on a scale of one to ten to a three to five. RP at 75, 80.

Ms. Dyrness coordinated with Ms. B.'s Behavioral Health Resources team to regulate her medication. *Id.* at 88, 90. Ms. Dyrness referred Ms. B. to psychiatric treatment with Behavioral Health Resources in December of 2016. Ex. 87, RP at 627. Ms. B. is on medication for Post-Traumatic Stress Disorder and an antidepressant. RP at 91, 592. Ms. Dyrness estimated that Ms. B. began taking these medications in March of 2017, and that she had been operating at her fully medicated potential for nine months at the time trial commenced. *Id.* at 92-93.

The Department referred Ms. B. to Dr. Mark Whitehill for a psychological evaluation on July 6, 2015, prior to establishment of dependency. Ex. 56. Dr. Whitehill's evaluation was completed on

October 6, 2015. Ex. 77. During the evaluation, Ms. B. denied the Department's concerns in their entirety. RP at 446. During the parent-child observation portion of the evaluation Ms. B. demonstrated the same inability to safely monitor the children that she displayed during visits throughout the dependency. RP at 451, 453. Dr. Whitehill determined that it appeared Ms. B. had cognitive capability, but had a deficit in willingness or motivation to use her capability to effectively parent. *Id.* at 449. Dr. Whitehill recommended a neuropsychological evaluation to further investigate that disconnect. *Id.* at 460. After reviewing Ex. 128, Dr. Whitehill determined that it was currently unsafe for the children to return to mother's care. RP at 458.

The Department offered Ms. B. all of the services recommended by Dr. Whitehill. Exs. 62-66. A change in assigned social worker delayed the referral for the neuropsychological evaluation by several months, but a referral was made on February 12, 2016, over twenty-four months before the commencement of the termination trial. Ex. 62, RP at 669-70.

The Department made a second referral on June 22, 2016. Ex. 63. On her attorney's advice, Ms. B. did not attend her neuropsychological evaluation appointment on June 30, 2016. Ex. 87. The social worker again referred for the neuropsychological evaluation on July 19, 2016. Ex. 64. After the third referral, Ms. B. participated in the neuropsychological

evaluation with Dr. Tatyana Shepel, and Dr. Shepel issued her report on November 13, 2016. Ex. 78.

During the evaluation, Ms. B. was extremely anxious. RP at 112. Ms. B. minimized the severity of the case, and denied the Department's concerns. *Id.* at 111. Dr. Shepel determined that Ms. B. was cognitively capable of understanding complex concepts and learning and understanding the developmental needs of her children, but that she may not be able to apply the knowledge to real life situations. Ex. 78. at 16, RP at 116, 149.

Dr. Shepel opined that Ms. B.'s inability to control symptoms of anxiety was her main impairment. RP at 137. Dr. Shepel recommend that Ms. B. engage in Dialectical Behavioral Therapy, a psychiatric evaluation for medication. Ex. at 17. Dr. Shepel advised that Ms. B. would benefit from individual parenting education that included one-on-one assistance, repetition, rehearsal, role-modeling, multiple reviews, and dividing information into small pieces. RP at 119, 127, 144, 149.

Upon receiving Dr. Shepel's neuropsychological evaluation report, social worker (SW) Doug Willman provided a copy of the report to Ms. B. *Id.* at 633. Ms. B. reviewed the report with her counselor, Cynthia Dyrness. Ex. 87.

SW Willman also referred Ms. B. to Dialectical Behavioral Therapy through Behavioral Health Resources when he received Dr. Shepel's report. *Id.* at 598, 671-72, 693. Ms. B. already had a case manager at Behavioral Health Resources and a written referral from the Department was not necessary for Ms. B. to engage in Dialectical Behavioral Therapy. *Id.* at 598, 693.

At the time of the referral, Behavioral Health Resources did not have a therapist qualified to provide Dialectical Behavioral Therapy. *Id.* at 598. Both Ms. B. and SW Willman understood that when a qualified therapist was hired, Behavioral Health Resources would set Ms. B. up with Dialectical Behavioral Therapy without further referral from the Department. *Id.* at 598, 672, 693. SW Willman explored all other potential Dialectical Behavioral Therapy providers in the area and discovered the services was not available. *Id.* at 672. When Dialectical Behavioral Therapy became available at Behavioral Health Resources, Ms. B. engaged in the service. *Id.* at 598.

B. Ms. B.'s Children's Behavior Presents Significant Challenges That are Difficult for Even a Trained Care Provider to Manage

Ms. B.'s children's behavior is very difficult to control. T.L. has a behavioral Individual Education Plan (IEP) at his pre-school. RP at 157, Ex. 113. He was very angry and his temper escalates quickly.

RP at 157, 330. His behavior is not typical of children in his class. *Id.* at 160-61.

T.L. will escalate over small things and it is never clear what will upset him. *Id.* at 159. When escalated at school T.L., will hit or kick objects, hurt friends and run out of the classroom, there is always a concern he will hurt himself or others. *Id.* at 160-61, 166, 330. T.L. also lacks safety boundaries. *Id.* at 332. He will run out of visits and into the parking lot. *Id.* at 759-60. T.L. needs a lot of monitoring to ensure his physical safety, and the safety of those around him. *Id.* During transport home from visits, a second supervisor accompanied the driver to handle the children's behaviors. RP at 47. At school, several trained adults are focusing hard on keeping T.L. safe. *Id.* at 334. Consistency is important in addressing T.L.'s behavior. *Id.* at 169.

S.T. also has an IEP at her school, though her issues are more social/emotional. *Id.* at 163, 755, Ex. 114. She is emotionally fragile, quiet and withdrawn, and she will cry with little provocation. *Id.* at 163, 754. S.T. wants a lot of adult attention. *Id.* at 163, 337, 755. She is very good at reading different adults and understanding how to get attention from them. *Id.* at 338-39, 756. She lacks boundaries, and does not have a sense of "stranger danger." *Id.* at 307. She is at risk of being exploited by adults,

and requires more supervision than an average child to keep her safe. *Id.* 163, 340.

D.H. had an I.E.P. at his school before his move to Texas. *Id.* at 305-306. Prior to his relative placement, he was placed in a behavior rehabilitation foster home to account for his severe behavioral issues. *Id.* He was often asked to leave school early due to behavior issues. *Id.* at 752. D.H. displayed behavior similar to that displayed by T.L. *Id.* at 361, 752, 756. He would try to run off, damage property and was aggressive toward caregivers. *Id.* at 361.

Ms. B.'s children display an unusual amount of physicality. *Id.* at 763. During sibling altercations there is potential for damage. *Id.* Ms. B. does not recognize that her children have special needs or behavior issues that require special attention. *Id.* at 476, 480, 555-56. D.H., S.T., and T.L. need stability in order to control their behaviors. *Id.* at 344, 362, 780. Changes in routine led to more challenging behavior for T.L. and L.L. *Id.* at 357.

Due to the children's ages and developmental levels the near term foreseeable future for them is very short term. *Id.* 309. For D.H. the future is no more than a month or two away. *Id.* at 309, 778-79. For S.T. the future is only one to two weeks away. *Id.* at 309, 778. For T.L. and L.L. the future would be limited to days or hours. *Id.* at 309, 778

C. The Mother Did Not Improve Her Parenting Ability Such That the Children Could be Safely Returned Home in the Foreseeable Future.

Dr. Shepel advised that Ms. B. would benefit from individual parenting education. Ex. 78 at 17. Dr. Shepel determined that Ms. B. would benefit from parenting classes that included one-on-one assistance, repetition, rehearsal, role-modeling, multiple reviews, and dividing information into small pieces. RP at 119, 127, 144, 149. The Department offered Ms. B. several parenting education courses that presented information to Ms. B in the forms recommended by Dr. Shepel.

The Department offered Ms. B. Triple P parenting instruction with Noel Villarivera. RP at 197, Ex. 65. Triple P is a one-on-one parenting instruction program that, incorporates practice sessions and rehearsal. RP at 196. Triple P's curriculum is divided into smaller sections, so that in each lesson a different skill is taught. *Id.*, Ex. 90-95. Triple P is designed as a ten-week program, but allows for eight additional classes when a parent would benefit from repetition and review of a particular lesson. RP at 196. Ms. B. engaged in eighteen weeks of Triple P because Mr. Villarivera determined that additional review and repetition of a skill was necessary. RP at 196, 198, 209-10.

Despite Triple P meeting the teaching elements suggested by Dr. Shepel, Ms. B. was still unable to internalize and apply the parenting

skills she was taught in Triple P. RP at 199. When Ms. B. became overwhelmed while attempting to apply the parenting skills, Mr. Villarivera would intervene and coach Ms. B. on the skills she was to apply. *Id.* at 200, 212. Mr. Villarivera would repeat the same instructions to Ms. B. several times during the course of a session. *Id.* at 201, 209.

The Department also referred Ms. B. for two separate hands-on parenting classes with Brenda Sullens: Promoting First Relationships and Family Preservation Services. *Id.* at 247-48. Ms. Sullens has been instructing these parenting courses since 2000. *Id.* at 246. Ms. B. engaged in Promoting First Relationships at the beginning of the dependency when L.L. was first born. *Id.* at 247. She engaged in Family Preservation Services from December 12, 2017 until February 28, 2018. *Id.* at 250.

Ms. Sullens provided Ms. B. parenting coaching and supported her during visits to gain skills and make progress. *Id.* at 249. The Family Preservation Services curriculum allowed Ms. Sullens to tailor the lessons to Ms. B.'s needs and goals. *Id.* at 249. Family Preservation Services consisted of twice-weekly sessions working specifically on the issues that arose during a visit. *Id.* at 252. In both Promoting First Relationships and Family Preservation Services, Ms. Sullens instructed Ms. B. on her children's developmental and social-emotional needs. *Id.* at 254-55. Ms. Sullens modeled skills for Ms. B. throughout the visits. *Id.* at 260-61.

Upon completion of Family Preservation Services in February 2018, Ms. Sullens believed Ms. B. had the tools and skills to properly control the children's behavior. *Id.* at 253-54. However, Ms. B. still struggled with keeping track of everything going on in a visit and consistently applying and following through with discipline techniques. *Id.* at 254. Ms. B. was not able to recognize that she still struggled to properly parent the children. *Id.* at 256-57, 575. Ms. B. also failed to recognize that parenting these children could induce anxiety. *Id.* at 585. Ms. Sullens' believed that Ms. B. still had a lot more work to do before she could safely have unsupervised visits. *Id.* at 257.

Ms. Sullens testified that even in a best-case scenario it would take Ms. B. a year to remedy her parental deficiencies such that the children could be returned to her care. *Id.* at 272. SW Willman also testified that a best case scenario would require Department supervision for at least another year. *Id.* at 300.

D. Visitation between Ms. B. and the Children Remained Chaotic, and Unsupervised Visitation Presented a Safety Threat to Both the Children's Physical and Psychological Safety.

At the time of the termination trial, Ms. B.'s visits were supervised, which required a supervisor to have both eyes and ears on the family at all times. RP at 17. The visits were divided between the children so that S.T. and L.L. visited on Tuesdays and T.L. and L.L. visited on

Wednesdays. *Id.* at 18. Ms. B. visited with D.H. by telephone and Skype twice per week for 30 minutes per visit *Id.*

Ms. B. had great difficulty dividing her attention between the children and meeting the needs of more than one of her four children at a time. RP at 39, 46-47, 302. While paying attention to one child, she would lose track of the other children. RP at 23, 39, 45-46, Ex. 122. T.L. would scream, throw things or try to run away and hide. RP at 21. Ms. B. would threaten T.L. with timeout or other discipline and attempt to initiate timeout, but would not follow through with enforcing the discipline. *Id.* at 22, 24, 45-46, 56-57, 301-02, 688, Ex. 121.

Throughout the history of this case, the visits between Ms. B. and the children have been loud, stressful and extremely chaotic. RP at 22, 65, 768. An experienced visitation supervisor testified that this family is the most difficult assignment that they have had. *Id.* at 48.

Ms. B. struggled to control the children's behavior. *Id.* at 56. T.L. would regularly run out of the visitation room and go into multiple other visit rooms. RP at 31, 68. It could take five minutes to corral T.L. and get everyone back into the visitation room. *Id.* at 31. Special precautions for Ms. B., such as closing the exterior doors, needed to be taken at the visitation facility to ensure the children are safe during visits. *Id.* at 34. Ms. B. was unable to consistently redirect T.L. RP at 71.

Ms. B.'s visits often required outside intervention to keep the children mentally, physically and emotionally safe. RP at 40, 57, 566-67.

For a short period in the spring of 2017, the visits occurred outside of the visitation facility in the children's play area at the local McDonalds. *Id.* at 19, 294, 765-66. Ms. B. was unable to control the children in this environment. *Id.* at 294, 756. Safety concerns led to the visits quickly returning to the visitation facility. *Id.* at 19, 294, 694.

Shortly after the visits returned to the visitation facility, visits were reduced to only two children at a time in an effort to make the visits less traumatic to the children and allow Ms. B. to apply the lessons learned in parenting education in a less chaotic environment. RP at 64, 295, 770.

After the reduction to two children, the visits remained overwhelming to Ms. B. *Id.* at 270. Ms. B. continued to have difficulty keeping the children safe and under control. *Id.* at 793. Ms. B. continued to rely on the visit supervisors and the parenting instructor to help meet the children's needs. *Id.* at 262, 303, 767, 772, 774. Ms. B. did not realize that she was relying on the parenting instructor and visit supervisor to help manage the children. *Id.* at 262-63. Ms. B. continued to struggle with following through with discipline. *Id.* at 772. Ms. Sullens testified that any improvement in the visits could be correlated to the reduction from four to

two children at the visits. *Id.* at 278. The visit remained chaotic up to the time of the termination trial. *Id.* at 297.

E. The Court Terminated Ms. B.'s Parental Rights to D.H., S.T., T.L., and L.L.

Beginning on March 7, 2018 and concluding on May 10, 2018, the trial court held an eight-day termination hearing. CP at 111.³ On May 26, 2018, nearly three years after the children were first found dependent and many years after the Department first offered remedial services to Ms. B., the trial court issued its oral ruling terminating Ms. B.'s parental rights as to nine-year-old boy D.H., seven-year-old girl S.T., five-year-old boy T.L. and three-year-old girl L.L. RP at 866-96.

IV. ARGUMENT

Ms. B. argues that the trial court erred in finding that the Department offered all necessary services, reasonably available and capable of correcting parental deficiencies; and that there was little likelihood that conditions would be remedied so that the children could be returned home in the near future. But substantial evidence in the record demonstrates that the Department offered Ms. B. all services, reasonably available, capable of correcting her parental deficiencies in the foreseeable future. Despite her participation in court-ordered services, at the time of

³ The clerk's papers for D.H., S.T., T.L., and L.L. are, for the most part, identical. This response brief cites to the clerk's papers for T.L.

trial Ms. B. remained unable to provide safe and appropriate parenting for her children even in the controlled setting of a supervised visit. Accordingly, Ms. B. remained unfit to parent her children, and the orders terminating Ms. B.'s parental rights as to D.L., S.T., T.L., and L.L. should be affirmed.

A biological parent has a fundamental liberty interest in the care, custody, and control of her child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Matter of K.M.M.*, 186 Wn.2d 466, 477, 379 P.3d 75 (2016). However, that right is not absolute. *K.M.M.*, 186 Wn.2d at 477. When a parent's actions, decisions, or inability to act seriously conflict with the physical or mental health of the child, the parent's rights must be balanced against both the child's right to basic nurture, safety, and physical and mental health, and the State's right and responsibility to intervene to protect the child. RCW 13.34.020; *Krause v. Catholic Cmty. Servs.*, 47 Wn. App. 734, 743, 737 P.2d 280 (1987). Ultimately, where the rights of the child and the rights of the parent conflict, the rights and safety of the child must prevail. RCW 13.34.020; *K.M.M.*, 186 Wn.2d at 477.

Washington law creates a two-step process to terminate parental rights. First, the party seeking to terminate the parent-child relationship

must establish the elements of RCW 13.34.180(1) by clear, convincing, and cogent evidence:

- (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.[...];
- (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); RCW 13.34.190(1)(a)(i).

Satisfaction of the six statutory elements is an implicit finding of parental unfitness, satisfying the due process requirement that the trial

court must find parents currently unfit before terminating parental rights.

In re Dependency of K.N.J., 171 Wn.2d 568, 577, 257 P.3d 522 (2011).

Once the trial court is satisfied that the petitioner has met its burden under RCW 13.34.180(1), the trial court must then turn its attention to the second step of the framework, which focuses on the best interests of the child. *Matter of K.M.M.*, 186 Wn.2d 466, 478, 379 P.3d 75, 83 (2016). The petitioner must prove by a preponderance of the evidence that termination of the parent-child relationship is in the child's best interest. *See* RCW 13.34.190(1)(b); *K.M.M.*, 186 Wn.2d at 479.

A. Standard of Review

When reviewing challenges to the sufficiency of the evidence, appellate courts consider whether substantial evidence supports the trial court's findings. *In re Welfare of A.G.*, 155 Wn. App. 578, 588, 229 P.3d 935 (2010). Substantial evidence exists where a rational trier of fact could find that the necessary facts were proved by clear, cogent and convincing evidence. *In re Welfare of M.R.H.*, 145 Wn. App. 10, 24, 188 P.3d 510 (2008). The question is not whether the evidence may have supported other findings of fact, but whether the evidence in the record supports the findings that were made by the trial court. *In re A.G.*, 155 Wn. App. at 588-89 (citing *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999)).

The trial court is afforded broad discretion, and its decision is entitled to great deference on review. *In re Dependency of A.M.*, 106 Wn. App. 123, 131, 22 P.3d 828 (2001). When evidence has been weighed in a bench trial, as is the case here, the evidence must be viewed in the light most favorable to the prevailing party, and the trial court must be deferred to on issues related to witness credibility and conflicting testimony. *Choi v. Sung*, 154 Wn. App. 303, 313, 225 P.3d 425 (2010); *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006). This strong deference is based on the trial court's advantage in having the witnesses before it, with the concomitant ability to observe demeanor and evaluate credibility. *In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Even if it disagrees with a trial court's determination, a reviewing court must uphold the decision so long as there is evidence that, if believed, supports the ruling. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994); *In re Sego*, 82 Wn.2d at 739-40.

B. Substantial Evidence Supports the Trial Court's Finding that the Department Expressly and Understandably Offered All Necessary Services, Reasonably Available, Capable of Correcting the Mother's Parental Deficiencies

The State has an affirmative duty to offer or provide reasonably available services that are capable of correcting identified

parental deficiencies within the foreseeable future. *In re Welfare of Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983); *In re Dependency of P.D.*, 58 Wn. App. 18, 26, 792 P.2d 159, review denied, *In re Dependency of P.A.D.*, 115 Wn.2d 1019 (1990). A parent who claims he received insufficient services, must point to evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *In re Dependency of T.R.*, 108 Wn. App. 149, 163, 29 P.3d 1275 (2001). In other words, “even where the State inexcusably fails to offer a service to a willing parent, which is not the case here, termination is appropriate if the service would not have remedied the parent’s deficiencies in the foreseeable future.” *Id.* at 164.

- 1. The Department timely offered the neuropsychological evaluation to Ms. B. and Ms. B. had sufficient time to comply with the recommendations of the neuropsychological evaluation before her parental rights were terminated.**

Ms. B. argues that the Department did not provide all reasonably available, necessary services as required under RCW 13.34.180(1)(d) because she did not complete her court-ordered neuropsychological evaluation until November of 2016. Br. of Appellant at 18-22. This argument fails for three reasons. First, Ms. B. was responsible for a substantial portion of the gap between the completion of the psychological evaluation and completion of the neuropsychological evaluation.

Second, following receipt of the neuropsychological evaluation report on November 13, 2016, Ms. B. was able to engage in over fifteen months of services informed by the neuropsychological evaluation before the termination trial commenced. Third, the Department referred Ms. B. for, and Ms. B. engaged in, mental health treatment during the period between receiving the recommendations of the psychological evaluation and receiving the recommendations of the neuropsychological evaluation.

The Department is required to offer Ms. B. “all necessary services, reasonably available, capable of correcting her parental deficiencies within the foreseeable future.” RCW 13.34.180(1)(d). “[A] parent’s unwillingness or inability to make use of the services provided excuses the State from offering extra services that might have been helpful.” *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1989). Furthermore, a parent’s lack of insight into her own condition and the child’s needs is relevant to assessing whether the parent would benefit from additional services. *See In re Welfare of H.S.*, 94 Wn. App. 511, 528, 973 P.2d 474 (1999) (citing *Krause v. Catholic Cmty. Servs.*, 47 Wn. App. 734, 747, 737 P.2d 280 (1987)).

On July 6, 2015, prior to a finding of dependency, SW Tami Johnson referred Ms. B. to Dr. Whitehill for a psychological evaluation. Ex. 56. Ms. B. completed the psychological evaluation, and

Dr. Whitehill issued his report on October 6, 2015. Ex. 77. Dr. Whitehill recommended that Ms. B. undergo a neuropsychological evaluation to determine levels of comprehension regarding her parenting. Ex. 77 at 17.

A change in assigned social worker contributed to a slight delay in the referral for the neuropsychological evaluation. RP at 669-70. On February 12, 2016, the Department referred Ms. B. to Dr. O'Leary for a neuropsychological testing battery and neurobehavioral status exam with interpretation and report. Ex. 62. The record does not explain why this evaluation was not completed. On, June 22, 2016, the Department referred Ms. B. to Dr. Shepel for a psychological evaluation/neuro eval. Ex. 63. On her attorney's advice, Ms. B. prioritized a visitation with her children and did not attend the scheduled neuropsychological evaluation on June 30, 2016. Ex. 87. On July 19, 2016, the Department again referred Ms. B. for a neuropsychological evaluation with Dr. Shepel. Ex. 64. Ms. B. did not require any additional referrals, and completed a neuropsychological evaluation with Dr. Shepel, who issued her report on November 13, 2016. Ex 78.

The Department timely referred Ms. B. for her neuropsychological evaluation. Ms. B.'s decision to prioritize a visit with her children over engaging in the neuropsychological evaluation led to a delay in completion of the service.

Absent a finding of good cause, the dependency court must order the Department to file a petition for termination of parental rights if a child has been in foster care for fifteen of the previous twenty-two months. RCW 13.34.145(2). Here, the children remained out of home from the time of their initial removal. CP at 216, Finding 3.3. The children were in foster placement on November 13, 2016 and remained out of home through the termination trial. Ex. 46, 126, CP at 216, Finding 3.3.

Even if the trial court's findings regarding whether remedial services were provided in a timely fashion were not supported by substantial evidence, the mother still had 15 months after receiving a neuropsychological evaluation to benefit from offered mental health services, and she still made insufficient progress. Neither the termination statute, nor appellate court decisions interpreting it, prohibit a termination when the Department initiated remedial services later than when dependency was established, but over a year before the parent's rights were terminated. In fact, in *In re K.M.M.*, the Washington State Supreme Court ruled that termination may be appropriate if a remedial service that was not offered to the parent would not remedy the parent's deficiencies in the foreseeable future. 186 Wn.2d 466, 486, 379 P.3d 75 (2016) (citing *In re Dependency of T.R.*, 108 Wn. App. 149, 164, 29 P.3d 1275 (2001)).

As in *T.R.*, the mother here is not arguing that a particularly helpful service was not provided; rather, she seeks more time to successfully complete her services. “But the statute requires the State to prove only that it provided the services that were necessary, available, and capable of correcting parental deficiencies within the foreseeable future.” *T.R.*, 108 Wn. App. At 165. A wait of 15 months from when the neuropsychological evaluation was provided, plus a minimum of another 12 months of parenting education, as Ms. Sullens and SW Willman testified would be necessary before the children could be returned home, exceeds these children’s foreseeable future.

Relying on *In re Termination of S.J.*, 162 Wn. App. 873, 256 P.3d 470 (2011), Ms. B. contends that the delay in accessing the neuropsychological evaluation prevented her from obtaining adequate mental health services. Br. App. at 15. But the facts in *S.J.* are substantially different from the facts here. In *S.J.*, the Department took a sequential approach to the mother’s dual parental deficiencies of mental health and substance abuse. *In re S.J.*, 162 Wn. App. 873, 882, 256 P.3d 470 (2011). The Department referred the mother for substance abuse treatment before attempting to address the mother’s mental health issues. *Id.* at 876. In *S.J.* the Department did not refer the mother to mental

health services for the first seven months of the dependency case. *Id.* at 882.

Here, Ms. B. engaged in Cognitive Behavioral Therapy, a mental health treatment program, with Cynthia Dyrness in July 2015, prior even to the establishment of dependency. RP at 73. Ms. B. had a break from treatment, but resumed seeing Ms. Dyrness for individual therapy in April of 2016, seven months before the neuropsychological evaluation report was issued, and nearly two years before the commencement of the termination trial Ex. 87. During the lapse in mental health treatment, Ms. B. continued to work with Ms. Dyrness in her capacity as instructor of the Parenting Protection Group. Ex. 86. Ms. Dyrness describes this group as similar to group therapy. RP at 86.

Ms. B. worked with Ms. Dyrness to address anxiety and stress as well as focus, concentration, and organizational ability through this therapy. RP at 75. Ms. Dyrness reviewed Dr. Shepel's report with Ms. B. shortly after it was released, and by December 7, 2016, had devised a plan to incorporate Dr. Shepel's therapeutic recommendations into her treatment plan. Ex. 87. Also by December 7, 2016, Ms. Dyrness had referred Ms. B. to psychiatric resources to further address Ms. B.'s neuropsychological issues. *Id.*

Ms. Dyrness coordinated Ms. B.'s mental health services and medication management with Behavioral Health Resources. RP at 88, 90-91. Ms. B.'s medication regimen addresses Post-Traumatic Stress Disorder and a low dose of antidepressant. *Id.* at 91. At the time of Ms. Dyrness's testimony on March 7, 2018, Ms. B. had been taking medication for approximately a year. *Id.* at 92.

Unlike the mother in *S.J.*, Ms. B. engaged in substantial mental health services concurrent with her engagement in parenting education. Ms. B. was provided mental health treatment services before and during the dependency cases, and had fifteen months from when she completed the neuropsychological evaluation to sufficiently progress in remedial services. Her failure to do so indicates she cannot remedy her deficiencies in the foreseeable future. Not because she was not provided sufficient timely services, but because she lacks the ability to do so.

2. Dialectical Behavioral Therapy was not reasonably available until February 2018.

Ms. B. argues that her inability to engage in Dialectical Behavioral Therapy until the month before trial undermined her ability to reunify with her children. Br. App. at 18. This argument fails for two reasons. First, Dialectical Behavioral Therapy was not reasonably available to Ms. B. during the course of the dependency. Second, Ms. B. has not

demonstrated how Dialectical Behavioral Therapy, if offered earlier in the dependency case, would have been more successful in correcting her parental deficiencies than the Cognitive Behavioral Therapy she engaged in throughout the course of the dependency case.

RCW 13.34.180(1)(d) requires the Department to provide “all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future.” RCW 13.34.180(1)(d). A service is necessary if it is “needed to address a condition that precludes reunification of the parent and child.” *K.M.M.*, 186 Wn.2d at 480 (quoting *In re Dependency of A.M.M.*, 182 Wn. App. 776, 793, 332 P.3d 500 (2014)). The phrase “necessary services” is modified by two additional statutory terms: necessary services must be “reasonably available” and capable of correcting a parental deficiency “within the foreseeable future.” Thus, even where a service is necessary, the RCW 13.34.180(1)(d) element may still be satisfied if the service is not reasonably available or if the parent is unable to make use of the service to remedy his or her parental deficiencies in the foreseeable future.

Here, Dialectical Behavioral Therapy was not a reasonably available service. Ms. B. was in mental health treatment with Behavioral Health Resources at the time Dr. Shepel recommended Dialectical Behavioral Therapy to treat her mental health needs. RP at 694. The social

worker coordinated with the mental health provider to provide Dialectical Behavioral Therapy to Ms. B. The provider did not have a staff person able to provide Dialectical Behavioral Therapy; when the staff position was filled, the plan was for the provider to contact Ms. B. to arrange her participation in Dialectical Behavioral Therapy as soon as this therapy was available. *Id.* at 672, 694. No further referral was necessary for Ms. B. to engage in Dialectical Behavioral Therapy with the provider. *Id.* at 693.

After determining that Behavioral Health Resources was not able to promptly engage Ms. B. in Dialectical Behavioral Therapy, the social worker contacted all other mental health service providers on the Department's contracted provider list. *Id.* at 672. None of the Department's contracted providers were able to provide Dialectical Behavioral Therapy at that time. *Id.* The Department continued to try to find a Dialectical Behavioral Therapy provider for Ms. B. and eventually Behavioral Health Resources was able to provide the service. *Id.* at 673.

Even if this Court finds that Dialectical Behavioral Therapy was a reasonably available service, Ms. B. cannot show that Dialectical Behavioral Therapy would have remedied her parental deficiencies in the foreseeable future, as the evidence shows it would not have done so. A parent who claims she received insufficient services must point to

evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *T.R.*, 108 Wn. App. at 163.

Here, as explained above, throughout the course of the dependency case, Ms. B. engaged in Cognitive Behavioral Therapy to treat her mental health issues. Dr. Shepel opined that Ms. B.'s inability to control symptoms of anxiety was her main impairment. *Id.* at 137. Ms. B.'s therapist integrated the recommendations of Dr. Shepel's neuropsychological evaluation into the treatment she was already providing in order to address Ms. B.'s neuropsychological issues. Ex. 87. Ms. B.'s Cognitive Behavioral Therapy focused on helping Ms. B. with techniques for reducing her anxiety. RP at 86. There is no evidence that Dialectical Behavioral Therapy, rather than the therapy that Ms. B. actually received, would correct Ms. B.'s parental deficiencies in the foreseeable future.

3. The Department offered parenting education specifically tailored to the mother's needs.

Ms. B. argues that that the Department failed to tailor services to the mother's needs. Br. App. at 22-26. However, substantial evidence supports a finding that the Department tailored the mother's services by referring her to parenting education courses that in their design, addressed the mother's needs and learning style.

When there is evidence that a parent may be developmentally disabled, the Department has an obligation to investigate the likelihood the parent is developmentally disabled and provide services to meet those needs. *Matter of I.M.-M.*, 196 Wn. App. 914, 924, 385 P.3d 268 (2016). The mother cites *I.M.-M.* as an analogous case, however *I.M.-M.* is distinguishable for two reasons. First, the Department investigated Ms. B.'s cognitive ability by referring her for a neuropsychological evaluation, which revealed her ability to learn and understand information is not nearly as limited as that of the mother in *I.M.-M.* Second, the Department offered Ms. B. parenting education that implemented the methods of instruction suggested in the neuropsychological evaluation.

In *I.M.-M.*, the mother had significant cognitive impairments that raised concerns about her ability to care for herself. *Id.* at 918. Her IQ was lower than 91 percent of individual her age. *Id.* In her psychological evaluation, the provider found evidence that she might be developmentally disabled, but did not reach a final diagnosis because he did not administer the appropriate testing. *Id.* at 918-19. The Court found the Department's failure to investigate the potential developmental disability diagnosis particularly significant, because a more comprehensive evaluation revealing a developmental disability diagnosis would have triggered a statutory obligation to refer the mother for services

with the Department's developmental disabilities administration and coordinate a care plan. *Id.* at 294.

Here, the Department fully investigated Ms. B.'s cognitive ability. Ms. B.'s cognitive impairments are much less severe than the mother in *I.M.-M.* In light of Ms. B.'s much less significant needs, the evidence indicates that the parenting instruction Ms. B. received was sufficiently tailored to her needs. In Ms. B.'s psychological evaluation, Dr. Whitehill determined her IQ to be in the 43rd percentile, placing her in the average range. Ex. 77 at 11. In Ms. B.'s neuropsychological evaluation, Dr. Shepel determined that Ms. B. is capable of learning and understanding of the developmental needs of her children. Ex. 78 at 16. Ms. B. is cognitively capable of understanding complex concepts, learning and understanding of the developmental needs of her children. RP at 149. It is Ms. B.'s defensiveness with regard to her parenting choices, and denial of the facts of neglect make her unable to apply learned parenting knowledge in real life situations. *Id.*

In order to address these parenting concerns, Dr. Shepel recommended that Ms. B. engage in parenting education to gain better understanding of children's growth and development, normal developmental behaviors, techniques for encouraging a child's positive growth, and techniques for reducing her own parental stress. *Id.*

Dr. Shepel noted that Ms. B.'s strength is in verbal comprehension. RP at 115. Ms. B. is able to comprehend written material, understand information presented in a group format, and to make sense of verbally presented information. *Id.* at 116. Dr. Shepel determined that Ms. B. would benefit from parenting classes that included one-on-one assistance, repetition, rehearsal, role-modeling, multiple reviews, and dividing information into small pieces. *Id.* at 119, 127, 144, 149, Ex. 78 at 17. The Department offered Ms. B. several parenting education courses that presented information to Ms. B. in the ways recommended by Dr. Shepel.

The parenting education courses provided by the Department met Ms. B.'s needs as described in Dr. Shepel's neuropsychological evaluation. The Department offered Ms. B. the Positive Parenting Program (Triple P), a one-on-one weekly session with the parent lasting between 45 and 90 minutes that is centered on the parent/child visit. RP at 195. Ms. B. first engaged in Triple P on August 3, 2016. *Id.* at 197. Triple P consists of a core of ten sessions, but allows for eighteen sessions if a parent is not able to apply a skill and needs to repeat a lesson. *Id.* at 196. Ms. B. repeated eight lessons and completed the maximum of eighteen Triple P sessions. *Id.* at 197. Ms. B. appeared to understand the material. *Id.* at 212. She completed her homework assignments and

engaged in discussion regarding the lesson, but was unable, even with constant reminders, to apply the lessons to the children. *Id.* at 212.

The Triple P instructor met with Ms. B. for 30-40 minutes prior to each visit to talk about the specific skills that Ms. B. was practicing during her upcoming visit. *Id.* at 198. The instructor then observed each visit and prompted Ms. B. when she struggled to implement a parenting skill during the visit. *Id.* When Ms. B. failed to implement a parenting skill, the Triple P instructor redirected her to the proper skill. *Id.* at 209. The instructor had to do a lot of redirecting with Ms. B. *Id.* at 212.

The Department also referred Ms. B. to two separate hands-on parenting classes with Ms. Sullens, a trained parenting coach who provides the services Promoting First Relationships and Family Preservation Services. *Id.* at 247-48. Ms. Sullens provided Ms. B. parenting coaching and supported her during parent-child visits to gain skills and make progress in her ability to parent her children. *Id.* at 249. Family Preservation Services consisted of twice-weekly sessions working specifically on the issues that arise during a visit. *Id.* at 252. In both Promoting First Relationships and Family Preservation Services, Ms. Sullens instructed Ms. B. on her children's' developmental and social-emotional needs. *Id.* at 254-55. Ms. Sullens modeled skills for Ms. B. throughout the visit. *Id.* at 260-61.

The Department also referred Ms. B. to Parenting Protection Group, which was taught by the mother's mental health therapist, Cynthia Dyrness. *Id.* at 84. Ms. Dyrness was familiar with Ms. B.'s mental health needs from before the dependency and provided Cognitive Behavioral Therapy treatment during the dependency. *Id.* at 73.

Substantial evidence supports the trial court's findings that the Department referred Ms. B. to parenting education services that were tailored to meet her needs.

- 4. Because the Department understandably offered all reasonably available services that were capable of correcting the mother's parental deficiencies, the trial court correctly made no finding regarding the futility of additional services.**

Ms. B. argues that the trial court's findings that Ms. B. cannot retain information and is incapable of applying learned parenting skills implies a finding that additional services would be futile. CP at 222, Findings 3.5.22, 3.5.28, Br. App. at 26. This is a misreading of the trial Court's findings. Findings 3.5.22 and 3.5.28 are subsections of finding 3.5, which reads in pertinent part as follows: "There is little likelihood that conditions will be remedied so that the children can be returned to their mother (Ms. B.'s) care ... in the near future." CP at 220. Rather than supporting a finding that the Department met the burden of RCW 13.34.180(1)(d), these findings support the finding that the

Department satisfied the burden of RCW 13.34.180(1)(e). The trial court did not make a finding that additional parenting education services would be futile, nor was such a finding necessary; instead, the court correctly found that the mother was expressly and understandably offered all necessary services, reasonably available, capable of correcting her parental deficiencies within the foreseeable future. Ms. B.'s argument that a futility finding was required is misplaced here, as the trial court correctly found that she was provided services under RCW 13.34.180(1)(d), and these findings are supported by substantial evidence as explained above.

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V. CONCLUSION

D.H., S.T., T.L., and L.L. urgently need a safe and permanent home. Substantial evidence supports the trial court's findings that all necessary, reasonably available, services, capable of correcting the mother's parental deficiencies within the foreseeable future, were offered or provided. Despite access to and participation in these services, Ms. B. did not remedy her parental deficiencies and remained unfit to parent at the time of the termination trial. Accordingly, the Department asks this Court to affirm the trial court's order terminating parental rights.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

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CERTIFICATE OF SERVICE

I certify that on December 20, 2018, I served a true and correct copy of this **BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** upon the person indicated below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 20th day of December 2018, at Tumwater, Washington.



KRIS ORCUTT
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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