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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of:

A.L.S.B.,

A Minor Child.

DSHS ANSWER TO BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

Amicus Washington Defender Association misconstrues the record and erroneously places the blame for the father's inability to bond with his daughter on the Department of Social and Health Services. Ultimately, the Defender Association's argument is little more than a futile challenge to the sufficiency of the evidence. The trial court's findings are amply supported by a fair reading of the record. The father is solely responsible for his early failure to visit the child and for the ensuing months of inconsistent contact and personal instability.

II. ARGUMENT

In its attempt to make the father appear fit, the Defender Association distorts the facts, attacks the Department, and misconstrues studies and reviews relating to child welfare and juvenile court proceedings. The record shows that the father was unavailable to A.B., by choice or criminal involvement, for all but a limited time during the dependency proceeding. During the year the father lived in Yakima and was able to have consistent contact with her, his home was violent and unsafe for children. It was not until he returned to his parents' home in Las Vegas, when A.B. was three and one-half years old, that he evidenced any stability.

A. The Father's Criminal Actions Made Him Unavailable To A.B. During Her First 14 Months Of Life; He Then Chose Not To Consistently Visit Until She Was Almost Two Years Old

Despite substantial evidence to the contrary, Amicus incongruously claims the Department maintained "that technical paternity testing was a necessary prerequisite to [the father's] exercise of any meaningful participation in the case." Br. of Amicus at 5. From the day the child came into state care on October 29, 2001, both the Department and the juvenile court treated Rogelio Salas as the child's father. Ex. 4 (ISSP at 3). He was immediately appointed an attorney through the Yakima Department of Assigned Counsel and was represented throughout the dependency.¹ Exs. 3, 4, 5. He participated in the hearings by telephone and through counsel and agreed to the dependency and disposition orders. RP at 76; Exs. 3, 4.

The Defender Association misstates the evidence when it claims the Department prevented contact between the father and child during her early months of life. Br. of Amicus at 3-4. From at least February 1, 2002, the date the agreed dependency disposition order was signed, the father had the opportunity to visit his daughter, in Yakima, at any time, upon

¹ The Yakima Department of Assigned Counsel is represented on the Amicus Curiae's Board of Directors – as is the Washington Appellate Project, which represents the father on appeal – and the full range of advice, consultation and services provided by the Washington Defender Association were available to the father's counsel in the juvenile court action. See <http://www.defensenet.org/>.

request. Ex. 4. The opportunity was not acted upon by the father for the first 16 months of his daughter's life. RP at 301-02.

The Department did not create a barrier to contact, as the Defender Association accuses. Instead, the father created the barrier by his criminal conduct. He was unable to leave the Nevada county where he resided, due to his felony conviction and related drug court participation. CP at 88 (Finding of Fact 1.16); Ex. 14. His involvement in a felony, committed when the mother was eight months pregnant with A.B., caused him to be unavailable to his daughter during her first year. RP at 79-80; Ex. 14.

The Defender Association also is wrong in asserting that the father was not considered for placement by the Department because he had not established paternity. Br. of Amicus at 5-6. In early January 2002 – even before the child was found to be dependent – the Department requested a home study of the father's home in Nevada.² Ex. 7. Nevada's Department of Human Resources refused to permit the placement, first, because of the father's extensive criminal history and drug use and, second, because he had not yet established paternity. Ex. 7. Once paternity was established, the Department submitted another home study request and it too was denied because of the father's criminal history and drug usage. Ex. 8.

² The Department is prohibited from placing a dependent child in another state, without the receiving state's approval of the home as safe and appropriate for the child, and that state's consent to provide supervision and services. RCW 26.34 (Interstate Compact on the Placement of Children (ICPC)).

Regardless of whether paternity was established, the Department and the juvenile court were unable to place the child with the father in Nevada without Nevada's consent. RCW 26.34.010.

The record shows that within a few days of the entry of the dependency order on February 4, 2002, the Department referred the case to the prosecutor's office for genetic paternity testing. Ex. 25. Testing was completed four months later, in June 2002. Ex. 27. Although he claimed he was concerned about the length of time the testing was taking, the father did not pursue genetic testing on his own and did not ask his attorney for help. RP at 340, 455. Despite the fact that the father was represented by counsel, and in disregard of the fact that a social worker is not licensed to practice law, the Defender Association argues that DSHS should have provided legal advice to the father by explaining his options under the Uniform Parentage Act. Br. of Amicus at 6 n.3.

The father did not request a visit with his daughter until January 2003. Ex. 14; RP at 302. The Department immediately set up the visit, but the father failed to appear. RP at 301-02. Another visit was scheduled by the Department a month later, and he finally saw his daughter on February 25, 2003, when she was 16 months old. RP at 301-02.

The Defender Association suggests that in the spring of 2003, the father had to go to court to enforce his visitation rights. Br. of Amicus at 7.

This is untrue. The orders in the dependency action provided that his visitation was contingent upon his coming to Washington. When he arrived in Yakima, visits began within two days. RP at 351-522.

The father did not move to Yakima until the juvenile court told him that if he was serious about getting custody of his daughter, he needed to relocate to Washington and begin visiting on a consistent basis. RP at 81. Once in Yakima, he contacted the Department on June 11, 2003. By this time A.B. was almost 20 months old. She had seen her father one time, for a short visit, four months earlier. RP at 301-02.

B. The Department Helped Create A Bond Between A.B. And Her Father; The Father Then Destroyed That Bond When He Was Incarcerated For Domestic Violence And, Once Again, Made Himself Unavailable To Her

The Department immediately scheduled three visits per week, beginning June 13, 2003. The Department agrees with Defender Association that frequent, consistent contact with very young children is necessary to develop a strong parent-child bond. Br. of Amicus at 7.

In addition to immediately arranging visits, the Department scheduled a parenting assessment, conducted by Andrés Soto. Mr. Soto's report states that the father told him "he was not allowed by the court in Las Vegas to come see [A.B.] in Yakima" and that although the father "stated he has tried to have contact with A.B. in the past, it is difficult to

understand why he did not do so before the court put the responsibility on him to return to Yakima.” Ex. 14. Mr. Soto found the father lacked the ability to communicate with and to engage with a small child. By the time Mr. Soto made his recommendations for parenting education, drug and alcohol assessments, and counseling (July 21, 2003), a good relationship was beginning to develop. RP at 27-29. The child’s foster mom had transitioned out of the visits; the location was changed to a local park; A.B. and her father were hugging and playing; and the visits were going “really well!” RP at 1672; Exs. 20, 21, 22 (visitation notes). The father acknowledged that the social worker, Amy Marshall, provided helpful instruction during the visits about how to interact with and engage his daughter and how to address parenting issues. RP at 494-95. It did not appear at that time that he needed services in addition to the parenting education being provided.

Visits went so well that the plan for the child was a transition to her father’s care. Ex. 31. The transition was to begin with unsupervised visits starting September 16, 2003. RP at 231-32. Unfortunately, the father was in jail the day of that visit, arrested for domestic violence against his pregnant girlfriend. RP at 232. He spent the next four months incarcerated on the assault conviction and a resulting immigration hold in Seattle. CP at 90 (Finding of Fact 1.27). Once again, because of his own actions, he

made himself unavailable to have frequent, consistent visits with his very young daughter.

C. After He Returned To Yakima The Father Continued To Act With Violence And To Use Poor Judgment In His Personal Life; His Efforts To Rebuild A Bond With A.B. Were Rejected By The Child And He Left Her Again In February 2005

By the time the father returned to Yakima and resumed visits in February 2004, the child had lost any attachment to him and resisted his efforts to bond with her. RP at 239. The juvenile court ordered an evaluation of the child and a domestic violence assessment and follow up treatment for the father. The Department contracted with therapist Tawyna Wright, who supervised five two-hour visits, and met individually with the father, and the child and her relative foster mom. RP at 152-53. The visits provoked anxiety and fear in A.B. RP at 157, 162.

The Department then contracted with a parenting educator, Steve Bergland, who worked one-on-one with Mr. Salas and also supervised visits once or twice a week for nearly a year. RP at 87-88. For the most part, the child did not want to take part in the visits and showed little willingness to interact with her father. RP at 93, 103. This continued even though the foster mom was transitioned out of the visits, the location of most visits was in a park, and the length and frequency of the visits were changed. RP at 97-109. The visits were traumatic for the child, and they

never progressed to the point where her foster grandmother could be completely transitioned out of the visits. RP at 113, 117. Mr. Bergland testified that different techniques had been tried, and that he knew of no other strategies that could be used to help develop a relationship between A.B. and her father. RP at 119. He did not recommend an increase in the visits because of the harmful effect the visits had on A.B. RP at 140.

During this same period of time, the father's home was not safe or appropriate for a child. Both he and his wife were violent. His wife also had mental health and drug (methamphetamine) problems, and a criminal history. RP at 417-19, 1072. The father met his wife, Christina, shortly after he arrived in Yakima in the summer of 2003. RP at 175-76. Christina had a baby in March 2004 and Mr. Salas believed he was the child's father – genetic testing proved he was not. RP at 438-42. The couple married in May 2004, and eight months later they had a son. RP at 176, 417. By that time the couple had separated. However, they began living together again, along with Christina's disabled sister, in January 2005. RP at 64-65, 459.

The father was violent toward Christina at least three times. The Defender Association excuses Mr. Salas's violent assaults on his wife, claiming it was just one misdemeanor conviction and two self-reported "altercations" that did not result in prosecution. Br. of Amicus at 11. The

assaults were serious. In September 2003, the father was arrested and pled guilty to fourth degree assault against Christina. RP at 409-10. There were two subsequent incidents, both in July 2004. One occurred while Christina was in a car with her infant son. In the other, the father kicked in a door and then threw the family dog against the wall. RP at 66-71. These last two were not merely “self-reported ‘altercations’” as Amicus suggests. Mr. Salas was charged in both incidents, but each time the charge was dismissed because Christina would not testify against him. RP at 68-71.

Christina’s own behavior was also extremely problematic. On February 20, 2005, she was arrested and later convicted for the criminal mistreatment of her paraplegic sister. RP at 64. This occurred in the father’s home. RP at 65.³ After this crime occurred, the father feared DSHS would take the two boys into care, so he called his mother and asked her come to Washington, pick up the children and take them to Nevada. She agreed. RP at 549-50. The father followed shortly after that. He and Christina gave custody of both children to the father’s mother and stepfather. RP at 459.

He also stopped visiting A.B. in February 2005. RP at 432. He complained that it was difficult to make time for visits while he was

³ The trial court told Mr. Salas that as long as he was involved with Christina “there is no way that I can envision [A.B.] being part of your life . . . I don’t know what court’s going to allow her to be a parent in light of what’s happened with her sister.” RP at 905-906.

working in Yakima and explained he wanted to move back to Las Vegas to return to his old job. RP at 82-83, 516-18. Before the father left Yakima abruptly in early March of 2005, he did not arrange for a good-bye visit with A.B. RP at 175. He testified that he knew consistent, frequent contact was necessary to build a relationship with a young child and he considered the impact his move would have on his daughter. RP at 173, 430. Even with this knowledge, he moved to Las Vegas, saying "I have to take care of myself first," before being able to take care of a child. RP at 173. He simply was not yet ready to parent.

The father had no contact with A.B. for three months, and did not schedule regular visits until the close of the first phase of the termination trial in mid-June 2005. RP at 1122, 1132-35.

D. Even After The Court Gave Him Additional Time To Correct His Parental Deficiencies, The Father Missed Visits With A.B., Continued His Unhealthy Relationship With Christina And Resisted Treatment For His Serious Anger Problem

At the termination trial in June 2005, the trial court was impressed with the patience and persistence the father showed during his visits with A.B., but recognized that the father's move to Las Vegas hurt his ability to maintain a relationship with his daughter. RP at 900-01, 903.

The father's counsel argued that in June 2005, the father still had the capability to benefit from services and that there was a likelihood that

his deficiencies could be remedied. RAP at 887. For the first time, the father's counsel suggested an additional service – Theraplay. RP at 888. The father asked the court to deny the termination petition, continue the dependency, and continue visits with A.B. at least twice a month. If this were done, he argued, the visits could eventually be increased and unsupervised, and at some point in the future, A.B. could visit Las Vegas. RP at 889-90. Although he did not believe he needed it, the father agreed he could complete domestic violence treatment in Las Vegas. RP at 891.

The trial judge acknowledged that there were “powerful arguments” in favor of terminating the father's rights, but struggled with the decision, saying “I have to feel very certain that if I do so that I am doing it correctly.” RP at 899-900. To reach that level of certainty, the trial judge deferred making a decision and continued the trial until August 1, 2005. RP at 909. He warned the father that he had just 45 days to: (1) divorce and end his relationship with Christina; (2) resolve the legal custody of the two boys; (3) get a domestic violence assessment that was based on information from the Yakima domestic violence counselor, and participate in an ongoing anger management program; (4) get a substance abuse evaluation and demonstrate involvement in regular urinalyses in Las Vegas; (5) resolve child support obligations for his children; (6)

participate in supervised visits in Yakima with A.B. every other weekend; and (7) arrange and pay for Theraplay. RP at 909-14.

The trial resumed November 6, 2005. RP at 924. By that time the father had divorced Christina, but he continued to have contact with her and she had stayed with him in Las Vegas. Ex. 34; CP at 89-90 (Findings of Fact 1.25 and 1.26); RP at 1070-74, 1103. His mother still had custody of his son.⁴ CP at 89 (Finding of Fact 1.24). The father testified that he contacted the child support office in July 2005, but had not heard from them and had not yet resolved his support obligations. RP at 1078-79.

He had missed two of the ten weekends available for visits and refused to visit with A.B. during another weekend visit because he did not want to meet her at a McDonalds or Burger King. RP at 1084, 1133-43. He never arranged for Theraplay during any of the visits.

The father did not believe he needed domestic violence treatment. CP at 89 (Finding of Fact 1.21). The Department sent him two letters, in April and May of 2005, letting him know he needed to continue with services and providing contact information for service providers in Las Vegas. Ex. 5 and 6. He did not get an assessment until July 2005, and did not begin participating in a treatment program until late September 2005.

⁴ His stepson is a member of the Yakama Indian Nation and Yakama tribal law or the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*, applies to decisions regarding his custody. The father filed a dependency petition in Yakama Tribal Court and obtained an ex parte order for temporary custody on October 31, 2005. Ex. 67.

CP at 88-89 (Finding of Fact 1.20). At the time of trial, he made only “fair” progress. RP at 1764-65. The provider in Las Vegas was unable to verify that the father had complied with the trial court’s ruling that the assessment include information from the Yakima domestic violence counselor. RP at 1771-73; CP at 88-89 (Finding of Fact 1.20).

At the end of the trial, the court specifically found:

There is considerable evidence in the record that DSHS has made reasonable efforts to provide and offer appropriate services to the father. These efforts have been made despite the logistical problems related to the father’s circumstances and within the context of the child’s need for permanence. The Court does not share the father’s view that DSHS ignored his concerns and his family’s right to participate, or otherwise unreasonably delay[ed] the process of paternity testing.

CP at 88 (Finding of Fact 1.15).

The trial court then found that each of the factors required under RCW 13.34.180(1), the termination statute, had been proved by clear, cogent and convincing evidence. CP at 38. As the Defender Association acknowledges, the trial court’s findings are entitled to “great deference” and constitute an implicit finding of parental unfitness. Br. of Amicus at 11-12; *In re Dependency of K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995); *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996); *Krause v. Catholic Cmty. Servs.*, 47 Wn. App. 734, 742, 737 P.2d 280, *review denied*, 108 Wn.2d 1035 (1987).

E. The Child Was Appropriately Placed With A Maternal Relative For Essentially The Entire Dependency.

The Defender Association accuses the Department of violating the father's rights and state law by refusing to place A.B. with her paternal grandmother. This is not an element that goes to the termination decision. Placement of a child with a relative out of state is not a "service" that must be provided to a parent under RCW 13.34.130 or proved before termination can be ordered. *In re Dependency of A.A.*, 105 Wn. App. 604, 608-09, 20 P.3d 492 (2001).

A trial court has broad discretion in making placement decisions in a dependency proceeding. *In re Dependency of Z.F.S.*, 113 Wn. App. 632, 637, 51 P.3d 170 (2002). In determining placement, the best interests of the child, not the parent's or relative's desires, are the paramount concern. *In re Dependency of J.B.S.*, 123 Wn.2d 1, 10-11, 863 P.2d 1344 (1993).

The dependency statute requires placement with a relative, when that is possible. RCW 13.34.130. However, the right to the placement is based on a right of the child, not the relative, and, ultimately, the placement decision must be based on the child's best interest. *See, e.g., In re Adoption of B.T.*, 150 Wn.2d 409, 78 P.3d 634 (2003) (giving preference to grandparents is inconsistent with the best interest standard).

In this case, the statutory preference for placement with a relative was followed. A.B. was placed with a relative, a maternal cousin, at the request of her mother, shortly after she was taken into care, and has been with that relative since she was three months old. She also lives with her little brother, who has been adopted by the maternal relative. Both parents agreed to this placement in the disposition order. Ex. 4.

In October 2002, when the child was almost one year old, the paternal grandmother asked for – and received – a visit with A.B. At a dependency review hearing that same month, the father asked the court to require the Department to conduct a home study of the grandmother's home. The juvenile court denied the request, finding that it was not in the best interest of the child. Ex. 19. However, the order goes on to state:

The grandmother may ask the court for visitation if she contacts the Department and presents a plan for visits (transportation expenses, time, place, length, and frequency).

There is nothing in the record to indicate the grandmother followed through with a request or plan for visitation.

F. The Department, The Service Providers And The Court Were Sensitive To The Cultural And Linguistic Needs Of The Family

The Defender Association makes baseless and unfair accusations of racism and bigotry against the Department and one of the therapists involved in providing services to the father. Br. of Amicus at 4-5. Amicus

wrongly states that because therapist Martha Burns does not speak Spanish, she unfairly characterized the father and his mother as “simple.”

What Ms. Burns said was that A.B. “would react extraordinarily negatively to a change of placement with immediate, if not life-long negative consequences.” Ex. 33 at 6. She commented on the paternal grandmother’s opinion that the child would “do fine” if she were moved to Las Vegas with the father, by stating, “I found this to be a very simplistic way of looking at things. I do not believe [A.B.] would do ‘fine.’ I believe it would be a very difficult move for her.” Ex. 33.

The grandmother testified that she was 100 percent certain a transition would go well and that the child would not have difficulty moving from the relative with whom she had spent her entire life because it had been “only four years.” RP at 1449. The father testified that he thought the child could transition in one or two weeks. RP at 1407. Therapist Burns testified that, in her opinion, the father and grandmother were “not fully aware, fully prepared for all of the difficulties” A.B. would experience if she were moved to Las Vegas. RP at 957.

The Defender Association also misrepresents the father’s and grandmother’s understanding of English. Both the father and his mother testified they understood English and had no need of a Spanish interpreter. RP at 484-85, 528-30; 1435-36, 1453-54. Any linguistic differences did

not unfairly penalize the father. There is nothing in this record to suggest that A.B. or her father suffered discrimination.

The Defender Association refers to a Child Welfare League of America factsheet on disproportionality of children of color in foster care, implying that Hispanic children are overrepresented and underserved in the child welfare system. Br. of Amicus at 4. This implication is untrue. Hispanic children are not significantly overrepresented in Washington's child welfare system.⁵

G. The Termination Statute Protects the Rights Of Both Parents And Children; When Those Rights Diverge, The Court Must Rule In Favor Of The Child

The Defender Association correctly implies the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, has had a significant impact on states' child welfare practice.⁶ ASFA resulted in change to dependency and termination law by departing from a standard which emphasized preservation of families and, instead, "subordinated parental rights to the child's right to safety and a permanent home." See Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the*

⁵ DSHS Children's Administration 2007 Annual Report states Hispanic children make up 14.6 percent of Washington's general population of children and 15.1 percent of the foster care population. See www.dshs.wa.gov/ca/pubs/2007perfrm.asp.

⁶ ASFA amends numerous sections of the Social Security Act, 42 U.S.C. It is a funding statute that conditions federal participation in funding foster care, adoption support and child welfare services upon compliance with the federal statute.

Federal Adoption and Safe Families Act and Its Implementing State Statutes, 10 A.L.R. 6th 173, 193 (2006).

The Legislature also requires an emphasis on safety and permanency. RCW 13.34.020 (a child's rights include the *right* to a speedy resolution of dependency proceedings; where the rights of the child and parent conflict, the child's rights should prevail); RCW 13.34.025 (defining remedial services as those "time-limited" services defined in ASFA); RCW 13.34.136(3) (permanency planning goals should be achieved at the earliest possible date; if the child has been in out-of-home care for 15 of 22 months, the court shall require the Department to file a termination petition.)

A.B. had been in foster care for four years and the trial court found it would take years of effort before she could be placed in her father's care. CP at 91 (Finding of Fact 1.32). The trial court was conscientious and careful in weighing the rights of the father and A.B. and, in the end, properly ruled in favor of the child – as it was required to do.

H. DSHS's Efforts To Assess And Improve The Child Welfare System And The Lives Of Foster Children Are Not Evidence That The Father's Rights Were Violated In This Case

The Defender Association misconstrues the purpose, extent and results of a federal Child and Family Service Review (CFSR) completed in 2004. The review looked at a total of 50 child welfare cases drawn from

three Washington counties.⁷ Twenty-five of those cases concerned children in foster care. The federal Department of Health and Human Services examined these cases and measured them against aspirational standards. The purpose of the review is to help states identify strengths, as well as areas that need improvement. No state was found to be in substantial conformity with the outcomes measured by the CFSR.

The Department and the juvenile courts of this state have used the CFSR and other tools to measure outcomes for children in foster care. These and other efforts toward improvements in the system do not support an argument that the Department has failed a particular child or parent.

Other organizations that have looked at Washington's child welfare policies have held the state up as a "good example of a state whose vision for child welfare emphasizes use of evidence-based services and practice, engagement of families, prevention of foster care placement, reduction of racial disproportionality, improving educational outcomes for foster children, and use of kinship care practices [which] are not fully supported by federal financing policy." *See, e.g.,* Overview of Child Welfare Services in Washington State July 2007 – Kids are Waiting: Fix Foster Care Now, a project of the Pew Charitable Trusts.⁸

⁷ The explanation and full 90-page report can be accessed <http://www.acf.hhs.gov/programs/cb/cwmonitoring/recruit/cfsrfactsheet.htm>

⁸ *See* www.kidsarewaiting.org/publications/statebriefs.

III. CONCLUSION

Decisions in juvenile dependency proceedings “must be made more expeditiously because growing up cannot be put on hold, and the impact of being without a permanent family is felt each day by a child.” Former Justice Bobbe Bridge, Chair of this Court’s Commission on Children in Foster Care, *View Foster Care Through Their Eyes*, Seattle Post-Intelligencer, May 30, 2006.

“Currently the average stay in foster care in Washington is 540 days – forever in the life of a child.” *Id.* A.B. was in foster care for more than 1,600 days before her father’s parental rights were terminated. The trial court properly found that she had waited long enough and that her dependency should not continue indefinitely.

RESPECTFULLY SUBMITTED this 18th day of June, 2008.

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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 18th day of June, 2008, at Tumwater, Washington.

Cheryl Chafin
 CHERYL CHAFIN, Legal Assistant