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STATE OF WASHINGTON

NO. 80759-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of:

A.L.S.B.,

A Minor Child.

DEPARTMENT'S AMENDED SUPPLEMENTAL BRIEF

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I. INTRODUCTION

When A.B. was placed in state care following her birth in October 2001, the Department of Social and Health Services immediately contacted her biological father and began to attempt reconciliation. The father did not participate in his daughter's life for the next year and a half. Over the course of four years, as the father moved in and out of state, the Department coordinated visits and parenting services. Although the father took some positive steps, he undermined his own efforts by committing an assault and multiple acts of domestic violence, entering a relationship that provided an unsafe environment for children, choosing to move out of the state, and failing to complete court ordered domestic violence treatment.

For essentially all of her young life, A.B. has lived with a maternal cousin and her half-brother in a foster care placement. She is distressed by visits with her father and has no attachment to him. After four years in foster care without any appreciable movement toward "reunification" the trial court correctly applied the termination statute, finding her father unfit, and determining that A.B.'s right to stability in a safe and permanent home outweighs her father's right to custody.

The Court should take this opportunity to reaffirm its longstanding decisions that children have rights independent of their parents, and where

the rights of a dependent child and those of the parent diverge, the rights of the child should prevail.

II. STATEMENT OF THE CASE

A.B. was born October 27, 2001, in Yakima. Prior to the birth, her parents lived together in Yakima and in Las Vegas, Nevada. RP at 489-90, 559. Both parents had criminal histories and were addicted to heroin, as well as other drugs. RP at 78-79; Ex. 4 (Order of Disposition on Dependency, incorporating DSHS Individual Service & Safety Plan (ISSP) at 2). They separated and the mother returned to Yakima in September 2001, when the father was arrested for a drug-related felony in Nevada. RP at 80, 561.

The Department removed the child from the mother's care on October 29, 2001.¹ That same day, the Department telephoned the father and informed him of the shelter care hearing, scheduled for November 1. RP at 76; Ex. 4. However, the father was not allowed to leave Nevada because he was participating in a criminal drug court following a conviction for conspiracy to commit burglary. RP at 71-72, 400; Ex. 14.

The father was represented throughout the dependency proceedings. Exs. 2, 3, 4. He agreed to the entry of the dependency order

¹ At the time of the baby's removal, the mother asked that she be placed with a relative. Ex. 4. Subsequently, the mother did not successfully engage in services and her parental rights were terminated in June 2005. CP at 66-70. She is not a party to this appeal.

on February 4, 2002, and was immediately provided an opportunity to visit his daughter. Ex. 4. He did not take advantage of that opportunity until February 25, 2003, when she was 16 months old. RP at 341; Ex. 14. Following the single visit in February 2003, he waited another four months before the next contact. RP at 215-16.

The father testified he stopped using drugs in late December 2001. RP at 80. In early January 2002, when A.B. was two months old, the Department requested the State of Nevada conduct a home study of the father's home, pursuant to the Interstate Compact on the Placement of Children (ICPC).² Ex. 7. Nevada refused to approve the placement because of the father's "extensive criminal history" and because paternity had not yet been established. Ex. 7. After paternity was established, Nevada denied the placement because of the father's criminal history and drug usage. Ex. 8. During this time, the father was residing in the home of his parents. Exs. 7 and 8.

A.B. was placed in the home of a relative – her maternal cousin, Trina L. – in March 2002, and has remained there ever since.³ RP at 1599.

² Under the ICPC, codified at RCW chapter 26.34, neither the Department nor the court may place a dependent child in another state without the receiving state's approval. The receiving state must approve the home and agree to supervise the placement and services during the dependency. RCW 26.34.010.

³ Throughout the dependency and in the termination proceeding, the father attempted to convince the trial court that Trina L. is not a blood relative of the child – asserting that the father who raised Trina L., who was married to her mother, and whose name is on her birth certificate, is not her father and that she was born outside of the

A.B. is now almost seven years old. She has never lived with her father and views him as a stranger. RP at 93-99, 160-61. For A.B., her family is her foster mother, Trina, and her little brother, who has now been adopted by her foster mom. The child's attachment to this family is stable, powerful and profound. CP at 91-92 (Finding of Fact 1.33 and 1.35).

A.B.'s father did not begin visiting her until he moved to Yakima in June 2003, when she was 20 months old. RP at 215-17. He contacted the Department on June 11, 2003 and the social worker immediately scheduled visits between the father and A.B, and referred the father for a parenting assessment. Ex. 14; RP at 216. The assessment was completed by Andrés Soto of Personal Parenting Assessment Services. Mr. Soto's evaluation included observations of the early visits. The parenting evaluator noted that the visits were traumatic to A.B., she was distressed whenever Trina left the room and, despite the father's attempts to entertain his daughter, it was clear that she did not want to be with him. Ex. 14. Mr. Soto noted that although the father made an effort to interact with

marriage. Ex. 60; RP at 1482-86. The trial court denied his attempts to disestablish paternity and refused to order Trina to submit to genetic testing. Ex. 63; RP at 1482-86. Contrary to statements in the father's supplemental brief at 4 n.3, Trina L. was divorced three or four years prior to the termination trial and did not have her mother provide child care for A.B. RP at 1600-01, 1622.

A.B., he lacked communication skills and the ability to engage with a small child. Ex. 14.

The father began with supervised visits three times per week. RP 216. The Department was able to have Trina leave the visits for a time and in mid-July 2003, the Department changed the location of the visits from the visiting room at DSHS to a local park. RP 219-22, 228. By the end of August 2003, the child began developing a bond with her father. RP at 216. The child's social worker, Amy Marshall, testified that the first six weeks of visits were difficult for A.B., but then there was a change in her. She began accepting him as someone she knew, "as somebody that was in her life consistently . . . [a]nd so she began to trust." RP at 248. The social worker planned for unsupervised visits and a gradual increase in visitation time. RP 228-29; Ex. 31. The first unsupervised visit was scheduled for September 16, 2003, at the park. RP at 232. The child and social worker arrived at the park for the visit, but the father did not. RP at 232. He was in jail, having been arrested for the assault of his girlfriend. CP at 89 (Finding of Fact 1.18).

Due to his resulting incarceration and immigration detention, he was unavailable to his daughter for the next four and one-half months. RP at 233. The social worker testified that while four months may seem a short time to an adult, it is a very substantial period for a two-year-old

child. RP at 249-50. She explained that a child's development between the ages of birth and three years old is significant. RP at 249. For example, when the father was visiting with A.B. in 2003, the child was barely communicating. RP at 249. When visits resumed in January 2004, after the father's detention ended, A.B. was able to express her likes and dislikes and "it was like starting all over again." RP at 250. The visits were extremely difficult for the child from then on. RP at 111-13, 239-41. She reacted negatively to her father, refusing his offers of food, not letting him hug or kiss her, and only interacting with him after a long warm-up period with her foster mother or grandmother nearby. RP at 93-94, 96-99, 103, 105-06, 111-14, 153-59, 241-43, 253-58; Exs. 31, 38-54. The attachment that had begun to form during the summer of 2003 was gone. RP at 250.

In an attempt to determine the most appropriate visitation plan, the juvenile court had the Department contract with a therapist to supervise and evaluate numerous visits. RP at 236. The Department contracted with Tawnya Wright, the clinical director and a licensed therapist for Personal Parenting, to provide the evaluation. RP at 151. Ms. Wright observed five visits between A.B. and her father and testified the child showed anxiety about the visits. RP at 153-58, 162. She did not want to be out of sight of her "mom" and did not engage with her father. RP at 155-62.

During one of the visits she pretended to be asleep. The therapist saw this as a “huge disengagement” by the child from her father. RP at 162. The visit “provoked a lot of anxiety in her and a lot of fear . . . as if it were a stranger.” RP at 162. She concluded that A.B. was not forming an attachment to her father and recommended that future visits be supervised by a parenting educator. RP at 236, 238-39.

The Department contracted with Steve Bergland, a parenting educator, to work with the father on methods to improve the father’s interactions with A.B. RP at 93-94, 143-46. Mr. Bergland worked with the father individually, as well as during visits for more than one year, until the father abruptly moved to Nevada. RP at 87, 114. The parenting educator tried to wean A.B. from needing a familiar caregiver with her during the father’s visits, so that the visits could be one-on-one between the father and the child. RP at 95-97. The foster mom transitioned out of the visits and was not transporting the child to and from the visits. RP 96-97. However, A.B.’s distress was so great that the foster grandmother began being present to limit the trauma to the child. RP at 96-97, 107-08, 110-11, 117. *See also* Ex. 33 (therapist Burns reported that although the foster grandmother’s presence “gets in the way of [A.B.] adjusting to the father . . . [t]he alternative . . . is to put the child through a great amount of trauma and anxiety”). In the more than one year that Mr. Bergland

worked with the father, there was very little progress and the child did not reach a point where she could handle the visits without the foster grandmother being present. RP at 117. When asked his opinion as to whether the visits were traumatic to the child, Mr. Bergland responded "Very much so." RP at 113.

While living in Yakima, the father tried very hard to connect with A.B. and to act in her interests during the visits. RP at 1112. Outside the visits, his life was chaotic and violent, and he was unable to establish a safe and appropriate home for his daughter.

During the approximate 20 months that the father lived in Yakima, he married and became a father to a son and a stepson. CP at 89-90. The father began a relationship with Christina S. shortly after he moved to Yakima. RP at 175-76. When Christina gave birth to a son on March 11, 2004, the father believed the child to be his son. RP at 423-24. Although this turned out not to be true, the father has continued to treat the child as his own. RP at 521. The father married Christina in May 2004 and the couple had a son in January 2005. RP at 175-76, 417-20. The father acted out violently against his new family and there were at least three serious domestic violence incidents. RP at 16-17, 28, 36-37, 50-51, 65-71. During the first incident in September 2003, the father pushed a police officer who attempted to intervene in a fight between Christina and the

father. The father was convicted of assault following this incident. RP 67. The next altercation against his then pregnant wife occurred in a car, with the father's infant stepson present. RP at 36-37, 51. In another the father threw the family dog against a wall. RP at 28. Although he reportedly separated from his wife before their son was born on January 1, 2005, Christina, the children, and Christina's paraplegic sister were living in the father's home in February 2005, when Christina was arrested for criminal mistreatment of her disabled sister. RP at 64. Immediately following Christina's arrest, the father sent his infant son and stepson to his mother's home in Las Vegas, and he followed shortly thereafter. RP at 82-83, 192-93, 548-50.

His decision to move meant that visits with his daughter were more limited and it raised a new barrier to bonding with her. The father admitted that he knew shorter, more frequent visits were needed to form an attachment to A.B. RP at 430. He did not transition out of the visits, did not have a goodbye visit with his daughter and did not visit her for nearly four months after his move. RP at 175; CP at 91 (Finding of Fact 1.27). When he did decide to resume visits in July 2005, he was only able to schedule a maximum of two short visits a month. RP at 1084-89. The Department hired Julie Doshier of Heart to Heart Social Services to supervise these visits. RP at 1041. Ms. Doshier made notes following

each of the visits from July to November 2005. Exs. 38 through 53. Her notes describe what occurred at the visits, but do not otherwise comment on the quality of the visits. The visits were consistent in that A.B. took “a long time to warm up to her father,” and even then did not fully engage with him. RP at 1053. Ms. Doshier never heard A.B. call her father “dad” or any other expression other than “you.” RP at 1055. Throughout the time she observed the visits, she saw no change in the child’s relationship with her father. RP at 1053.

By the time of the termination trial the father had more than 100 visits with his daughter. RP at 1758; CP at 91 (Finding of Fact 1.29). Nonetheless, no attachment had formed. RP at 1737-38.

The professionals involved in the case were not able to explain A.B.’s refusal to engage with her father, although they expressed that it appeared to be due in part to the father’s inability to begin bonding with A.B. during her first two years of life and his sporadic and inconsistent attempts to have a relationship with her thereafter. Exs. 14, 33; RP at 283-85; CP at 91 (Finding of Fact 1.31).

A.B. was described as a “very well rounded, well adjusted, emotionally stable” child with no special needs that were hindering her ability to bond or that were negatively impacting the father’s visitation. Ex. 33; RP at 812, 952

There was no evidence that the child's maternal relatives were interfering in any way in the visits. Instead, the evidence from the professionals involved in the case was that A.B. was not being manipulated or influenced by her foster mother or foster grandmother. *See, e.g.*, Testimony of Julie Doshier RP at 1055-56 (describing foster grandmother as supportive of the visits, encouraging the child to take food and toys from the father, and referring to the father as "Dad" and his mother as "Grandma Edie"); Steve Bergland at RP 106-07 (stating foster mother encouraged A.B. to open up to her father and was receptive to transitioning out of visits).

The professionals also testified that they knew of no intervention or services that would help in developing an attachment between A.B. and her father in the foreseeable future. Ex. 33; RP at 119, 285-86, 952. This was especially true in light of the defiance and anger A.B. shows toward the father. RP at 119. Only continued visits would potentially lead to an attachment and the professionals testified that it would take a very long time before the father and A.B. had a good enough relationship for A.B. to be placed in his care. RP at 129; CP at 91 (Finding of Fact 1.32). When the father suggested that play therapy during the visits might be helpful, the trial court agreed that the father could engage such a provider. RP at 913. However the father chose not to do so.

Although the father claimed he was fit and ready to assume custody of A.B. at the time of the termination trial, the record belies his claim. To his credit, he addressed his heroin addiction. RP at 79. However, he had not completed court-ordered parenting classes and, more critically, he had failed to complete domestic violence treatment and saw no need to do so - despite two further domestic violence incidents after his assault conviction and despite the fact that his progress in treatment was only "fair." RP at 28-30, 36-37, 1763. The trial court noted that the father was slow to engage in services in Nevada, despite the Department's encouragement to do so. CP at 88-89 (Finding of Fact 1.20); Exs. 5 and 6. He did not even begin his domestic violence perpetrator treatment program in Nevada until September 2005 and had completed less than one-quarter of the sessions by the time of the termination trial. CP at 88-89 (Findings of Fact 1.19 and 1.20); RP at 1736. The evidence at the termination trial was that it would not be safe for the child to be placed in her father's care until he completed anger management or domestic violence treatment. RP at 55-56, 118-19.

He still lived with and depended on his mother and stepfather, who had legal custody of his young son and stepson and who did "all the work" in caring for them. RP at 192, 456, 547. He had not seen his nine-year old son since that child was one year old, and he "seldom provides

support” for the child. Ex. 14; RP at 185-86. The father was able to maintain his sobriety while living with his parents, but had not yet demonstrated an ability to manage his own life, on his own, or to care for the needs of his children by the time of trial. RP at 1731-32. The child’s guardian ad litem was particularly concerned that the father had not yet shown that he was capable of caring for his children on his own. RP at 1474. The only time during the dependency action that he lived on his own was when he was in Yakima, which the GAL described as a “time of turbulence” for the father and his family. RP at 1745. The GAL noted that the father went from Yakima, where he was unable to establish a safe environment for a child, to his mother’s home in Las Vegas, where it seemed she was meeting his needs and those of his children. RP at 1745-47. Even the home study, which was privately commissioned by the father and submitted at trial was a study of his parents’ home – not his. Ex. 56. Most importantly, he failed to be present and consistent in the life of his daughter. She simply had no attachment to him at the time of the termination trial. RP at 162-65.

The trial judge specifically found that the Department provided appropriate services to the father, despite the logistical problems related to the father’s circumstances and that he did not share the father’s view that the Department had delayed paternity testing. CP at 35, 87-88 (Findings

of Fact 1.14 and 1.15); *see also* Exs. 24 through 27 (showing that the Department notified the prosecuting attorney's office of the need for a paternity action shortly after the dependency order was entered in February 2002, and that paternity was established in June 2002 – nine months before the father arranged to see his daughter).

The father heard the professionals' testimony that it would take considerable efforts over "a very long time" for the child to develop a relationship with him and that placement of the child with him – and the resulting loss of her family – would cause her considerable distress, trauma and harm. RP at 117-18, 1643, 1740; CP at 91; Ex. 33. Even so, he pushed the court for custody, declining suggestions for an open adoption, which would have given his daughter the security of remaining with her known family and still enabled him to maintain contact with her. In the father's view, it would only take A.B. a week or two to transition into and adjust to his care. RP at 1406-08.

The trial court conducted the termination trial in two phases. At the close of the presentation of evidence at a hearing lasting from June 13 to 17, 2005, the trial court deferred ruling in the termination proceeding to give the father additional time to try again to bond with the child, and to engage in services in Las Vegas. RP at 923; CP at 95-96. For the next five months, the father had an opportunity to engage in further services

and to visit with A.B. in various locations, observed by various supervisors. During this interim there was no improvement in father-daughter interactions and little progress in services. Ex. 33, 39-53; RP at 1737-40, 1775.

At the close of the second phase of trial on November 25, 2005, the trial court ruled that the required elements for termination had been proved by clear, cogent and convincing evidence. CP at 38, 93. It also found that termination was in the child's best interests. CP at 38, 93. The trial judge believed that it would be appropriate for the child to be able to have contact with the father after termination and adoption, so long as that relationship did not conflict with the permanent placement of the child. CP at 38. He then directed the parties to engage in settlement discussions to see whether an open adoption agreement could be negotiated, and delayed entry of the order until those discussions could occur. CP at 39. The father rejected any option short of custody and the trial court entered the order terminating the parent-child relationship. CP at 85-94.⁴

III. ARGUMENT

The father asks this Court to abandon its longstanding interpretations of the statute governing termination proceedings, and its

⁴ The trial court's findings of fact, conclusions of law and order terminating parental rights is attached as Attachment 1. The court of appeals unpublished decision affirming the termination, *In re Welfare of A.B.*, No. 24923-9-III (Sept. 6, 2007), is attached as Attachment 2.

holding that the termination statute satisfies the requirements of the Due Process Clause of the federal constitution. This Court should reject the father's arguments and, once again, hold that the statute is constitutional and that the rights of the child are the paramount concern in any dependency or termination proceeding.

A. A Parent's Right To Custody Of His Dependent Child Must Be Weighed Against the Rights of the Child

A biological parent's interest in the care and custody of his children is generally protected by the Due Process Clause of the Fourteenth Amendment of the federal constitution. *See, e.g., In re Custody of Smith*, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998), *aff'd sub nom., Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (tracing the history and development of the right); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

However, it is equally well established that the right is not absolute. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983); *In re Sumey*, 94 Wn.2d at 762; *In re Dependency of I.J.S.*, 128 Wn. App. 108, 116, 114 P.3d 1215, *review denied*, 155 Wn.2d 1021 (2005); *In re Dependency of A.V.D.*, 62 Wn. App. 562, 567, 815 P.2d 277 (1991). The State has both a right and an obligation as *parens patriae*

to intervene to protect the child when the parent's actions or inactions endanger the child's physical or emotional welfare. *In re Sumey*, 94 Wn.2d at 762; *In re A.V.D.*, 62 Wn. App. at 567.

Moreover, in recent years, the scope of the parent's right, and even the continuing validity of the right, has come under new scrutiny, as courts have weighed the parent's right against the child's welfare and needs. *See, e.g., In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980) (court may not accommodate parents' rights when to do so would ignore the basic needs of the child); *In re Welfare of Becker*, 87 Wn.2d 470, 477, 553 P.2d 1339 (1976) (growing concern for the welfare of the child and the disappearance of the concept of the child as property has led to a gradual modification of the parent's right to custody); *In re Custody of Shields*, 157 Wn.2d 126, 152-53, 136 P.3d 117 (2006) (Bridge, J., concurring) (even outside the dependency/termination context, the Court should recognize the right of the child to a stable and healthy family life); *In re Custody of Smith*, 137 Wn.2d at 40 (Talmadge, J., concurring/dissenting) (parental prerogatives are entitled to considerable legal deference, but they are not absolute and must yield to fundamental rights of the child when to accord them dominance would ignore the needs of the child). Although the *Smith/Troxel* case involved the right of a fit parent to decide whether a child should visit her grandmother, not whether

the rights of a parent with established deficiencies should be terminated, the *Troxel* Court's concurring and dissenting Justices were troubled by an overly broad articulation of the parent's right. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (urging the Court to look beyond the interests of the parents and to also consider the nature of the child's interests).⁵

In juvenile dependency and termination actions, the child's rights are defined by statute and take priority over conflicting rights of the parent. RCW 13.34.020; *In re Dependency of J.B.S.*, 123 Wn.2d 1, 863 P.2d 1344 (1993) (child's best interests were primary consideration in deciding whether to change child's placement from his foster family to his biological father, and were paramount consideration to the extent they conflicted with rights of the father). The statute recognizes the important rights of parents, but ultimately focuses on the welfare of the child. It provides that the rights of dependent children include the rights to physical and mental health, safety, and basic nurture, which includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency and termination proceedings. RCW 13.34.020; *In re Dependency of C.R.B.*, 62 Wn. App. 608, 615, 814 P.2d 1197 (1991).

⁵ Two of the Justices questioned the continuing validity of the right. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment) (the plurality decision leaves for another day the issue of whether the parent's rights cases were wrongly decided); *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (the due process right of a parent is a theory of unenumerated parental rights that now has little claim to *stare decisis* protection).

The statute protects these rights in at least three important ways. First, it requires reasonable efforts be made to help the parent correct parenting deficiencies so that, if possible, the child can be returned home. Second, it limits the time a parent has to correct his deficiencies so that the child does not spend the whole of her childhood in foster care, waiting for the parent to act. Third, it mandates that any conflict between the rights of the child and the rights of the parent be resolved in favor of the child.

B. The Statutes Governing Dependency And Termination Proceedings Adequately Protect Parents' Due Process Rights

The state proceeds with caution before terminating the parent-child relationship. Prior to filing a petition for termination, the Department files a dependency action, in which parental deficiencies are identified, and under which the parents are provided services to address and correct those deficiencies so that the child can be returned to the parent. Only if the parent is unable to correct his deficiencies and have the child placed in his care within a reasonable time is a petition for termination filed.

1. The Dependency Proceeding

RCW 13.34 governs both juvenile dependency and termination actions. Although the two proceedings may proceed simultaneously, they are separate actions. Each has a different focus and a different result.

In order to declare a child dependent,⁶ the juvenile court must find a parental deficiency, but it need not find parental misconduct or unfitness. *In re Dependency of Schermer*, 161 Wn.2d 927, 943 ¶ 39, 169 P.3d 452 (2007). Where the dependency is based on RCW 13.34.030(5)(c) (no parent capable of adequately caring for the child) – as it was in this case, Ex. 3 – the parental deficiency may be based on a consideration of both the child’s needs and any other circumstances which affect the parent’s ability to respond to those needs. *Schermer*, 162 Wn.2d at 944 ¶ 40.

If a dependency order is entered, the Department must submit a plan to the court, identifying the proposed permanent plan for the child and specifying what services will be offered to the parents to enable them to resume custody. RCW 13.34.136. A dispositional order includes the services that must be provided by the Department, and engaged in by the parent, to correct the conditions that led to the child’s dependent status. RCW 13.34.120, .130 and .136.

At least every six months, the court must review the dependent child’s status and determine whether continued judicial oversight is needed. RCW 13.34.138. If the parent has remedied his deficiencies, and the conditions which led to the removal of the child from the parent’s

⁶ A dependent child is one who (a) has been abandoned, (b) is the victim of abuse or neglect, or (c) has no parent capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child’s psychological or physical development. RCW 13.34.030(5).

custody have been eliminated, the child is returned to the parent and, after an additional six months of supervision and services, the dependency dismissed. RCW 13.34.138(1). If the child is not returned home, the juvenile court may order the Department to file a petition for termination of parental rights. RCW 13.34.138(2)(d). *In re Dependency of A.W.*, 53 Wn. App. 22, 28, 765 P.2d 307 (1988).

The parent does not have unlimited time to correct his deficiencies. The law creates a sense of urgency by requiring that a petition for termination of parental rights be filed whenever the child has been in foster care for 15 of the past 22 months, unless compelling reasons excuse the requirement.⁷ RCW 13.34.145(1)(c).⁸ The law's focus on permanency reflects the importance of security and stability in a child's life, as well as a child's need for continuity and permanency in relationships. *See*, Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interests of the Child* (2d ed. 1979). Additionally, the law views

⁷ In this case, a termination trial was scheduled for July 2003, when the child had been out of home for 20 months, but it was continued when the father moved to Yakima and began visits with A.B. The termination petition was withdrawn when the father re-engaged in services and visitation after his incarceration. RP at 236-37.

⁸ Washington law parallels the federal Adoption and Safe Families Act of 1997 (ASFA) requirements in this regard. Pub. L. No. 105-89, 111 Stat. 2117, amending 42 U.S.C. § 675(5)(E). The legislature recently reinforced this requirement by amending RCW 13.34.136 and .145 to require the juvenile court in a permanency planning hearing to order the Department to file a petition seeking termination of parental rights, if the child has been in out-of-home care for 15 of the last 22 months, unless the court makes a good cause exception. Laws of 2008, ch. 152 §§ 2, 3. The amendment was intended "to encourage a greater focus on children's developmental needs and to promote closer adherence to timeliness standards in the resolution of dependency cases." Laws of 2008, ch. 152 § 1.

the passage of time from the child's perspective, not the parent's. *In re Dependency of T.R.*, 108 Wn. App. 149, 164-65, 29 P.3d 1275 (2001) (foreseeable future must be viewed from the eyes of the child).

In this case, the father did not even meet his daughter until she was 16 months old and did not begin visits until she was 20 months old, despite the fact that he had the opportunity to visit from the time she was three months old. Exs. 4, 14. When he did make himself available for visits, they were immediately scheduled and the Department worked toward a plan of placing the child with him. This was not possible, however, because of the father's criminal problems, his failure to address his anger control issues, the lengthy interruptions to his efforts to build a relationship with his daughter, and the resulting intractable problems encountered in the visits. Consequently the dependency court never placed the child in her father's care. The father never challenged or appealed any order in the dependency, and the Department ultimately filed a termination petition.

2. The Termination Proceeding

A termination action is a separate and parallel proceeding to the dependency action. As in the dependency, the parent has a right to notice, counsel, and an opportunity for a hearing. RCW 13.34.090. Additionally, there is an enhanced burden of proof to further protect the parent's

substantive due process right to custody of his child.
RCW 13.34.190(1)(a).

In the termination, the Department must prove six statutory elements. RCW 13.34.180(1)(a)-(f).⁹ Proof of these six factors by clear, cogent and convincing evidence establishes that the parent is unfit. *In re Dependency of K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995); *In re Dependency of A.S.*, 101 Wn. App. 60, 70-71, 6 P.3d 11 (2000).

Moreover, establishing that the child is dependent and that it is unlikely conditions can be remedied so the child can be returned to the parent in the near future, RCW 13.34.180(1)(e), is the equivalent of finding that continuing the parent's relationship places the child in a position of harm. *In re I.J.S.*, 128 Wn. App. at 118 ¶ 26; *Krause v. Catholic Community Svcs.*, 47 Wn. App. 734, 742-43, 737 P.2d 280 (1987).

The court weighs the interests of the child against the interests of the parent only if the six factors are proved. *In re I.J.S.* 128 Wn. App. at

⁹ The elements are (1) the child has been found dependent; (2) a dispositional order has been entered; (3) the child has been in foster care for at least six months; (4) all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; (5) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future (parent's failure to substantially improve parental deficiencies within 12 months of entry of the dispositional order gives rise to a presumption that there is little likelihood conditions will be remedied so that the child can be returned to the parent in the near future); and (6) continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

118 ¶ 25. At that point, the trial court must find that termination is in the child's best interest. RCW 13.34.190(2). Here the trial court determined each of the six factors was proved by clear, cogent and convincing evidence. Under the statute and case law, the father was deemed unfit. The trial court then found that termination of parental rights was in A.B.'s best interests, and it properly terminated the father's rights.

If the Department had not proved the statutory elements, the only option available to the trial court was dismissal of the termination petition and continuation of the dependency proceeding. Transition to the parent, if that is possible, occurs in the dependency, where the juvenile court continues to have oversight over the case plan and the welfare of the child. RCW 13.34.138, .145. The father's suggestion that the child could have been immediately transitioned to his care is incorrect.

C. The Father's Request To Add To The Elements Necessary To Prove A Termination Of Parental Rights Would Require Amending The Statute and Overruling Existing Precedent

The father asks this Court to hold that "absent proof of a current parental deficiency, consideration of the statutory factors set forth in RCW 13.34.180(1) . . . violates due process." Father's Supp. Br. at 2.

This Court resolved this issue over a decade ago when it rejected a claim that due process requires an explicit finding of current parental

unfitness, as a threshold determination or a judicial finding, in termination proceedings. *In re K.R.*, 128 Wn.2d at 141-42. This Court held:

The statute does not require relitigation of the dependency determination. Further, no explicit finding of current parental unfitness is required. However, if the state proves the allegations set out [in RCW 13.34.180(1)], an implicit finding of current parental unfitness has been made. Because the termination statute requires proof by clear, cogent and convincing evidence, which necessarily and implicitly includes evidence of current parental unfitness, it comports with the constitutional due process requirement that unfitness be established by clear, cogent and convincing evidence.

Id. at 141-42; *see also In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996). The Court's holding in *K.R.* is consistent with the law of other jurisdictions that have considered the issue. *See, e.g., In re Brittany M.*, 19 Cal. App. 4th 1396, 1403, 24 Cal.Rptr.2d 57 (1993) (the continuing finding of parental deficiencies throughout the dependency proceeding sufficiently establishes parental unfitness in a subsequent termination action to satisfy due process; no express finding of unfitness is necessary); *In re Adoption of J.J.B.*, 119 N.M. 638, 647, 894 P.2d 994 (1995) (parental unfitness is inherent in a finding that a basis for termination of parental rights is shown; no separate showing or finding by the court of unfitness is necessary)¹⁰; *In re Stillman*, 155 Ohio App.3d 333, 801 N.E.2d 475 (2003)

¹⁰ The father mistakenly cites the New Mexico Supreme Court's decision in *J.J.B.* as holding an express finding of unfitness is required in a termination proceeding. Father's Supp. Br. at 35. Although the court of appeals decision in the case, did hold that

(finding of unfitness was inherent within the proof required under the termination statute; no express finding of unfitness is necessary); *In re Audrey S.*, 182 S.W.3d 838, 882 (Tenn. Ct. App. 2005) (if a trial court finds the grounds for termination are met under the statute, an express finding of unfitness would be redundant); *In re C.L.*, 178 Vt. 558, 564, 878 A.2d 207 (2005) (no express finding of unfitness required where trial court found biological father failed to develop a relationship with his child and waited nine months after paternity was established to show an interest in the child); *Knox v. Lynchburg Div. of Soc. Svcs.*, 223 Va. 213, 220, 288 S.E.2d 399 (1982) (proof of statutory factors for termination is tantamount to a finding of parental unfitness); *In re Interest of K.D.J.*, 163 Wis.2d 90, 109, 470 N.W.2d 914 (1991) (where statutory factors for termination are found, it is unnecessary to make an independent finding of parental unfitness).

These decisions are based on statutory schemes which, like RCW chapter 13.34, require a finding of parental deficiencies or parental unfitness before a child can be found dependent or removed from a parent's custody. The subsequent termination proceeding is based on the unresolved parental deficiencies. Where there is no pre-existing judicial

an express finding was necessary, *In re Adoption of J.J.B.*, 117 N.M. 31, 39, 868 P.2d 1256 (Ct. App. 1993), the New Mexico Supreme Court reversed the court of appeals, holding "no separate showing or finding of unfitness is required for the termination of parental rights" under the statute. *In re J.J.B.*, 119 N.M. at 640.

finding of deficiency or unfitness, as was the case in *Smith*, a visitation action, and *Shields*, a private custody action, an express finding of unfitness may be necessary to satisfy due process.¹¹ This is not the case in an action under RCW 13.34.

To accept the father's proposed additional factor to be proved at termination, under RCW 13.34.180(1), the Court would have to judicially amend the statute and overrule existing precedent. Not only is such a decision unwarranted, it is not necessary to protect the rights of parents and dependent children.

The current statutory scheme governing juvenile dependency and termination proceedings requires a finding of parental deficiency in the dependency action. *See, e.g., In re Dependency of T.L.G.*, 126 Wn. App. 181, 198, 108 P.3d 156 (2005) (parental deficiencies should be identified in dependency proceeding); *In re Interest of S.G.*, 140 Wn. App. 461, 468 ¶ 19, 166 P.2d 802 (2007) (termination statute assumes finding of parental

¹¹ In addition to *J.J.B.*, the father cites to a private adoption case in which prospective adoptive parents filed an action for adoption and termination of parental rights, *In re Adoption of J.M.H.*, 215 S.W.3d 793 (Tenn. 2007). No prior dependency existed. As noted above, both New Mexico and Tennessee have held that in the context of a termination proceeding where statutory factors impliedly show a parent is unfit, no express finding of unfitness is necessary. Neither of the other cases cited by the father is relevant here. *In re J.L.*, 20 Kan. App. 2d 665, 891 P.2d 1125 (1995), held that a finding of parental unfitness must be made in termination cases where a dependency action has not yet established parental deficiency. *In re Custody of Terrance G.*, 190 Misc.2d 224, 731 N.Y.S.2d 83 (N.Y.Fam.Ct. 2001), is a trial court decision ruling that although the parents had permanently neglected their child, termination under the specific facts of the case was not in the child's best interest.

deficiency has been made in the dependency). That finding is continually made throughout the dependency, until a child can be returned to the custody of a parent. RCW 13.34.138. A termination petition is filed only if the parental deficiencies identified in the dependency proceeding are not corrected. The termination statute “does not require relitigation of the dependency determination.” *In re K.R.*, 128 Wn.2d at 141.

This Court has often stated that it will not amend a statute unless the statute violates a constitutional principle. *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998); *In re Pers. Restraint of Quackenbush*, 142 Wn.2d 928, 935, 16 P.3d 638 (2001). Because the Court has found this statute to be constitutional with respect to this specific question, it should reject the father’s argument. This Court should not add a new, redundant requirement to the statute. Additionally, as this Court has consistently held, overruling precedent “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). No such showing has been made in this case. Nor could it be made.

First, the holding of *K.R.* is correct. The father asserts that the failure to prove current parental unfitness as a preliminary finding in a termination action results in a due process violation. He has provided no analysis of this claim, fails to meet the heavy burden of showing the

termination statute is unconstitutional beyond a reasonable doubt, and fails to adequately address this Court's decisions rejecting his position. A parent's right to the care and custody of his child is adequately protected in a termination proceeding, if the state is required to prove unfitness of the parent by clear, cogent and convincing evidence. *Santosky*, 455 U.S. at 769. Proof that a child is dependent because of her parents' deficiencies, that the state has offered services to correct the deficiencies, and that it is unlikely that conditions can be remedied so that the child can return home within the foreseeable future necessarily demonstrates that the parent is not fit and that the parent-child relationship harms or potentially will harm the child. *In re J.C.*, 130 Wn.2d at 428; *In re I.J.S.*, 128 Wn. App. at 118. *In re K.R.* correctly determined that proof of the statutory factors is proof of parental unfitness.

Second, the Court will not overrule its precedent unless the challenged decision causes harm. *Riehl*, 152 Wn.2d at 147. The *K.R.* decision does not cause harm. Rather, it recognizes that the termination statute affirmatively protects both the parent's and the child's rights. It prevents the state from terminating a parent's rights unless the parent is found unfit. Yet it also is cognizant of the child's right to a speedy resolution of the dependency proceeding.

The Court should abide by its precedent and reject the invitation to edit the termination statute by adding additional, unnecessary elements.

D. The Evidence Showed That The Father Was Unfit To Parent A.B. And Her Interests Were Best Served By Termination

The trial court correctly found that “all necessary services, reasonably available, capable of correcting the parental deficiencies [identified in the dependency proceeding] within the foreseeable future” were offered or provided to A.B.’s father and that there was “little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.” These conclusions resulted in an implicit finding of parental unfitness and a conclusion that continuing the relationship would result in harm to A.B. *See* Homer H. Clark, Jr., *The Law Of Domestic Relations In The United States*, § 20.6, at 530 (2d ed. 1987) (unfitness includes a serious parental inadequacy, a parent’s inability to care for his child, or conditions such that the child will suffer serious physical or emotional harm if placed with a parent).

A.B.’s father had four years to develop a relationship with his daughter, to learn adequate parenting skills and to resolve his considerable problems with anger management and domestic violence. Because of his own actions he was unable to reach a point where A.B. would be safe and secure in his care. It was the father’s inability to even begin trying to

build a relationship with A.B. until she was 20 months old, and then his erratic contact with her over the next two years, multiple instances of domestic violence, and an unwillingness to complete court-ordered domestic violence services, that resulted in the trial court's findings. RP at 776-77.

In support of his argument that A.B. should immediately be placed in his care, the father points to testimony and a report of an educator/therapist, Kathryn Lanthorn, who he hired to evaluate the visits. Ex. 58; RP at 1296. The evaluator saw A.B. with her father twice, but declined an opportunity to see the child in any other setting. RP at 1640-43. Based on her observations she speculated that A.B. was suffering from what is described as Parent Alienation Syndrome (PAS). Father's Supp. Br. at 13. The father criticizes the trial court for discounting the evaluator's conclusion based on PAS. However, this is exactly how PAS "evidence" should be treated. In the National Council of Juvenile and Family Court Judges' publication, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (2006) at 24, the authors flatly state that the theory "has been discredited by the scientific community" and testimony that a child suffers from the syndrome "should therefore be ruled inadmissible and/or stricken . . . both

under the standard established in *Daubert* and the earlier *Frye* standard.”¹²

The publication goes on to state:

The discredited “diagnosis” of “PAS” (or allegation of “parental alienation”), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children’s behaviors and attitudes toward the parent who claims to be “alienated” have no grounding in reality.

Navigating, supra, at 24. See also Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, & Policy*, 26 Children’s Legal Rights J. 1 (Spring 2006) (presenting a comprehensive analysis of the science, law and policy involved in PAS’s evidentiary admissibility and concluding that PAS is “*ipse dixit* and inadmissible under [*Frye* and *Daubert*] standards”).¹³

The trial court appropriately discounted any speculative opinion based on this discredited theory.

Ms. Lanthorn further speculated that A.B. would not be harmed by an immediate, abrupt move to the father’s home, based on her belief that “children are resilient and no matter what, they want to be with their parents.” Ex. 58. Based on the overwhelming opinion from all other

¹² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), and *Frye v. United States*, 293 F. 1023 (D.C. Cir. 1923), set the standard for admitting purported scientific theories. The publication can be accessed online at <http://www.ncifcj.org/content/blogcategory/256/302/>.

¹³ The article notes that by July 2006, “sixty-four precedent bearing cases referenced PAS. Only two of these decisions, both originating in criminal courts in New York State, set precedent on the issue of PAS’s evidentiary admissibility; both held PAS inadmissible.” Hoult, *supra*, at 3-4.

professionals involved in the case that A.B. would suffer significant harm if even a slow transition were to occur, the trial court properly accorded little weight to Ms. Lanthorn's testimony. *See* Martha Burns, Ex 33 (the child would react extraordinarily negatively to a change of placement with immediate, if not life-long negative consequences); Domestic Violence Counselor Rose Roberson, RP at 55-56 (until father receives domestic violence treatment, would not recommend placing *any* child in his care); Parent Educator Steve Bergland, RP at 118 (expressing "major concerns about the safety of the child in the home" and that a transition into the father's home would have a major effect on her); Therapist Tawnya Wright, RP at 162-63 (transition to the father would be damaging to A.B. – it would damage her emotional framework, undermine her ability to trust, and create a great deal of anger); Social Worker Amy Marshall, RP at 289-90 (even continuing the visits and the dependency will cause the child to suffer distress); A.B.'s Guardian Ad Litem Keith Gilbertson RP at 1744 (the father is not able to provide an appropriate, safe and suitable home for A.B.).¹⁴

¹⁴ The trial court's unique opportunity to observe these numerous witnesses and weigh their respective credibility also supports this Court's strong deference to the trial court in deprivation proceedings. *In re K.R.*, 128 Wn.2d at 144.

The professionals also agreed that there were no additional services that would result in a reunification within a reasonable time for A.B. Ex. 33; RP at 119, 129, 952.

The father attempts to align the facts and circumstances of his case with those of the parents in *In re Welfare of Churape*, 43 Wn. App. 634, 719 P.2d 127 (1986), *In re S.G.*, 140 Wn. App. 461, and *In re T.L.G.*, 126 Wn. App. 181. In each of these cases, the lack of a relationship between the parent and child was of concern to the trial court. In each case, the court of appeals reversed a termination order because the Department had not proved that the parent had an identified parental deficiency that could not be remedied so that the child could return to the parent in the near future. That is not the case here.

In both *S.G.* and *T.L.G.*, the court of appeals held that the Department failed to identify a parenting deficiency in the underlying dependency action. Without that identification, the provision of appropriate services - a factor under the termination statute - could not be proved. RCW 13.34.180(1)(d). Unlike the parents in those cases, the father of A.B. did have parental deficiencies that were identified in the dependency proceeding. Moreover, he was offered services to correct these deficiencies, but was unable to remedy them before the termination

trial and, even with additional time and services, was unlikely to do so within the child's foreseeable future. *In re S.G.* and *T.L.G.* are inapposite.

In *In re Churape*, deportation and transportation problems impacted the father's relationship with his children. Two years after the children were found dependant, a petition for termination was filed. At the trial, a Department counselor testified that despite the obstacles, the father managed to visit his children once or twice each month, obtained housing and steady employment, and acquired a supportive spouse who would assist in raising the children. The court of appeals remanded the case to determine whether the father's problems could be remedied. *Churape*, 43 Wn. App. at 638-40. *Churape* was decided before major amendments to federal and state child welfare law changed the focus of dependency proceedings from reunification to permanency for children and limited the time that a parent has to remedy his deficiencies.¹⁵

In stark contrast, in this case the trial court took particular care to ensure that no additional services would likely lead to a relationship between A.B. and her father within a foreseeable time. The attachment problems were so profoundly intractable that it would take years to resolve them and transition A.B. to the father's care. The trial court had ample basis to find that there was little likelihood the father would remedy this

¹⁵ Adoption and Safe Families Act, amending 42 U.S.C. § 675(5)(E); RCW 13.34.020, .138.

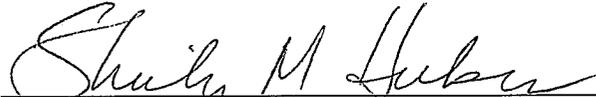
condition in A.B.'s near future. A child cannot wait indefinitely for conditions to change. *In re T.R.*, 108 Wn. App. at 164-66.

IV. CONCLUSION

The state provided A.B.'s father with services and extensive time and opportunities to develop a relationship with his daughter. Even with the support provided, he did not reach a point where A.B. could be placed in his care. She should not have to wait any longer. This little girl has a right to emotional well being, permanency, and resolution of this proceeding. The decisions of the trial court and the court of appeals should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of May, 2008.

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APPENDIX

APPLICABLE STATUTES

RCW 13.34.020 - Legislative declaration of family unit as resource to be nurtured — Rights of child

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

RCW 13.34.090 Rights under chapter proceedings

(1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact-finder.

(2) At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

(3) If a party to an action under this chapter is represented by counsel, no order shall be provided to that party for his or her signature without prior notice and provision of the order to counsel.

(4) Copies of department of social and health services or supervising agency records to which parents have legal access pursuant to chapter 13.50 RCW shall be given to the child's parent, guardian, legal custodian, or his or her legal counsel, prior to any shelter care hearing and within fifteen days after the department or supervising agency receives a written request for such records from the parent, guardian, legal custodian, or his or her legal counsel. These records shall be provided to the child's parents, guardian, legal custodian, or legal counsel a reasonable period of time prior to the shelter care hearing in order to allow an opportunity to review the records prior to the hearing. These records shall be legible and shall be provided at no expense to the parents, guardian, legal custodian, or his or her counsel. When the records are served on legal counsel, legal counsel shall have the opportunity to review the records with the parents and shall review the records with the parents prior to the shelter care hearing.

RCW 13.34.136 Permanency plan of care (PART)

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

...

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

RCW 13.34.138 Review hearings (PART)

(1) Except for children whose cases are reviewed by a citizen review board under chapter 13.70 RCW, the status of all children found to be dependent shall be reviewed by the court at least every six months from the beginning date of the placement episode or the date dependency is established, whichever is first. The purpose of the hearing shall be to review the progress of the parties and determine whether court supervision should continue.

(a) The initial review hearing shall be an in-court review and shall be set six months from the beginning date of the placement episode or no more than ninety days from the entry of the disposition order, whichever comes first. The requirements for the initial review hearing, including the in-court review requirement, shall be accomplished within existing resources.

(b) The initial review hearing may be a permanency planning hearing when necessary to meet the time frames set forth in RCW 13.34.145 (1)(a) or 13.34.134.

(2)(a) A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists. The parents, guardian, or legal custodian shall report to the court the efforts they have made to correct the conditions which led to removal. If a child is returned, casework supervision shall continue for a period of six months, at which time there shall be a hearing on the need for continued intervention. . . .

RCW 13.34.180 Order terminating parent and child relationship (PART)

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

- (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. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. . . . and
 - (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. . . .

RCW 13.34.190 Order terminating parent and child relationship — Findings.

After hearings pursuant to RCW 13.34.110 or 13.34.130, the court may enter an order terminating all parental rights to a child only if the court finds that:

(1)(a) The allegations contained in the petition as provided in RCW 13.34.180(1) are established by clear, cogent, and convincing evidence; or

(b) The provisions of RCW 13.34.180(1) (a), (b), (e), and (f) are established beyond a reasonable doubt and if so, then RCW 13.34.180(1) (c) and (d) may be waived. When an infant has been abandoned, as defined in RCW 13.34.030, and the abandonment has been proved beyond a reasonable doubt, then RCW 13.34.180(1) (c) and (d) may be waived; or

(c) The allegation under RCW 13.34.180(2) is established beyond a reasonable doubt. In determining whether RCW 13.34.180(1) (e) and (f) are established beyond a reasonable doubt, the court shall consider whether one or more of the aggravated circumstances listed in RCW 13.34.132 exist; or

(d) The allegation under RCW 13.34.180(3) is established beyond a reasonable doubt; and

(2) Such an order is in the best interests of the child.

ATTACHMENT 1

FILED

2005 MAR 31 PM 3 25

KIM H. EATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF YAKIMA
JUVENILE DIVISION

In re the Welfare of:

ANGELIQUE LIZETTE SALAS BRIGGS

DOB: 10/27/01

A person under the age of eighteen years.

NO. 04-7-00643-8

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER OF TERMINATION RE:
FATHER
(Clerk's Action Required)

THIS MATTER having come on regularly for hearing on June 13-17, 2005 and November 16-22, 2005 before the undersigned Judge of the above-entitled court upon the Petition for Termination of the Parent-Child Relationship filed herein by the Department of Social and Health Services (hereinafter DSHS), DSHS appearing by and through its social worker, Amy Marshall and its attorneys, Rob McKenna, Attorney General, and Kimberly A. Loran, Assistant Attorney General, the guardian ad litem, Keith Gilbertson appearing, and the mother of the above-named child not appearing and the court having previously entered an order terminating her parental rights, and Rogelio Salas-Orozco, the father of the above-named child, appearing personally and being represented by Holly Hermon and Sonia Rodriguez of Morales and Rodriguez P.S., and the court having heard the testimony of Amy Marshall, Rose Roberson, Steve Bergland, Tawnya Wright, Rogelio Salas-Orozco, Martha Burns, Julie Doshier, Edelmira Orozco-Rocke, Larry Rocke, James Sluder, Alton Jack Cathey, Dr. Kathy Lanthorn, Paget Gunnier, Samuel Gonzalez, Trina Luna, having heard the recommendations of the guardian ad litem, and having reviewed the files, exhibits,

1 and records herein and being otherwise fully advised in the premises, the court now makes the
2 following:

3 I. FINDINGS OF FACT

4 1.1 The minor child in this proceeding is Angelique Lizette Salas Briggs. Angelique
5 Lizette Salas Briggs was born on October 27, 2001 and currently resides in Yakima County
6 pursuant to a dispositional order of this court.

7 1.2 The mother of the above-named child is Jessica L. Briggs. Her parental rights were
8 terminated by order entered on July 8, 2005.

9 1.3 The father of the above-named minor child is Rogelio Salas-Orozco. He was
10 personally served with the termination petition and notice of hearing, and appeared at the hearing.
11 He was represented by his attorneys Holly Hermon and Sonia Rodriguez of Morales Rodriguez P.S.

12 1.4 The guardian ad litem is Keith Gilbertson, whose business address is 1728 Jerome
13 Avenue, Yakima, Washington. Mr. Gilbertson also served as the child's guardian ad litem in the
14 dependency case since July 2002.

15 1.5 The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., does not apply to this
16 proceeding.

17 1.6 The Soldiers and Sailors Relief Act of 1940, 50 U.S.C. § 501 et seq., does not apply
18 to this proceeding.

19 1.7 At the time of the child's birth on October 27, 2001, tests at the hospital indicated
20 the presence of cocaine in the child's system. A referral was made to DSHS. On October 29, 2001,
21 the Yakima Police Department took the child into protective custody and placed her in the care of
22 DSHS. The child was then placed into a licensed foster home pending more information on a
23 relative placement.

24 1.8 At the time the child was placed into protective custody, the mother was arrested
25 and incarcerated for unrelated outstanding warrants. The father was residing in Las Vegas, Nevada
26 with his mother and step-father, the Rocke's. The father was notified of the shelter care hearing.

1 1.9 On February 4, 2002, an order was entered in Juvenile Court for Yakima County
2 finding Angelique Lizette Salas Briggs dependent pursuant to RCW 13.34.030. An order of
3 Disposition was entered on that same date, placing Angelique Lizette Salas Briggs in out of home
4 care. She has remained in out of home placement since that date.

5 1.10 The child was placed with Trina Luna, a maternal cousin, in February 2002 and has
6 resided there since. Trina Luna has been determined by the court to be a maternal blood relative of
7 the child. Also present in Ms. Luna's home is Darren, a half-brother of Angelique. Darren is now
8 three years of age and has lived with Ms. Luna since birth and she has adopted him.

9 1.11 Angelique Lizette Salas Briggs has been out of her parent's home for over six
10 months pursuant to the finding of dependency. She has never resided with her father.

11 1.12 The parents were never married. The father underwent genetic paternity testing. On
12 June 25, 2002 the results of the testing indicated he was the biological father of the child. An order
13 of paternity was subsequently entered.

14 1.13 DSHS has had contact with the father commencing in October 2001 and has
15 continued to have contact with him ever since. The father had his first visit with the child on
16 February 25, 2003 when the child was 16 months of age. On June 11, 2003, the father re-located
17 from Las Vegas, Nevada to Yakima, Washington. A visitation schedule with the father was begun
18 on June 13, 2003 and has continued, with several interruptions, since then. The father has
19 participated in a variety of services since February 2002 both in Yakima, Washington and Las
20 Vegas, Nevada. The father re-located back to Las Vegas, Nevada in March 2005.

21 1.14 All services ordered under RCW 13.34.136 have been offered or provided and all
22 necessary services, reasonably available, capable of correcting the parental deficiencies within the
23 foreseeable future have been offered or provided to the father in an express and understandable
24 manner, including but not limited to the following: drug/alcohol evaluation and treatment, random
25 UAs, home study, paternity testing, parent assessment and education, domestic violence assessment
26 and counseling, and casework services.

1 1.15 There is considerable evidence in the record that DSHS has made reasonable efforts
2 to provide and offer appropriate services to the father. These efforts have been made despite the
3 logistical problems related to the father's circumstances and within the context of the child's need
4 for permanence. The Court does not share the father's view that DSHS ignored his concerns and
5 his family's right to participate, or otherwise unreasonably delay the process of paternity testing.

6 1.16 At the time of DSHS' initial involvement, the father was involved in a felony drug
7 court program in Las Vegas, Nevada. He successfully completed that program in 2003. While he
8 was involved in that program, he was unable to physically re-locate to Washington State. He has
9 been clean and sober since December 2001.

10 1.17 In July 2003, the father participated in a parenting assessment through Personal
11 Parenting and Assessment Services. He continued to participate in that program until February
12 2005, when he re-located back to Las Vegas, Nevada. Steve Bergland was the primary parent
13 educator who worked with the father. Over the two years that Mr. Bergland worked with the father
14 he did see improvement in the father's parenting abilities, but still had concerns about the lack of a
15 bond and father-child relationship.

16 1.18 The father plead guilty to fourth degree assault in late 2003 following a September
17 2003 arrest. The victim of the assault was Christina Scott, his girlfriend at that time.

18 1.19 The father participated in a domestic violence assessment with Rose Roberson in
19 March 2003. Initially, Ms. Roberson recommended a 20-week program, which the father began
20 that same month. In the 10th week of the program, the father acknowledged to Ms. Roberson an
21 incident that had happened between he and Christina Scott. Based upon this information, Ms.
22 Roberson modified his program to a 52-week program. The father stopped attending that program
23 when he returned to Las Vegas, Nevada.

24 1.20 In July 2005, the father obtained a new domestic violence assessment in Las Vegas,
25 Nevada, which recommended a 26-week batterer's program. It is uncertain what information (or
26 how much) he shared with his new evaluator regarding his past involvement in the domestic

1 violence program in Washington State. He started the batterer's program in late September 2005,
2 but has not yet completed the program.

3 1.21 The father testified that he does not believe he needs domestic violence treatment.

4 1.22 The father's life has been very complicated in the last four years. His basic
5 residence and family support has always been in Las Vegas, Nevada, where he now lives with his
6 mother and step-father. He has indicated from the very beginning a strong desire to have custody of
7 the child and to also have his own family involved in her life. He moved back and forth from Las
8 Vegas, Nevada to Yakima, Washington in an attempt to cover a wide variety of legal and personal
9 responsibilities. However, certain legal troubles in Las Vegas, Nevada and Yakima, Washington,
10 as well as financial difficulties, have hampered his ability to successfully complete all treatment
11 recommendations and to maintain consistent and meaningful contact with the child. Despite these
12 circumstances, he has demonstrated a sincere and conscientious commitment in this case regarding
13 his child.

14 1.23 The father has been able to maintain steady employment since he returned to Las
15 Vegas, Nevada in March 2005.

16 1.24 The father married Christina Scott in Yakima, Washington on May 8, 2004. The
17 marriage was dissolved in Las Vegas, Nevada on August 21, 2005. One child was born to Ms.
18 Scott and the father named Aksel Jahmeel Salas, born on January 1, 2005. The Decree of Divorce
19 provided for joint custody, but the primary residential placement has been and continues to be with
20 the father in Las Vegas. Further, Ms. Scott and the father agreed that the child should be placed on
21 a temporary basis with the father's mother and step-father as guardians. That guardianship is still
22 legally in place.

23 1.25 The father's relationship with Christina Scott has been dysfunctional and unhealthy.
24 There have been reports of domestic violence between them and Ms. Scott has a substance abuse
25 problem. According to the father, Ms. Scott continues to abuse drugs. In February 2005, Ms. Scott
26 was convicted of criminal mistreatment as a result of the care she was providing to her disabled

1 sister. This mistreatment happened while Ms. Scott and her sister were residing in the father's
2 home before he left to return to Las Vegas, Nevada. The father continues to have limited contact
3 with Ms. Scott.

4 1.26 Christina Scott is also the mother of Geovany Isaak Salas, born on March 11, 2004.
5 The natural father is unknown. Mr. Salas-Orozco currently has custody of this child pursuant to a
6 Yakama Indian Nation dependency order.

7 1.27 The father began a regular visitation schedule in June 2003, when the child was 20
8 months of age. He visited weekly and sometimes twice weekly. Initially, in 2003, the father began
9 to develop a positive relationship with the child. By September 2003, the DSHS plan was to
10 increase the father's visitation and move towards a placement in his home in Yakima, Washington.
11 This plan was interrupted, however, by the father's incarceration for an assault pertaining to
12 Christina Scott and a subsequent immigration hold, which kept him incarcerated for several
13 months. His visitation did not resume until February 2004 after he was released. Since his
14 visitation resumed in early 2004, his relationship with his child has not been the same. The father
15 visited weekly from February 2004 until February 2005 when he re-located back to Las Vegas,
16 Nevada. After he moved, he did not visit the child for four months, but then returned to visiting the
17 child approximately every 2 weeks from July 2005 until November 2005.

18 1.28 The trial record in this case was accomplished in two stages. At the end of the first
19 stage in June 2005, the Court was not satisfied that DSHS had identified and addressed all
20 necessary issues relating to the father-child relationship. The Court made some suggestions in that
21 regard. This led to the second stage of the trial in November 2005 at which time all parties
22 supplemented the record.

23 1.29 After reviewing the record, including a very intense evaluation of the testimony of
24 the witnesses, the Court continues to have concerns regarding numerous issues connected to the
25 visitation. The father has had over 100 visits, including many where his mother was also present.
26 Other visitation also included a parent educator. The father and his family have made almost heroic

1 | efforts to participate in these visits and to try and make them meaningful, but despite their efforts
2 | the visitation has not established a close attachment between the father and child.

3 | 1.30 Specifically, the Court is concerned about the location of the visits, the participation
4 | of the caretakers, certain behaviors of the child during the visits, lack of affectionate physical
5 | contact between the father and child during the visits; sharing of food during visits, utilization of
6 | toys, books and other activities during visits, and comments made by the child during the visits.

7 | 1.31 Numerous professionals have participated in or otherwise observed the visits and
8 | several have expressed bewilderment at the wall that seems to exist between the father and his
9 | family and the child. DSHS' witnesses and the GAL have concluded that it is too late to continue
10 | to try and break down the wall because of the child's need for permanency. The father's witnesses
11 | maintain that the wall is easily breached by immediately transitioning the child to the father's
12 | custody and the natural family environment of his home in Las Vegas. The Court has concluded
13 | that the problems in this regard are profound and intractable and will need considerable long-term
14 | efforts to be resolved. These problems are not the fault of DSHS or the result of DSHS' failure to
15 | provide reasonable services. They may be the result of subtle changes in the child's relationship
16 | with her caretaker and her original status as a drug-affected newborn.

17 | 1.32 There is little likelihood that conditions will be remedied so that the child can be
18 | returned to or placed with her father in the near future. Despite the 100 visits and parent education
19 | provided to the father over the past three years, the problems with the father-child relationship will
20 | still take long-term efforts to change. It will take years of transition and work with the child.

21 | 1.33 The child is currently 4 years of age. The child's caretaker, Trina Luna, and the
22 | caretaker's immediate family have been the central and dominant part of the child's life. The
23 | child's attachment to them is profound and exclusive. This attachment with them may change in
24 | the next few years as the child develops more contacts with the outside world at school, at play, and
25 | in the larger community. During this transition, there is a likelihood that the child's bonds with her
26 |

1 caretaker will soften and evolve and the child may be more open and accepting of a relationship
2 with her father. Hopefully that relationship will be fostered on an informal basis.

3 1.34 The child has been living with her current caretaker virtually all of her life, for
4 almost 4 years. She is fully integrated into that home, which has been demonstrated to be a stable
5 home. Ms. Luna has also demonstrated a commitment to the child and a desire to adopt her. There
6 is currently no legal designation of a permanent home for the child and the continuation of the
7 father-child relationship does in fact prevent the continuation of a stable home and the
8 establishment of a permanent home with the caretaker at the earliest possible time. Thus,
9 continuation of the parent-child relationship clearly diminishes the child's prospects for integration
10 into a stable and permanent home. The child knows who the father is, but a significant relationship
11 has not developed. The father and his family do not recognize Ms. Luna as a legitimate family
12 member. Because of the belief of the father and his family, they will continue to fight for the child
13 which will interfere with her ability to achieve and maintain permanency. A permanent setting for
14 the child cannot be established until the father's rights have been terminated.

15 1.35 Based upon the foregoing findings of fact, termination of the father's parental rights
16 is in Angelique Lizette Salas Briggs' best interests. The child has established a stable and powerful
17 bond with her caretaker, Trina Luna, and her half-brother, Darren. Ms. Luna has done a fine job of
18 caring for her and nurturing the child through some very difficult life stages. It would not be in the
19 best interests of the child to remove her from Ms. Luna's home at this time or in the near future.
20 The father's on-going relationship with the child will conflict with her permanency because of his
21 perpetual challenge to the legitimacy of the placement with Ms. Luna. Termination of parental
22 rights rather than a guardianship is in Angelique Lizette Salas Briggs best interest.

23 1.36 The guardian ad litem recommends that the parent-child relationship be terminated.

24 II. CONCLUSIONS OF LAW

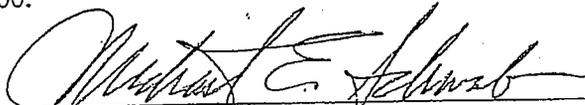
25 2.1 The court has jurisdiction over the parties and subject matter herein.

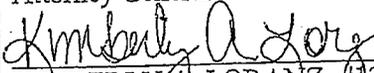
26

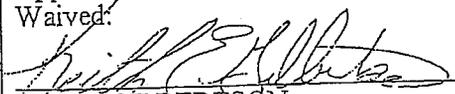
1 3.2 IT IS FURTHER ORDERED that the Washington State Department of Social and
2 Health Services is hereby granted permanent legal custody of the above-named child with the right
3 to place such child in a prospective adoptive home, the power to consent to the adoption of said
4 child, and the power to place said child in temporary care and authorize any needed medical care,
5 dental care or evaluations of said child until the adoption is finalized.

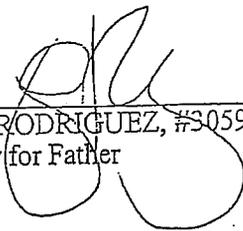
6 3.3 That this matter is set for a review hearing on the 20th day of July at 9:00 a.m.,
7 under the dependency cause number 01-7-00116-0, unless the child is earlier adopted. The review
8 hearing scheduled for July 19, 2006 is hereby stricken.

9 DATED this 3/8 day of March, 2006.

10 
11 JUDGE MICHAEL E. SCHWAB

12 Presented by:
13 ROB MCKENNA
14 Attorney General
15 
16 KIMBERLY A. LORANZ, #17430
17 Assistant Attorney General

18 Approved, Notice of Presentation
19 Waived:
20 
21 KEITH GILBERTSON
22 Guardian ad litem

23 
24 SONIA RODRIGUEZ, #30595
25 Attorney for Father

26 SW: Amy Marshall, Yakima DCFS

CERTIFICATE OF SERVICE
I certify to be true under penalty of perjury under the laws of the State of Washington that I sent via email or fax a
copy of this order to the persons/parties listed below in the manner indicated on the _____ day of _____, 20____
at Yakima, Washington.

- GAL (email/FAX)
- Father/attorney (email/FAX)
- Social Worker (email/FAX)
- Other _____ (email/FAX)

Signature

ATTACHMENT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Welfare of:)	No. 24923-9-III
)	
A.B.,)	
)	
A Minor Child.)	
)	
ROGELIO SALAS,)	
)	Division Three
Appellant,)	
)	
v.)	
)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES,)	
)	
Respondent.)	UNPUBLISHED OPINION

Stephens, J —Rogelio Salas appeals the trial court’s termination of his parental rights. He contends the termination order violated his constitutionally protected interest in the care and custody of his child and that the court’s findings on the required statutory factors were unsupported by the evidence. We affirm.

FACTS

Mr. Salas is the father of A.B, born October 27, 2001, in Yakima,

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In re Welfare of A.B.

Washington. At the time of A.B.'s birth, Mr. Salas had ended his relationship with A.B.'s mother and was living in Las Vegas, Nevada, with his mother and step-father and participating in a felony drug court program. On October 29, police took A.B. into protective custody and placed her in the care of a social worker after hospital testing indicated the presence of cocaine in her system. The Department of Social and Health Services (Department) called Mr. Salas to inform him that A.B. had been placed in state care. The next day, a dependency petition was filed by the Department.

On February 4, 2002, dependency orders were entered. The disposition order required A.B.'s mother to participate in services to correct her drug/alcohol and parenting issues so that she could be reunited with A.B. She failed to participate in services for any length of time. A final order was later entered terminating her parental rights to A.B.

Mr. Salas was required to submit to drug/alcohol evaluation and comply with a home study. He was also asked to comply with Nevada drug court services and visit A.B. as often as he could. The Department rejected Mr. Salas's request that A.B. be placed in his care at his mother's home in Las Vegas, and instead placed A.B. with a maternal relative in Yakima.

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In re Welfare of A.B.

On February 25, 2003, Mr. Salas had his first visit with A.B. when she was 16 months old. On June 11, Mr. Salas relocated to Yakima, Washington. Mr. Salas met with Department social worker, Amy Marshall, and requested that services be offered immediately. Ms. Marshall referred Mr. Salas for random urinalysis testing and a parenting assessment. A supervised visitation schedule with A.B. was also started.

In July, Mr. Salas and A.B. met with parent educator, Andres Soto, for a parenting assessment. Mr. Soto found that based on his meetings with A.B., he believed that A.B. was suffering painful emotions in dealing with the separation from her caregiver during visits. He thus recommended that A.B. and Mr. Salas receive counseling and that some of the visits be monitored by a child therapist.

Although the initial visitation sessions were extremely difficult for A.B., A.B. began to stabilize and establish a positive relationship with Mr. Salas. By September, the Department planned to increase visitation and move towards placement of A.B. in Mr. Salas's home. Mr. Salas had been participating in services and had completed three parenting classes.

On September 16, unsupervised visitation was scheduled to start. Mr. Salas, however, did not show up for the visit, because he had been arrested for a

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In re Welfare of A.B.

domestic violence incident involving his then-girlfriend. Mr. Salas pleaded guilty to fourth degree assault and was incarcerated for several months. Visitation with A.B. did not resume until February 2004.

In early 2004, the Department referred Mr. Salas for parenting and domestic violence assessments. Parent educator, Steve Bergland, was assigned to work with Mr. Salas and A.B. Mr. Bergland provided Mr. Salas with parenting education and observed visitation sessions. Visitation, however, was very difficult for A.B. A.B. did not want to take part in the visits and Mr. Bergland had a difficult time getting A.B. to interact with Mr. Salas. A.B. did not want to leave her caregiver's side during the visits. A.B. would respond negatively to Mr. Salas and would come to the visits unhappy.

Mr. Salas was also assigned to mental health counselor, Rose Roberson, for a domestic violence assessment. Ms. Roberson conducted a personality assessment and domestic violence inventory on Mr. Salas. Ms. Roberson recommended that Mr. Salas participate in a 20-week anger management program and Mr. Salas immediately started the program. In the 10th week of the program, Mr. Salas informed Ms. Roberson of the domestic violence incident involving his girlfriend. Mr. Salas's program was then modified to a 52-week

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In re Welfare of A.B.

program.

On May 8, 2004, Mr. Salas married. Mr. Salas and his wife separated later that summer. For the next several months, Mr. Salas continued to participate in his parenting classes, visitation sessions with A.B. and the anger management program. Despite several visitation sessions, there was very little progress in A.B.'s interaction with Mr. Salas. A.B. was still unhappy at the visits and did not want to take part in the sessions. There was also no improvement in A.B.'s ability to accept Mr. Salas.

On September 13, the Department filed a termination petition. On November 22, Keith Gilbertson was appointed by the court to serve as A.B.'s guardian ad litem.

On January 1, 2005, Mr. Salas and his wife had a son, A.S. In February, Mr. Salas's wife was convicted of criminal mistreatment as a result of the care she was providing to her disabled sister while she and Mr. Salas were living together. That same month, Mr. Salas was suspended from his anger management program after he stopped attending classes. On February 7, Mr. Salas informed Mr. Bergland that he was moving back to Las Vegas. Mr. Bergland told Mr. Salas that he would keep his file open in case he came back so

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that visitation with A.B. could continue. On February 25, Mr. Salas did not attend his scheduled visitation session. His file was later closed.

On March 8, Mr. Salas called Ms. Marshall to inform her that he was considering a move back to Las Vegas. Mr. Salas told Ms. Marshall that he wanted to visit with A.B. before he left. Later that day, Ms. Marshall was informed that Mr. Salas had already moved to Las Vegas. No visitation was coordinated.

In May, Mr. Salas called Ms. Marshall to set up visitation with A.B. A visitation session was scheduled for May 20. At the visit, A.B. ignored Mr. Salas. A.B. refused to open the gifts Mr. Salas brought for her. She would not touch the toys and refused food offered to her by Mr. Salas.

Ms. Marshall called the Nevada Department of Child and Family Services and forwarded to Mr. Salas the names of agencies providing parenting and domestic violence education services, as he had not yet started participation in court-ordered services in Las Vegas. Ms. Marshall, however, did not receive any further communication from Mr. Salas on whether he had engaged in services in Las Vegas.

On June 13, 2005, the termination trial commenced. The Department first called Ms. Roberson to testify. Ms. Roberson testified that Mr. Salas's progress

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in the anger management program was "average" and that he was still in need of domestic violence treatment. Report of Proceedings (RP) at 35. Ms. Roberson said she would not recommend returning the child to Mr. Salas.

Mr. Salas testified that he made a request with Las Vegas social services at the time A.B. was born to investigate his home situation, but that request was denied because paternity had not yet been established. He said that he went through the steps to get paternity established and then requested another home study, but that request was also denied because he was involved in drug court. He said visitation was hampered by the caregiver and her mother participating in his visitation sessions with A.B., because A.B. would constantly interact with them.

Mr. Salas testified that he made efforts to follow through with Ms. Marshall's recommendations for services in Nevada. He said that he was participating in Alcoholics Anonymous meetings and trying to stay away from people who use drugs. Mr. Salas said that his son with his wife, as well as her other child, were both living with him in Nevada and that he had given his parents temporary custody of the children because of financial problems. He said it was his desire to have A.B. move to Las Vegas.

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Mr. Bergland testified that the biggest problem between Mr. Salas and A.B. concerned their bonding and attachment. He said that even though he saw improvement with Mr. Salas, there was no improvement with A.B. He said that the visits were traumatic for A.B. and that after one year, she still did not want to participate in the visits. Mr. Bergland said that it would take a considerable length of time before A.B. would be comfortable with Mr. Salas and that Mr. Salas still needed work on setting boundaries for her.

Mr. Bergland said that he had concerns with Mr. Salas's past history of drug abuse and violence and that he had major concerns for the safety of A.B. He also said that he would have major concerns about placing A.B. in Mr. Salas's care. Mr. Bergland testified that it was in A.B.'s long term best interest to keep her with the caregiver. He said that A.B. needed stability and had a strong bond with her caregiver. He said he did not recommend increasing visitation with Mr. Salas as that was not in A.B.'s best interest.

Ms. Marshall testified that A.B. needed consistency and stability. She said that there were consistencies in Mr. Salas's progress, but then he suddenly moved to Las Vegas. She opined that Mr. Salas was not a stable parent. Ms. Marshall said that A.B. did not progress after one year of consistent visitation with

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Mr. Salas and that continuing the dependency would cause her distress. Ms. Marshall said she did not think that Mr. Salas's relationship with A.B. would ever progress to the point where therapy would be beneficial and it was in A.B.'s best interest to live with her caregiver.

Mr. Gilbertson, A.B.'s guardian ad litem, testified that Mr. Salas was making an effort to connect with A.B. and that he had a very strong family support system. However, even with the support, Mr. Gilbertson said there was never a long period of time where Mr. Salas had displayed solid stability. Mr. Gilbertson said he was worried because Mr. Salas exhibited a lack of judgment in relationships, and his incarceration and subsequent lapse in visitation were detrimental to his relationship with A.B. He said that Mr. Salas and A.B. were nowhere near the point of a parent-child bond and that A.B. was far from any transition to be placed with Mr. Salas.

Mr. Gilbertson testified that A.B. was extremely bonded to her caregiver and to remove her would cause extreme emotional problems. He said that A.B. was currently living with her half-sibling and that a bond had already been established between them. He said that on-going court procedures would be very problematic for A.B. because she needed permanency. He concluded it was in

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A.B.'s best interest to sever the relationship with Mr. Salas and his extended family.

At the conclusion of the trial, the court was not satisfied that the Department had addressed all necessary issues relating to the relationship between Mr. Salas and A.B. The court asked Mr. Salas to demonstrate his commitment to be involved with A.B and asked Mr. Salas to resolve the issue with his wife within 45 days. The court asked Mr. Salas to (1) have a domestic violence assessment done in Las Vegas and demonstrate participation in an on-going program and (2) have a substance evaluation done and demonstrate his involvement in regular urinalysis testing. The court also asked the Department to provide Mr. Salas and his mother with weekend visitation with A.B., in the event that they were in Washington. The court then deferred making its final decision until after the record was supplemented, and continued the matter.

In July, Mr. Salas obtained a domestic violence assessment in Las Vegas, which recommended a 26-week batterer's program. He also visited A.B. every two weeks. On August 21, 2005, Mr. Salas's marriage was dissolved. In September, Mr. Salas started a domestic violence program.

On November 16, trial resumed. The Department called family therapist,

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Martha Burns, to testify. Ms. Burns testified that she observed four visitation sessions between Mr. Salas and A.B. She also said she met with A.B. outside of visitation. Ms. Burns said that A.B. appeared nervous and anxious when with Mr. Salas and that she could not see how increasing contact between Mr. Salas and A.B. would develop a better relationship between them. She said that keeping this process going would increase A.B.'s anxiety and nervousness even in her own home. Ms. Burns said that A.B. understood that things were in limbo and that as long as Mr. Salas continued to try and reunify with A.B., her anxiety would be heightened, hindering his visits with her.

Mr. Salas then testified. Mr. Salas testified that his parents still had guardianship over his son with his former wife, and that he had not taken any steps to vacate or terminate the guardianship. Mr. Salas also said that he had completed eight sessions of the domestic violence program, but that he had missed two sessions. He said he had completed a drug and alcohol assessment and that he had been sober since 2001.

Julie Doshier of Heart to Heart Social Services testified that she supervised visitation between Mr. Salas and A.B. Ms. Doshier testified that between July and November, the visits remained the same in that it took a long time for A.B. to

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warm up to Mr. Salas and his mother. Ms. Doshier said that the caregiver's mother participated in these visits, but that she did not influence A.B. to be negative about the visitations with her father. She said that the caregiver's mother always encouraged A.B. to play with Mr. Salas and eat what they brought for her.

Ms. Marshall testified that she had also observed some of the visits between Mr. Salas and A.B. She said that the progression of a relationship between Mr. Salas and A.B. had been minimal. She said she believed that removing the caregiver's mother from the visits would result in distress to A.B. that would outweigh any benefit. Ms. Marshall said that if the termination petition was granted, the Department would still support A.B.'s paternal grandparents having contact with A.B. Ms. Marshall said that continuing the parent-child relationship, however, would greatly impact A.B.'s ability to have permanency in her life, and that she had been in limbo for four years.

After the Department rested, Mr. Salas called therapist Kathy Lanthorn to testify. Ms. Lanthorn testified that she observed A.B. during two visitation sessions. She said that Mr. Salas was very determined and committed to pursuing custody of A.B. Ms. Lanthorn said that she noticed behaviors

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unexpected of a four-year-old. She said that A.B. was very comfortable telling the adults what to do and that she seemed very accustomed to having things done for her. She said there were several situations where the caregiver's mother asked her to do something, and A.B. completely ignored her. She said she did not see Mr. Salas do anything that would concern her. She said that Mr. Salas was unbelievably patient and was very creative with A.B. She said that it took A.B. less than 30 seconds to start engaging with Mr. Salas, that A.B. did not hesitate and that it was a very quick transition. She said that A.B. was laughing and smiling at Mr. Salas and that A.B. called Mr. Salas "dad" and Mr. Salas's mother "grandma." RP at 1308. She said that on one visit A.B. sat on Mr. Salas's lap for awhile. She also said that she observed A.B. kiss Mr. Salas on his cheek.

Ms. Lanthorn said she did not agree with Ms. Burns's conclusion that A.B. and Mr. Salas did not have an attachment. She said that A.B. needed time with Mr. Salas without her caregivers so that she would not experience the anxiety of conflicting loyalties. She said she believed a transition to Mr. Salas was possible with A.B. Ms. Lanthorn said it was not in the best interests of A.B. to be forever denied contact with Mr. Salas.

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Mr. Gilbertson was then called to testify as a rebuttal witness. Mr. Gilbertson testified that he had not participated in the visitation sessions since June, because he felt that he had a good sense of how the visitations were going based on previous sessions. He said, however, based on what Ms. Lanthorn had said at trial, he attended one visitation session on November 18 to see if there was any change from previous sessions. Mr. Gilbertson said that when he arrived at the visit, he kept to a distance so as to not interfere. He said that A.B.'s expression changed when she saw Mr. Salas. He said she appeared saddened. He said that she would allow Mr. Salas to hold her, but that she never faced him. He said she would not make eye contact with him and would not turn to ask him questions.

Mr. Gilbertson said that an open adoption would have been a very good option for A.B. but that it was in A.B.'s best interest to terminate the parental rights, because A.B. needed permanency and stability. He said that the continuing efforts for visitation between A.B. and Mr. Salas were not benefiting A.B., as there had been no progress. Mr. Gilbertson said the older A.B. became, the more difficult visitation would be.

At the conclusion of the trial, the court found that despite Mr. Salas and his

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family's efforts, visitation had not yet established a close attachment between Mr. Salas and A.B. The court stated that this problem would need considerable long-term efforts to be resolved and that these problems were not the fault of the Department. It proposed an open adoption arrangement allowing Mr. Salas and his family regular visitation with A.B., but Mr. Salas did not agree to this option. Ultimately, the court found it in A.B.'s best interest to terminate Mr. Salas's parental rights. This appeal follows.

ANALYSIS

A. Constitutionally protected liberty interest in the care and custody of children

Mr. Salas contends the termination order violated his constitutionally protected liberty interest in the care and custody of A.B. He argues that he was competent, fit and able to care for A.B., and that the court erred by severing the parent-child relationship on the basis that A.B. had bonded with her caregiver. Mr. Salas relies on *In re Welfare of Churape*, 43 Wn. App. 634, 719 P.2d 127 (1986) and *In re Dependency of T.L.G.*, 126 Wn. App. 181, 198, 108 P.3d 156 (2005) to support his argument.

Biological parents have a fundamental liberty interest in the care, custody and control of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *In re*

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Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). A trial court asked to interfere with a parent's right should employ great care. *In re Welfare of H.S.*, 94 Wn. App. 511, 530, 973 P.2d 474 (1999), *cert. denied*, 529 U.S. 1108 (2000). However, a parent's fundamental right is not absolute. *Sumey*, 94 Wn.2d at 762. The State has a responsibility as *parens patriae* to intervene to protect a child when the parent's actions or inactions endanger the child's physical or emotional welfare. *Id.* RCW 13.34.180 and RCW 13.34.190 effectuate this obligation. Under these statutes, a court may terminate parental rights if it finds that (1) the requisite allegations are supported by clear, cogent and convincing evidence; and (2) termination is in the best interests of the child. RCW 13.34.190(1)(a), (2).

Here, there was an adequate basis for the trial court to conclude that the relevant factors were met, and neither *Churape* nor *T.L.G.* supports Mr. Salas's argument that this violated his constitutional rights as a parent. In *Churape*, 43 Wn. App. at 635, the father was an undocumented migrant worker who had been deported several times. Both of his daughters were declared dependent and placed in foster care. *Id.* After several months of little contact with his daughters, the Department filed a termination petition to terminate the father's parental rights. *Id.* The frequency of the father's visits increased thereafter, however, and

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the termination petition was dismissed. *Id.* A subsequent termination petition was filed following the father's second deportation that year, and the father's parental rights were ultimately terminated. *Id.* at 635-36.

On appeal, the Court remanded the proceeding to the trial court for additional testimony regarding whether the problems necessitating state intervention had been remedied and whether reunification of the family could be effectuated in the near future. *Id.* at 639. The court found that the evidence established the only irremediable condition was the father's lack of contact with his children. *Id.* at 638. The court then stated that the fact that the children had been in foster homes and had developed ties to their foster parents could not be the controlling consideration. *Id.* at 639. The court did not indicate, however, whether the children were unable to bond or form attachments to their father or whether the visits were detrimental to them in any way.

In *T.L.G.*, 126 Wn. App. at 194-95, the Department filed a petition to terminate parental rights based in part on the parents' issues with anxiety and depression. The Department alleged these mental health issues rendered the parents incapable of providing proper care for their children for an extended period of time. *Id.* at 195. At the conclusion of the trial, the court terminated the

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parental rights of both parents, finding that the parents suffered from significant mental health issues that would require three years of specialized treatment and that their mental illnesses rendered them incapable of providing proper care for their children for an extended period of time. *Id.* at 196-97.

On appeal, the court reversed the termination order, holding the State did not establish how the parents' mental health issues related to their ability to care for their children. *Id.* at 198-206. The court stated that mental illness is not, in and of itself, proof that a parent is unfit or incapable. Instead, the court stated that termination must be based on current unfitness and children cannot be removed from their homes merely because their parents suffer from mental illness. *Id.* at 203.

Churape and *T.L.G.* demonstrate that where a parent is competent, fit and able to resume custody, a court cannot end the parent-child relationship simply because the child has bonded to a foster care provider. Here, however, the fact that A.B. had bonded to her caregiver was not the only concern before the court. Rather, the irremediable condition was not Mr. Salas's lack of contact with A.B. or his inability to parent her, but A.B.'s inability to form any sort of bond or attachment to her father. Mr. Salas had over 100 visits in three years with A.B.

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Despite the number of visits, the evidence supported the trial court's finding that A.B. was unhappy and distressed by the visits. A.B. was anxious and nervous and several experts testified at trial that she was far from any transition toward a parent-child relationship with Mr. Salas, and the problem would get worse as she grew older. These concerns go beyond the concerns at issue in *Churape* and *T.L.G.*

Moreover, although parents have a fundamental liberty and privacy interest in the care and custody of their children, the court may not accommodate the parents' rights when to do so would ignore the basic needs of the child. *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). A child's right to basic nurturing includes the "right to a safe, stable, and permanent home and a speedy resolution of [dependency] proceeding[s]." RCW 13.34.020; *In re Dependency of C.R.B.*, 62 Wn. App. 608, 615, 814 P.2d 1197 (1991).

Here, A.B. has been dependent and in foster care since her birth. She is now almost six years old. The trial court carefully examined the services provided to Mr. Salas and his progress in addressing his deficiencies, even continuing the dependency trial for several months to allow Mr. Salas and the Department to address additional issues. Because the testimony at trial

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established that A.B. was far from any transition to Mr. Salas, the only alternative to termination was to continue her dependency indefinitely. The trial court considered the testimony and reasonably concluded that further services were unlikely to remedy the conditions that prevented placing A.B. with Mr. Salas, and that permanently placing A.B. in a stable home with her caregiver was in her best interests. Absent agreement to an open adoption, the court concluded that termination of Mr. Salas's parental rights was necessary to a permanent placement for A.B. In so holding, the court gave full respect to Mr. Salas's constitutional interest in the care and custody of A.B.

B. Sufficiency of evidence to support termination of parental rights

Apart from his constitutional challenge, Mr. Salas contends the court's findings of fact under RCW 13.34.180 are unsupported by the evidence.

RCW 13.34.180(1) governs the termination of parental rights and sets forth six factors the State must allege and prove in a termination hearing:

- (a) That the child has been found to be a dependant 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 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

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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 that child's prospects for early integration into a stable and permanent home.

A court may terminate parental rights if the Department proves the elements of RCW 13.34.180(1) by clear, cogent and convincing evidence. RCW 13.34.190(1)(a). "Clear, cogent and convincing" means highly probable. *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). Additionally, the trial court must find by a preponderance of the evidence that termination is in the best interests of the child. RCW 13.34.190(2).

We will not second guess the court's factual findings under RCW 13.34.180(1) if they are supported by substantial evidence. *In re Dependency of C.B.*, 61 Wn. App. 280, 286, 810 P.2d 518 (1991). Because only the trial court has the opportunity to hear the testimony and observe the witnesses, its decision is entitled to deference; this court does not judge the credibility of the witnesses or weigh the evidence. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991).

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Mr. Salas does not challenge the court's findings on the first three elements of the statute. He contends, however, that the Department failed to provide all services reasonably necessary to correct his parental deficiencies. Specifically, he argues that the Department did not offer or provide individualized parent-child therapy sessions, despite a 2003 recommendation for such services, and did not work towards transitioning A.B.'s caregivers out of the visits. This is not a basis to reverse the trial court. Even where the Department "inexcusably fails" to offer services to a willing parent, termination will still be deemed appropriate if the services "would not have remedied the parent's deficiencies in the foreseeable future, which depends on the age of the child." *In re Dependency of T.R.*, 108 Wn. App. 149, 164, 29 P.3d 1275 (2001). Where the record establishes that the offer of services would be futile, the trial court can make a finding that the State has offered all reasonable services. *In re Welfare of Ferguson*, 32 Wn. App. 865, 869-70, 650 P.2d 1118 (1982), *rev'd on other grounds*, 98 Wn.2d 589, 656 P.2d 503 (1983).

Here, there was substantial evidence to establish that therapy sessions between Mr. Salas and A.B. would have been futile. Ms. Marshall testified that based on her observations of A.B. and Mr. Salas, she did not think that Mr.

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Salas's relationship with A.B. would ever progress to the point where therapy would be beneficial. Ms. Burns testified that it would be hard to provide therapy to a young child, because young children are not as verbal as older children. She said that it is difficult to teach a young child to identify feelings and that some children are not "in touch" with the same types of things as adults. RP at 954.

Additionally, the testimony at trial established that it would be harmful to A.B. to transition her caregivers from the visits. Mr. Bergland testified that he never got to a point during the visitation sessions where A.B.'s caregivers could be removed from the visits without causing trauma to A.B. Ms. Doshier testified that even though the caregiver's mother participated in the visits she observed, she did not negatively influence A.B. in any way, and in fact encouraged A.B. to play with Mr. Salas. Ms. Marshall also testified that the progression of the relationship between A.B. and Mr. Salas was so minimal that removing the caregiver from the visits would result in negative consequences to A.B. that would outweigh any benefit. Mr. Gilbertson testified that the difficulties in visitation between Mr. Salas and A.B. would only increase as A.B. grew older. The evidence was thus sufficient that any additional services would have been futile to remedy the deficiencies in Mr. Salas and A.B.'s ability to bond or form an

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attachment. The court did not err in finding that the Department offered or provided all necessary services and concluding that additional services would not likely remedy the conditions in the near future.

Mr. Salas next contends the Department failed to establish that the continuation of the parent-child relationship clearly diminished A.B.'s prospects of integration into a stable and permanent home. However, the testimony at trial established that A.B. had been in foster care since birth and needed permanence and stability. The court acknowledged that it would be a misnomer to consider "returning" A.B. to Mr. Salas, as she has never lived with him. Clerk's Papers at 35. The Department presented evidence that it would take a considerable length of time before A.B. would be comfortable with Mr. Salas and that there had never been a significant period of time over which Mr. Salas had displayed solid stability. The Department also presented evidence that ongoing court proceedings would be problematic, that A.B. understood she was in limbo and that keeping the dependency process open would increase A.B.'s anxiety and nervousness. The evidence was thus sufficient to establish that continuation of the parent-child relationship clearly diminished A.B.'s prospects of integration into a stable and permanent home.

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Mr. Salas also contends the Department failed to prove that termination of his parental rights was in A.B.'s best interests. No specific factors are involved in a best interests determination, and "each case must be decided on its own facts and circumstances." *A.V.D.*, 62 Wn. App. at 572.

Here, substantial evidence supported the finding that termination was in A.B.'s best interests. A.B.'s social worker, her guardian ad litem and a family therapist all recommended that it was in A.B.'s best interests to sever the relationship with Mr. Salas. The court thus did not err in finding that termination was in A.B.'s best interests.

CONCLUSION

We conclude that the court's termination order did not violate Mr. Salas's constitutionally protected liberty interest in the care and custody of A.B. We also conclude that the court's findings that Mr. Salas was provided all services reasonably necessary to correct his parental deficiencies and that continuation of the parent-child relationship clearly diminished A.B.'s prospects of integration into a stable and permanent home were supported by substantial evidence at trial. Based on the evidence presented, the trial court did not err in concluding that termination was in A.B.'s best interests.

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Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Stephens, J.

WE CONCUR:

Schultheis, A.C.J.

Kulik, J.

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date 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 30th day of May, 2008, at Tumwater, Washington.

Cheryl Chafin
Cheryl Chafin, Legal Assistant