

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF A.L.S.B.

STATE OF WASHINGTON,

Respondent,

v.

ROGELIO SALAS,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION THREE

AMICUS CURIAE BRIEF OF WASHINGTON DEFENDER
ASSOCIATION ON BEHALF OF PETITIONER ROGELIO SALAS

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Defender Association (WDA), a nonprofit organization, has member attorneys, including court appointed, contract, and private attorneys, who represent parents and children in dependency actions. The WDA has an interest in protecting the constitutional rights of parents and children in dependency proceedings, and ensuring the integrity of the dependency process.

B. STATEMENT OF THE CASE

The Amicus Brief incorporates by reference The Statement of the Case in the Petitioner's Supplemental Brief.

C. ARGUMENT

1. THE FATHER AND HIS DAUGHTER WERE
SUBJECTED TO A STATE AGENCY, DSHS, WHICH
FAILED A FEDERAL AUDIT DUE TO ITS
SYSTEMATIC VIOLATIONS OF FAMILIES' RIGHTS
IN CHILD WELFARE CASES.

State child welfare systems are governed by federal statutes which establish a framework of legal requirements and provide for the distribution of federal funds. A 1997 law, the Adoption and Safe Families Act, 42 U.S.C. 679b, requires periodic Child and Family Services Reviews of each state's child welfare system by the U.S. Department of Health and Human Services (DHHS) in order to evaluate the state's compliance with federal requirements. If a state's practices are deemed unacceptable, the

state must prepare a program improvement plan and, if the state does not remedy its unacceptable practices, DHHS withholds significant federal funds.

In 2004, DHHS conducted Washington's first Child and Family Services Review. The review involved the examination of a number of Washington State case files currently open in 2003, and the systematic consideration of several other sources of information contemporaneous to 2000-2003. DSHS's performance was deemed unacceptable in many of the areas that are present in this case. In fact, Washington's system was ranked among the seven worst of the 41 state reviews completed at that time.¹

First, many fathers were found to be completely disregarded by DSHS in dependency cases. The audit specifically found that in 51% of the cases examined, fathers who should have been involved in case planning were not, and DHHS articulated a particular concern in DSHS's failure in some cases to involve the father at all. *Id.* At 34, 36. Second, DSHS's efforts to attain the goal of reunification in a timely way were found to be adequate in only 50% of the cases examined. *Id.* at 21. Third, the review found that the services provided to parents and children by DSHS were adequate in

¹ Sharon Michael, *DSHS to Release audit response today*, The Olympian, May 24, 2004, available at theolympian@newsbank.com.

only 46% of the cases examined. Id. at 12. Fourth, the review found that the continuity of family relationships, including the placement of children in close proximity to their families and the provision of adequate visitation, was achieved in only 64% of the cases examined. Id. at 24. DSHS's efforts to promote parent-child bonds of children in foster care were rated insufficient in 42% of the cases examined. Id. at 33.²

At a number of critical points during A.B.'s dependency, DSHS acted to prevent her father, Mr. Salas, from any participation in her life. Throughout the dependency, DSHS set up barriers against his ability to succeed in the case, contrary to federal and state law. DHHS's numerous findings indicate that the unsurmountable problems he encountered at many points in this case were systemic DSHS practices.

DSHS ignored Court orders by not providing services or visitation; thus, discouraging Mr. Salas from participating in the case. 3RP 539; 2RP 352-53. Adequate services to assist in reunification such as counseling were not provided. 2RP 316-19, 334; 2RP 350-51. DSHS wanted Mr. Salas to maintain employment, but then refused to accommodate his employment by providing visitation after work hours. 3RP 432-35, 460.

After the Court determined the State had not proven necessary services

² Department of Health and Human Services, Washington Child and Family Services Final Report, available at http://basis.caliber.com/cwig/ws/cwmd/docs/cb_web/SearchForm (last visited May 21, 2008.)

had been offered or provided, the main “service” provided by DSHS was a “child therapist,” Ms. Burns. In fact, the therapist provided no service at all, except to provide a report which bolstered the State’s termination case. 6RP 960-62. DSHS did nothing to promote the parent-child bond, and merely hired an expert to say a bond did not exist.

2. IN THIS CASE AN UNDERLYING ISSUE IS THAT THE FAMILY IS AN IMMIGRANT FAMILY OF COLOR.

The horrendous failure of the Washington DSHS as documented by DHHS is even worse for children of color. The Child Welfare League of America (CWLA) states, “Children of color are likely to stay in foster care for longer periods of time and are less likely to be either returned home or adopted.” Child welfare League of America (2003), Disproportionality – Facts about Children in Foster Care, www.fostercaremonth.org/mediakit/ cited by 2006 Children’s Administration Performance Report, Public and Legislative Accountability for Child Safety, Permanency, and Well-being, p. 30. Linguistic and cultural differences can unfairly penalize immigrants thrust into the cauldron of the American justice system. Joanne I. Moore, Immigrants in Courts, p. 5 (University of Washington Press 1999).

Mr. Salas and his daughter are Hispanic. Mr. Salas’ mother, Edelmira Rocke, and Mr. Salas spoke English as a second language. 7 RP 1327. The DSHS hired-expert, Ms. Burns, interviewed the paternal

grandmother and Mr. Salas in English, because she does not speak Spanish, and characterized them as “simplistic.” 7RP 1327. The characterization of being “simple” unfairly penalized Mr. Salas and his mother for their linguistic and cultural differences. This is a result the Court should not permit to stand.

3. DSHS SYSTEMATICALLY AND INTENTIONALLY CIRCUMVENTED THE FATHER’S AND CHILD’S ABILITY TO ESTABLISH A PARENT/CHILD RELATIONSHIP FOR THE CHILD’S FIRST SIXTEEN MONTHS OF HER LIFE.

DSHS systematically failed to accord Rogelio Salas his parental rights by maintaining that technical paternity testing was a necessary prerequisite to his exercise of any meaningful participation in the case, though he was contacted as the father by DSHS before the dependency was filed, there was no dispute as to A.B.’s parentage, he was appointed counsel as a party, and the dispositional court order was entered giving him services and visitation rights. 1RP 76; 3RP 539; 2RP 352-53.

Immediately after the child was born, her mother unequivocally named Salas as the father. When DSHS contacted Salas two days later, he instantaneously verbally acknowledged he was A.B.’s father, and immediately took steps to participate in the case and secure custody of his daughter. DSHS, however, informed Mr. Salas that he could not obtain custody, nor could his mother, until he underwent paternity testing. 3RP

535-39, 553. DSHS did not inform Mr. Salas that he could immediately establish paternity through procedures available under Washington's Parentage Act, which provided that the mother and father could both immediately sign an affidavit acknowledging paternity.³

In February 2002, after the fact-finding hearing, the Yakima Superior Court entered a dispositional order against Salas which fully treated him as the father, finding the child to be dependent as to him and ordering him to submit to a drug and alcohol evaluation. The order also provided for visitation. 3RP 539; 2RP 352-53. Despite the visitation order, DSHS refused to allow Mr. Salas to visit A.B. 2RP 301-02. In June 2002, paternity results through the prosecutor's office confirmed that Salas was the father. Memorandum Opinion at 3, §3. DSHS never took any steps to expedite this process; it was completed largely due to Salas's efforts. 2RP 453-54; 3RP 539, 576.

Following the paternity test results, Salas and his mother, Edelmira Roche, again requested placement but DSHS refused on the ground that the social worker did not want to move A.B. from her current placement,

³ DSHS did not inform Salas that he could immediately seek to establish paternity either through RCW 70.58.080, which in 2001 allowed unmarried parents to jointly sign the child's birth certificate when paternity was not disputed, or through RCW 26.26.040 at any time, which in 2001 established that a natural father of a child could file a writing with the state which, if undisputed, would become a legal finding of paternity of the child 60 days later if not rescinded or challenged.

despite the fact that she had previously assured Rocke that once paternity was established, she could obtain custody of her granddaughter. 3RP 535-39, 553. At that time, A.B. had lived with Luna for less than five months. 2RP 303-307, 309.

DSHS refused to allow the father to visit his child at this point as well, despite the court's visitation order, and refused to provide him with services. 3RP 539; 2RP 352-53. After fruitless attempts to get DSHS to follow the dispositional order, Salas had to go to court to enforce his parental rights to visitation and the ordered services. 2RP 301-02. As a result of this series of DSHS delays, Salas was not able to visit A.B. for the very first time until February 2003, when she was sixteen months old. 2RP 301-302.

By depriving Mr. Salas of any contact with A.B. for the first sixteen months of her life, DSHS blocked his ability to develop a deep early parental relationship with his child. It is undisputed that when babies are removed from their parents, frequent visitation is considered to be of paramount importance to the early establishment of a natural parent-child relationship. As noted by the ABA Center on Children and the Law, "To promote attachment and strengthen the parent-child relationship, very young children in foster care need frequent and consistent contact with their parents." American Bar Association, ABA Practice and Policy Brief,

Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know at 5 (July 2007).⁴

When DSHS has removed a child, it must make reasonable efforts to strengthen and encourage family relations. In 2002, RCW 13.34.136 mandated the following:

The agency shall encourage the maximum parent-child contact possible, including regular visitation and participation by the parents in the care of the child while the child is in placement. Visitation may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child's health, safety, or welfare.

Instead of encouraging or even allowing parent-child contact, DSHS blocked Salas from having any relationship with his daughter at all during the critical first sixteen months of her life.

In this regard, DSHS's first impermissible failure was to ignore Salas's status as the natural father even though both parents unequivocally agreed he is the father and no one disputed that fact. DSHS's second impermissible failure was the social worker's refusal to honor the court's visitation order entered when A.B. was five months old. Finally, DSHS's third impermissible failure was the social worker's refusal to honor the court's visitation order for some eleven additional months, eight of which

⁴ Available at <http://www.abanet.org/child/policy-brief2.pdf> (last visited May 15, 2008).

followed the confirming paternity test results.

4. THROUGHOUT THE REST OF THE CASE, THE SOCIAL WORKER'S ACTIONS CONTINUED TO VIOLATE STATE LAW AND FRUSTRATE THE CHILD-PARENT RELATIONSHIP.

Even after paternity was confirmed through testing, DSHS impermissibly refused to consider placement with Salas's mother, the child's grandmother, in violation of RCW 13.34.260, which in 2001 established:

(i) in an attempt to minimize the inherent intrusion in the lives of families in the foster care system and to maintain parental authority where appropriate, the department, absent good cause, shall follow the wishes of the natural parent regarding the placement of the child.

Throughout the case, DSHS ignored this statutory directive.

In June 2003, after Salas moved to Washington pursuant to the trial court's advisement that that was the only way he could obtain custody of A.B., DSHS further failed to adequately support his visitation efforts by refusing then, or ever, to provide individual counseling for A.B. and Salas. 2rp 316-19, 334. This counseling, recommended by DSHS's parenting evaluator, Sotos, is identified as a remedial reunification service under the federal Adoption and Safe Families Act. 42 U.S.C.A § 629a(a)(7)(B).

DSHS further interfered with Salas' earnest attempts to connect with his daughter during visits by arranging that the child's caregiver

participate in the initial visits. Ex. 14. The caregiver competed with Salas for A.B.'s attention and caused her to feel conflicted, according to the DSHS parenting evaluator. 2RP 223; 6RP 960, 983-84, 987; 7RP 1371. After the caregiver was removed from visitation, DSHS arranged for the caregiver's mother, Carol Lopez, to be present at visits, apparently on an on-going basis throughout the rest of the dependency. At the termination trial, two state witnesses opined that Lopez's presence "could have a chilling effect on A.B.'s bonding with Salas." 6RP 960, 983-84, 987. The inclusion of the caregiver and her mother in parent-child visitation interfered with A.B.'s ability to overcome her 'loyalty conflict' typically experienced during parental visitation by foster children who have strong ties with their care providers.⁵ This intrusive action in the child-parent visits denigrated the child's ability to develop a strong relationship with her father, contrary to DSHS's duty to encourage and strengthen that relationship.

5. THE FATHER WAS NOT UNFIT AND THE COURT DID NOT FIND HIM TO BE UNFIT.

The trial judge made no finding of unfitness. The child's attachment difficulties were caused by DSHS's actions and failures to act, as discussed above, and cannot be construed as parental unfitness. Further,

⁵ See Sonya Leathers, 52 Family Relations 1 Parental Visiting, Conflicting Allegiances, and Emotional and Behavioral Problems Among Foster Children (2003).

the trial judge concluded after reviewing the father's substance abuse history that he no longer had a problem as he had completed treatment and had been clean since 2001. Additionally, regarding Salas's domestic violence history consisting of one misdemeanor conviction, incarceration for about three months, and two self-reported 'altercations' that did not result in prosecution, the trial judge explicitly found that one of the father's "excellent credentials" was that he participated in domestic violence and anger management counseling, Memorandum Opinion at 14-15, and that by the second phase of the trial, he had dissolved his troubled marriage, obtained a new domestic violence assessment, and promptly enrolled in and was participating in treatment. 7RP 1252; Ex. 59.

When a parent is making significant progress at the time of a termination trial, the state may no longer claim that the parent has failed to substantially improve parental deficiencies. In re the Welfare of C.B., 134 Wn.App 942, 143 P.3d 846 (2006). Great deference should be given to the findings of a trial court in termination proceedings. In re K.R., 128 Wn. 2d 129, 144, 904 P.2d 1132 (1995).

As a matter of law, most state statutes do not allow termination of parental rights unless the parent is specifically found to be unfit. This Court has held:

It is unquestionable that biological and adoptive parents do

have a fundamental liberty and privacy interest in the care, custody and management of their children. The parent's right to custody of their children is described as being rooted in the natural and the common law, and as being a sacred right that is more precious than the right to life itself.

In re J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991); In re Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). As established in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), "(t)he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." Id. at 753.

Washington's unfitness requirement is implicit in the statute. Parenting deficiencies must be significant to constitute unfitness. DHHS has analyzed all the states' and territories' termination statutes, and summarizes statutory grounds for determining parental unfitness as follows:

The most common statutory grounds for determining unfitness include:

- Severe or chronic abuse or neglect
- Abuse or neglect of other children in the home
- Abandonment
- Long-term mental illness or deficiency of the parent(s)

- Failure to support or maintain contact with the child
- Involuntary termination of the rights of the parent to another child
- Another common ground for termination is a felony conviction of the parent(s) for a crime of violence against the child or another family member, or a conviction for any felony when the term of incarceration is so long as to have a negative impact on the child, and the only available provision of care for the child is foster care.”

U.S. Department of Health and Human Services, Grounds of

Involuntary Termination of Parental Rights: Summary of State Laws at 2 (2007).⁶

Nothing in Mr. Salas’ behavior during this long dependency and termination case rises to the enumerated parental deficiencies. The state should not be permitted to circumvent the unfitness requirement by exaggerating Salas’ imperfections and disregarding his ‘almost heroic’ attempts to care for his daughter, including his successful mastery of his substance abuse problem, his divorce from his troubled marriage at the trial judge’s instructions, his participation in anger management and domestic violence treatment to remedy problems arising from that relationship, his detailed and adequate transition and safety plan for A.B. , and his 100-plus visits to his daughter under the extremely difficult and

⁶ Available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundterminall.pdf (last visited May 15, 2008).

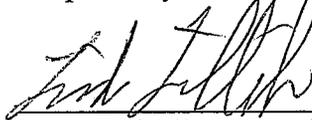
constrained conditions that were created by DSHS during the case.

D. CONCLUSION

A child should not have her parent's rights terminated based on systemic failures within DSHS. Likewise, the Court should not permit systemic biases to result in children of color being returned to their parents less frequently than Caucasian children. The Constitution requires that parental unfitness be found by clear, cogent, and convincing evidence before a Court orders that a parent's right to his child be terminated, and before a child's right to her father be terminated. DSHS neither met its statutory obligations nor constitutional burden in this case.

DATED this 27th day of May, 2008.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF,

A.S.L.B.

)
) SUPREME COURT NO. 80759-1
)
)
)
)

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 27th DAY OF MAY, 2008, A COPY OF PETITIONER'S *MOTION TO FILE AMICUS CURIAE BRIEF* AND THE *AMICUS CURIAE BRIEF OF WASHINGTON DEFENDER ASSOCIATION* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON, THIS 27TH DAY OF MAY, 2008

x Ann Joyce