

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

Corrected SUPPLEMENTAL BRIEF OF PETITIONER

SUSAN F. WILK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. STATEMENT OF THE CASE..... 2

C. ARGUMENT 20

1. DUE PROCESS REQUIRES THE STATE PROVE PARENTAL UNFITNESS BEFORE PARENTAL RIGHTS MAY BE TERMINATED..... 20

 a. The Supreme Court has recognized a finding of parental unfitness must precede the termination of the parent-child relationship in order to adequately protect the parent’s fundamental liberty interest in the care and custody of his child..... 20

 b. A requirement that termination of parental rights be based on an explicit finding of current parental unfitness is in line with this Court’s decisions in *Smith* and *Shields* and safeguards the constitutionality of the Juvenile Court Act..... 22

 c. Alternatively, to sustain RCW 13.34.180’s constitutionality, this Court must construe “conditions to be remedied” to mean “parental deficiencies” 26

2. BECAUSE THEY EXCUSED THE STATE FROM PROVING CURRENT PARENTAL UNFITNESS, BOTH THE TRIAL COURT AND COURT OF APPEALS MISAPPLIED THE STATUTORY TERMINATION FACTORS 29

 a. The lower courts improperly frontloaded the child’s best interests into their consideration of the statutory termination elements contained in RCW 13.34.180..... 29

 b. The requirement of an individualized determination of parental unfitness prevents the absence of a bond between parent and child from being considered a parental deficiency; this is a factor which bears solely on the child’s best interests 32

c. A result which gives precedence to Salas’s constitutional rights is
consistent with other state court decisions and serves the interests
of public policy 35

E. CONCLUSION 37

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

- In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006).. 21-23, 26, 32, 33
- In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998) 22, 26, 31, 32
- In re Dependency of K.R., 128 Wn.2d 129, 904 P.2d 1132 (1995).... 26, 28
- In re Parentage of J.M.K., 155 Wn.2d 374, 119 P.3d 840 (2005) 27

Washington Court of Appeals Decisions

- In re Dependency of S.G., 140 Wn. App. 461, 166 P.3d 802 (2007) 25, 26, 28
- In re Dependency of T.L.G., 126 Wn. App. 181, 108 P.3d 156 (2005) .. 24, 26
- In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981)..... 23

United States Supreme Court Decisions

- Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) 21
- Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982)..... 20, 21, 25, 26, 28, 31, 33, 34, 36
- Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972)20, 33
- Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed 2d 49 (2000) 20, 22, 31

United States Constitutional Provisions

U.S. Const. amend. 14 20

Statutes

RCW 13.34.020 25
RCW 13.34.025 27
RCW 13.34.030 27
RCW 13.34.180 2, 23-26, 28, 29, 37
RCW 26.44.010 23

Other Authorities

Department of Health and Human Services, Washington Child and Family Services Final Report (February 2004)..... 27
Ira Turkat Parental Alienation Syndrome: A Review of Critical Issues, 18 J. Am. Acad. Matrimonial Law 131 (2002)..... 30

Other State Cases

In re Adoption of J.M.H., 215 S.W.2d 793 (Tenn. 2007), cert. denied, Baker v. Shiao-Quiang He, 2007 U.S. LEXIS 8357 (2007)..... 35
In re Guardianship and Custody of Terrance G., 731 N.Y.S.2d 832 (2001) 35
In re J.L. and D.L., 891 P.2d 1125 (Kan. App. 1995)..... 35
In re the Adoption of J.J.B., 894 P.2d 994 (N.M. 1995)..... 35

A. INTRODUCTION

When the State petitioned to terminate Rogelio Salas's parental rights in his daughter, A.B.,¹ Salas was a fit parent who rectified all of the deficiencies that initially prompted the State's intervention in the parent-child relationship. In addition to engaging in numerous services, during the course of the dependency Salas engaged in over 100 visits with his daughter, all of which evidenced Salas's persistent and patient efforts to forge a bond with his child.

At the termination trial, Salas presented evidence of the safe, nurturing home he would provide his daughter, his stable employment, a plan for A.B.'s schooling, counseling, and health care, a day care arrangement, and a transition proposal that sensitively sought to minimize distress to A.B. during the shift from foster care to reunification with her father. Salas's efforts were so remarkable the juvenile court characterized them as "almost heroic." Despite Salas's fitness as a parent, however, the juvenile court terminated his parental rights because A.B. had not formed a close attachment to him.

The Legislature enacted the Juvenile Court Act to safeguard and preserve familial bonds, and, consistent with due process, intended that the

¹ The case is captioned A.L.S.B., which are the initials of the child's legal name, but she is referred to as "A.B." in this briefing.

State prove current parental unfitness by clear and convincing evidence in order to terminate parental rights. Salas asks this Court to give substance to this constitutional mandate. To the extent this requirement is only implicit in RCW 13.34.180, this Court should make a finding of parental unfitness an explicit prerequisite of any order terminating parental rights. Salas asks this Court to hold that because the courts here substituted a “best interests of the child” standard for the constitutionally required finding of parental unfitness, the termination order violated due process.

B. STATEMENT OF THE CASE

Rogelio Salas and Jessica Briggs had a six-year relationship which resulted in the birth of A.B. in Yakima on October 27, 2001. 1RP 74, 79; 2RP 205. 3RP 535.² A.B. was born cocaine-addicted and was immediately removed from her mother’s custody and placed in protective care. 2RP 203, 205, 359.

² Nine volumes of consecutively-paginated transcripts are referenced herein as follows:

1RP	-	6/13/05
2RP	-	6/14/05
3RP	-	6/15/05
4RP	-	6/16/05
5RP	-	6/17/05
6RP	-	11/16/05
7RP	-	11/17/05
8RP	-	11/18/05, 11/21/05
9RP	-	11/22/05

A supplemental volume of transcripts containing additional proceedings from 11/21/05 is referenced as 10RP followed by page number.

At the time Salas had left Briggs due to her drug use and moved to Nevada to live with his mother and stepfather. Briggs informed the Department of Social and Health Services (“DSHS” or “Department”) that Salas was A.B.’s father. 1RP 76. When Salas learned of A.B.’s birth he immediately took steps to obtain custody. 3RP 571-72. Salas, who had previously abused heroin, stopped using drugs, enrolled in drug court, engaged in substance abuse treatment, found employment, and made progress in his personal life. 3RP 535, 571-72.

He also sought immediate placement of A.B. in his care or with his family, but DSHS refused to grant him any custody rights, including visitation, because paternity had not yet been established. 1RP 77-78, 2RP 300. Salas’s mother, Edelmira Orozco Rocke, also sought to be a placement for A.B. 3RP 535-39, 553. A.B.’s social worker, Jennifer Hammermeister, told Rocke that no action would be taken toward placing A.B. with her until paternity was established, but assured her that if paternity was proven, Rocke could obtain custody of A.B. 3RP 535-36, 553. In lieu of expediting paternity testing and pursuing placement of A.B. with Salas’s mother in Nevada or a local paternal relative, however, DSHS focused on placing the child with one of Briggs’ relatives,

ultimately placing the child with a distant cousin, Trina Luna.³ 2RP 303-07, 309.

Eight months after A.B.'s birth, due largely to Salas's efforts, paternity was finally established as to Salas, but by this point, DSHS opposed removal of A.B. from Luna's home. 2RP 453-54; 3RP 539, 576, 578-79. DSHS denied Salas's mother's request for placement and, despite a court order permitting Salas to have visitation in Yakima, did nothing to facilitate the occurrence of visits. 3RP 539. Nor did DSHS initially fulfill its obligation to provide Salas with services. 2RP 352-53. In order to get services and visit his daughter, Salas had to seek court intervention. Salas's first visit with A.B. occurred on February 25, 2003, nearly a year and a half after her birth. 2RP 301-02.

In June 2003, Salas moved from Las Vegas to Yakima because he was advised by the juvenile court that this was the only way he could gain custody of his daughter. 1RP 81. This move coincided with the transfer

³ Although Salas's mother and aunt both presented themselves as possible placements for A.B., the Department chose to focus on a maternal relative placement. The Department investigated several maternal relatives, all of whom were disqualified as potential placements due to their criminal involvement. 2RP 303. Briggs' mother Carol Lopez was deemed an unsuitable placement because of convictions for drug possession, forgery, and possessing stolen property. Although Luna did not drive, had dropped out of high school, and was married to a sex offender imprisoned for second-degree rape and child molestation, the Department reasoned that because Luna herself did not have criminal history, she would be a good placement for A.B. 2RP 304-07. Even though her criminal history had rendered her ineligible as a foster parent, Lopez provided day care to A.B. in Luna's home. 2RP 309.

of the case from Hammermeister to DSHS social worker Amy Marshall. 2RP 203. On June 13, 2003, Salas presented himself to Marshall in her office and immediately requested services. 2RP 216. Marshall referred Salas for urinalyses, a parenting assessment with Andrès Soto, and immediate visitation with A.B. Id. The visits were three supervised visits per week for one hour each. 2RP 217.

To conduct the parenting assessment, Soto met with Salas and observed visits on June 19, 2003 and June 26, 2003. Ex. 14. At the same time that he commended Salas for his evident commitment to obtaining custody of A.B., Soto also noted that Luna, the foster parent, had perceptible difficulty with the notion of A.B. transitioning to Salas's care. Ex. 14 at 1-2. Soto wrote that Luna was "tense and uncomfortable with the fact of Rogelio visiting with [A.B.]." Ex. 14 at 2. During the visit on June 19, 2003, Soto found that Luna "competed with Rogelio for [A.B.]'s attention." Id.; see also 3RP 427-28. A.B. in turn showed distress when Luna left the room. Ex. 14 at 2; 2RP 217-18.

Soto recommended that Salas continue with random urinalysis, engage in parent education, and continue with visits supervised by a Parent Educator. Ex. 14 at 2-3. Soto's written recommendations were for: "intensive parent education services, drug and alcohol assessment and

follow recommendations for treatment, and counseling for [A.B.] and Rogelio.” Ex. 14 at 3.

Marshall failed to refer Salas and A.B. to counseling, failed to involve a child therapist in the visits between Salas and A.B., and did not place Salas in individual, intensive parenting classes. Instead, she referred Salas to group parenting classes. 2RP 316-19, 334. Marshall claimed that Soto told her it would be okay to substitute his written recommendations for parent education and individual counseling with weekly group classes, but she was able to provide no documentation of this conversation. 2RP 317. She explained that she did not follow Soto’s recommendation for parenting classes during Salas’s visitation because the Department was “not sure how the case was going to go,” and wanted to “hold off” on providing this service if the plan was to terminate Salas’s parental rights. 2RP 350-51.

After Luna was transitioned out of visits and A.B. was transported to visits by Lopez, her maternal grandmother, A.B.’s separation anxiety diminished. 2RP 223. The visits also improved after they were scheduled in a park, rather than the sterile environs of the DSHS office. 2RP 219-20, 312, 314; 3RP 431. By August 2003, Marshall felt the visits were progressing well enough that she referred Salas to a supervising agency in lieu of supervising the visits herself. 2RP 227-28.

In addition to progressing well with his visits, Salas did very well in services. He had maintained sobriety since December 25, 2001, and completed four out of five of recommended group parenting classes. Ex. 10, 11, 12, 13; 3RP 403-06. By September, 2003, Marshall was prepared to approve unsupervised visits; however, on September 16, 2003, Salas did not attend a scheduled visit. 2RP 232. He had been arrested for a fourth-degree assault involving his then-girlfriend, Christina Scott. 2RP 233, 235; 3RP 410-11.

Because of his immigration status,⁴ Salas was detained until December 2003. 2RP 233; 3RP 410-11. Upon his release, visits recommenced but DSHS's attitude toward reunification changed. 2RP 235, 315. The primary plan advocated by DSHS was now adoption of A.B. and this plan never changed for the remainder of the proceedings. 2RP 237, 262.

DSHS required Salas to complete a domestic violence assessment and follow any recommendations. 2RP 235. Rose Roberson conducted the assessment and referred Salas to a 20-week anger management program, which Salas began on March 16, 2004. 1RP 16-21. Salas married Scott in May 2004, when he learned she was pregnant with his child. 1RP 175. In July 2004, Salas disclosed another altercation with

⁴ Salas is a Mexican national.

Scott to Roberson. 1RP 28-30. On July 19, 2004, Salas was arrested for an alleged assault involving Scott. 1RP 37. After this incident, Salas separated from Scott. In January 2005, Scott gave birth to a son. 1RP 176.

By court order, following his release from custody, Salas's visits with A.B. were supervised. 2RP 236. After visits recommenced in 2004, A.B. was resistant to the visits and the attachment to Salas she had shown in 2003 had disappeared. 1RP 98, 100, 104-05, 110-12, 149-59; 2RP 238-39, 241, 243, 250; 5RP 776-77, 828. This notwithstanding, DSHS opposed increasing visits, even though this step was recommended by an expert as a means of establishing and promoting an attachment between A.B. and Salas. 5RP 742-45. In order to obtain increased visits, Salas had to go to court and then received only two visits twice a week for a total of two hours. 5RP 751.

At the same time, it was exceedingly difficult for Salas to obtain and maintain stable employment and housing – prerequisites to reunification – and meet all of his obligations under the dependency, as all of Salas's services, including his visitation with A.B., were scheduled during regular work hours. Marshall refused to reschedule visits for a time that would have enabled Salas to maintain a regular job, because this was not convenient for Luna's schedule. 3RP 432-35, 460. Salas found

employment in construction and then when this job posed too many conflicts with his obligations under the dependency he worked as an auto detailer. 3RP 408. Salas's bills piled up and he soon found himself in trouble financially. 1RP 82. In March 2005, finding DSHS no closer to transitioning A.B. to his care than one year earlier, and facing increasing financial difficulty, Salas returned to Las Vegas, Nevada. 1RP 82-83, 173; 3RP 434-35.

In Las Vegas, Salas immediately obtained employment with Roofing Wholesale as a roof loader, a job which paid him \$9 an hour plus overtime and provided medical benefits. 3RP 386-89. Salas was a reliable worker with a congenial personality who was expected to advance in his position. 3RP 389-90, 395-96. Roofing Wholesale required employees to submit to urinalyses, and Salas took all urinalyses requested and never had a positive test. 3RP 391-92.

On September 13, 2004, the Department filed a petition to terminate Salas's parental rights. CP 74-80. Marshall explained that even though the Department had earlier that year elected to withdraw a termination petition, the Department intended to go forward with termination at that time because Salas had had an opportunity to reunite with A.B. which he disrupted because of his incarceration and the domestic violence incidents with Scott. 2RP 263. A termination trial took

place before the Honorable Michael Schwab on June 13, 14, 15, 16, and 17, 2005.

At the trial, Salas presented evidence of the safe, stable home he provided for the two sons of Christina Scott, A. and G., of whom A. was his biological son. 2RP 440-51. Salas lived in a house belonging to his parents, across the street from his parents' own residence, 1.5 blocks away from a park and three blocks away from an elementary school. 4RP 658-59. The neighborhood was suitable for children, consisting of single-family residences, and the house had an enclosed backyard where children could play safely. 4RP 658-59. Salas also noted he had maintained sobriety since December 25, 2001, engaged in parenting classes in both Yakima and Nevada, separated from Scott, obtained stable employment, and faithfully engaged in over 100 visits with A.B., all with the ultimate goal of obtaining custody of her. 3RP 400-06, 417-18, 435-51, 498, 520-26.

Salas's mother, Edelmira Orozco Rocke, also testified. 3RP 534-62. She recounted her efforts to obtain custody of A.B. and, when these efforts were unsuccessful, to simply be a part of her life, and the concerted resistance to these efforts she met from DSHS. 3RP 536-41. Rocke also testified Salas was a good son and a very good father to his own sons. 3RP 542. Although Rocke cared for the children while Salas was at work,

upon his return home, Salas helped with the children's care. 3RP 542-44. He fed and changed them, played with them, walked with them in a stroller to the park, put them to bed, gave them a lot of affection, and kept them safe. 3RP 542-43. Roche believed Salas was ready to take A.B. right away, and both she and her husband, Salas's stepfather, testified they would be able to provide Salas with a lot of support in giving A.B. a safe and stable home. 3RP 544, 554-55, 588-601.

Larry Roche, Salas's stepfather, also worked closely with Salas to provide a transition plan to move A.B. into Salas's care. He proposed that visitations be increased, and be followed by supervised visits in Nevada. 3RP 597. Next, A.B. could have unsupervised visits in Nevada, and ultimately, Salas could obtain custody of his daughter. 3RP 597. Roche believed this transition could be accomplished within three to six months. 4RP 649.

The trial court commented that it believed strongly in family, and that it was very impressed by the passion and commitment of Edelmira Roche. 4RP 673. The court found it was in A.B.'s best interest to know a credible blood line. 5RP 907. Based on A.B.'s history of being born drug-addicted, the court suggested it would be appropriate to have her evaluated by a specialized professional. 5RP 901. The court concluded the State had not proven necessary services had been offered or provided,

had not proven there was little likelihood conditions would be remedied so A.B. could be returned to her parent in the near future, and had not established continuation of the parent-child relationship would diminish A.B.'s prospects for early integration into a stable and permanent home. 5RP 908-09. The court reserved on the question whether termination would be in A.B.'s best interest, and continued the matter until August 1, 2005, for Salas to submit a proposed plan addressing the issues of substance abuse, domestic violence, his relationship with Christina Scott and her children, child support for A.B., and parental and personal assessments for himself and A.B. 5RP 909.⁵

Salas submitted a plan that addressed all of the issues of concern to the court.⁶ Salas completed a drug and alcohol assessment and committed to providing all recommendations and/or court orders; he set up urinalysis testing; and he obtained a domestic violence assessment and committed to following all recommendations of the provider, as well as to living his life without future incidents or accusations of domestic violence. Salas and Scott entered a joint petition for divorce and agreed to permit the Rockes to file for legal guardianship of their biological son, A. Salas arranged to

⁵ A copy of the court's letter outlining the court's expectations is attached as Appendix C to Salas's opening brief in the Court of Appeals.

⁶ A copy of Salas's proposed plan is attached as Appendix D to Salas's opening brief in the Court of Appeals.

address outstanding child support obligations and obtained a home study of his residence in Las Vegas. Salas proposed a detailed transition plan that incorporated his mother so as to ease A.B.'s move from Yakima into his home. Salas identified a child and family counselor who would work with A.B. to address the inevitable emotional distress she would experience when she transitioned to his custody and located a pediatrician and elementary school for her. Salas provided the court with written proof of the joint petition for divorce decree, his domestic violence assessment, and a copy of the home study completed by Alton J. ("Jack") Cathey, a licensed marriage and family therapist and alcohol and drug counselor. CP 44-65.⁷

Nonetheless, in November 2005, the State renewed its effort to terminate Salas's parental rights. The Department retained Martha Burns, a child therapist and former DSHS adoption worker who had testified numerous times for DSHS as an expert witness, to evaluate A.B. 6RP 960-62. Burns testified that Salas had made little progress in forging a bond with A.B. despite his consistent efforts during scheduled visits. 6RP 960-62, 985; 7RP 1186.

⁷ A copy of Cathey's home study was admitted as Exhibit 56 and is attached as Appendix E to Salas's opening brief in the court of appeals.

Julie Doshier, a visitation supervisor who observed all of Salas's visits between July 23, 2005 and October 16, 2005, agreed the visits had remained the same since she began supervising them. 6RP 1053-62. She never heard A.B. refer to Salas by name and noted that occasionally, A.B. threw away toys that Salas gave her. 6RP 1055, 1061-62. Both Burns and Doshier opined that Carol Lopez's presence could have a chilling effect on A.B.'s bonding with Salas but neither recommended her removal from the visits. 6RP 960, 983-84, 987.

Cathey testified at the November hearings on Salas's behalf. 7RP 1244-69. He stated that in order to conduct the home study, he visited Salas's home on July 29, 2005, arriving early so as to observe Salas interacting with his mother and getting ready for the visit. 7RP 1247-48. Cathey met with and interviewed Salas for approximately three hours. Cathey described the home atmosphere as congenial, and the home as well-maintained, suitable, and safe for a child. 7RP 1248, 1269. Cathey interviewed Salas's work manager, Sluder, who said Salas was a responsible employee. 7RP 1249. Cathey also performed a drug/alcohol assessment of Salas and found he was not dependent on drugs or alcohol. 7RP 1254-55. For this reason, Cathey did not recommend further substance abuse treatment. 7RP 1256. Cathey reviewed Salas's transition

plan and found it as viable as it could be, with the caveat that Cathey did not have an opportunity to meet A.B. 7RP 1250.

Salas retained Kathy Lanthorn, a licensed therapist, to review videotapes of visits and documents, physically observe visits, and offer an opinion based on her observations and expertise whether a transition could be made under the existing circumstances.⁸ Lanthorn reviewed the home study and drug and alcohol assessment completed by Cathey, Burns' assessment, Doshier's visitation reports, Salas's letter to the court in which he outlined his transition plan, and an ISSP dated July 25, 2005, by Amy Marshall. 7RP 1296-97. Lanthorn met A.B. in two visits on September 29 and 30, 2005, and prepared a report detailing her findings and recommendations.⁹ 7RP 1297.

Lanthorn found Salas sincere, authentic, and very determined to pursue custody of A.B. 7RP 1298. She thought A.B.'s behavior was unusual for a four-year-old: A.B. was bossy and Lanthorn did not hear her say "please" or "thank you." 7RP 1303. Lanthorn attributed this behavior to a lack of structure in the home system in which A.B. resided: A.B.'s conduct was consistent with a child who wielded a lot of power in a system which did not provide adequate limits. 7RP 1357-58. Lanthorn

⁸ Lanthorn's curriculum vitae was admitted as Exhibit 47.

⁹ Lanthorn's report was admitted as Exhibit 58. 7RP 1299.

found Salas “unbelievably patient” with a child who tested him quite frequently, and creative in his ability to find non-threatening ways to redirect her. 7RP 1305-06.

Lanthorn noted that while she did not observe Lopez overtly trying to distract A.B., Lopez also did not encourage A.B. to take snacks or drinks from Salas or his mother. 7RP 1310. She testified that children are sensitive to covert cues, and opined that A.B.’s hesitance to engage with Salas might stem from divided loyalties and a desire to please both parents; she might feel that if she ate or drank food provided by her father it would be negative. 7RP 1311. In support of this, Lanthorn cited an incident during the visit on July 29th. At that visit, A.B. spent an extended amount of time playing with her father and paternal grandmother, then when it was time to leave, went to Lopez, crawled in her lap, and asked, “Was I bad, grandma?” 7RP 1371.

Lanthorn disagreed with many of Burns’ observations. 7RP 1316. In contrast to Burns, Lanthorn observed a clear emotional connection between A.B. and Salas, as well as a demonstrable physical comfort level. 7RP 1316. Lanthorn faulted Burns’ characterization of Salas and his mother as “simplistic,” and stated Burns did not account for the fact that both Salas and Edelmira Rocke spoke English as a second language. 7RP 1327. Lanthorn herself was a fluent Spanish speaker who was state-

certified at the highest level, and conducted her evaluation in both English and Spanish. 7RP 1327-28.

Lanthorn believed Salas's ability to gain custody of his daughter had been negatively impacted by what she characterized as institutional bias against a single Latino male. 7RP 1330. Lanthorn also noted that family therapy would have been very helpful to Salas and A.B., but that this service was never offered or provided. 7RP 1326. Even so, Lanthorn believed A.B.'s development in the past five years had given her stability so she could weather an adjustment to living in Salas's home, provided she received support in this transition from her current caregivers. 7RP 1324-25.

Lanthorn strongly believed it would be in A.B.'s best interest to be transitioned to her father because she had already lost her mother. 7RP 1329, 1378. All things being equal, Lanthorn believed the best place for a child was with a biological parent who was a competent parent. 7RP 1359. Salas wanted A.B. and had demonstrated to the court that he was willing to do everything possible to prove his competency as a father. 7RP 1329. Lanthorn testified that A.B. would be damaged by not being raised by her father when he was available, competent, and able to parent her.

In deciding the case, the court initially issued a memorandum

opinion setting forth its findings.¹⁰ The court did not find Salas had any parental deficiency. Nor did the court find Salas was an unfit parent. In fact, the court commended Salas on the actions he had taken in order to obtain A.B.'s custody. The court noted Salas's attendance at over 100 visits and described his participation in the visits and efforts to make them meaningful as "almost heroic."

Nevertheless, the court was unwilling to deny the State's termination petition. The court commented that A.B. had never lived with Salas, and thus it was 'a "misnomer" to consider "returning the child to the father in this case."' The court then turned to A.B.'s attachment to her foster home, which the court described as "profound and exclusive." The court noted the nature of this attachment was likely to "soften and evolve" as A.B. "develops more contacts with the outside world", and as a result the child "will be more open and accepting of her father." But the court noted A.B. had lived with Luna virtually all her life, and that Luna wanted to adopt her. The court found for this reason that continuation of Salas' relationship with A.B. "does in fact prevent . . . the establishment of a permanent home with the caretaker at the earliest possible time."

Turning to A.B.'s best interests, the court noted Salas's "excellent

¹⁰ The memorandum opinion is attached as Appendix A to Salas's opening brief in the Court of Appeals.

credentials as a responsible adult,” which the court listed as follows:

- (a) He has a good job, a demonstrated work ethic, and a commitment to providing financial support for his family
- (b) He has overcome a substance abuse problem, been clean and sober for four years, and been willing and able to continue counseling and treatment as needed
- (c) He has participated in domestic violence and anger management counseling
- (d) He has maintained a patient and loving commitment to visitations with his child, despite frequent indications of resistance by the child
- (e) He is part of a loving and caring extended family who maintain a safe and stable home in Las Vegas
- (f) He has disengaged himself physically and legally from a dysfunctional and unhealthy relationship with Christina Scott and taken appropriate steps to care for two children from that relationship[.]

Given these considerations, the court found “great potential for an attachment between the father and the child” and further found that maintaining a relationship with her father was key toward the cultivation of A.B.’s cultural identity as a half-Hispanic child. The court concluded termination of the parent-child relationship would not be in A.B.’s best interest, and recommended the parties enter an open adoption arrangement with a visitation plan for the father and his family.

When Salas did not agree to an open adoption arrangement, the court decided “The father’s on-going [sic] relationship with the child will conflict with her permanency because of his perpetual challenge to the

legitimacy of the placement with Ms. Luna”, and terminated Salas’s parental rights.

On appeal, Division Three affirmed. The court did not disagree that Salas was a fit and competent parent, but found “A.B.’s inability to form any sort of bond or attachment to her father” was an “irremediable condition” making termination appropriate. Slip Op. at 18. The court found further services were unlikely to remedy the “conditions” that prevented placing A.B. with Salas, and that a permanent placement with Luna was in her best interests. Slip Op. at 19.

C. ARGUMENT

1. DUE PROCESS REQUIRES THE STATE PROVE PARENTAL UNFITNESS BEFORE PARENTAL RIGHTS MAY BE TERMINATED.

a. The Supreme Court has recognized a finding of parental unfitness must precede the termination of the parent-child relationship in order to adequately protect the parent’s fundamental liberty interest in the care and custody of his child. The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to the care, custody, and management of their children. U.S. Const. amend. 14; Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed 2d 49 (2000); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). Parents’ fundamental liberty interest “does not evaporate simply

because they have not been model parents or have lost temporary custody of their child to the State.” Santosky, 455 U.S. at 753.

In Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972), the Court held an Illinois law which permitted the termination of parental rights of unwed fathers without an individualized showing of unfitness violated the Equal Protection Clause. Stanley, 405 U.S. at 652-53. The Court has since made it clear that because of the compelling interest at stake, a showing of parental unfitness is a component of the due process owed a parent facing the severance of the parent-child relationship and therefore a necessary prerequisite of any order terminating parental rights. Santosky, 455 U.S. at 760 n. 10. “[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” Id. at 760; see also, Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[if] the State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” (citation omitted)).

b. A requirement that termination of parental rights be based on an explicit finding of current parental unfitness is in line with

this Court's decisions in *Smith* and *Shields* and safeguards the constitutionality of the Juvenile Court Act. In two recent cases, this Court reaffirmed that efforts to interfere with the relationship of a fit parent with his child are subject to strict scrutiny. *In re Custody of Shields*, 157 Wn.2d 126, 142-43, 136 P.3d 117 (2006); *In re Custody of Smith*, 137 Wn.2d 1, 16, 969 P.2d 21 (1998), aff'd sub nom. *Troxel*, 530 U.S. at 76. In *Smith*, this Court observed the State's *parens patriae* and police power enable the State to act only where children lack the guidance and protection of fit parents of their own, and have "been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm, or threatened harm." *Smith*, 137 Wn.2d at 16. This Court held a third party visitation statute that permitted a court to order visitation based solely on the court's assessment of the child's best interests could not serve as a compelling state interest overruling a parent's fundamental rights. *Id.* at 20.

In *Shields*, this Court reversed a trial court order awarding custody of a child to his stepmother over the fit biological mother. 157 Wn.2d at 150. The trial court had found that the child was bonded to his stepmother and considered her his psychological parent, his adjustment to living with his mother had been guarded, and his mental health and future development in adolescence was at risk in his mother's home. *Shields*,

157 Wn.2d at 136. In ruling the trial court abused its discretion in awarding custody to the stepmother instead of the fit biological parent, this Court noted that in custody determinations, there are only two instances when the State may interfere with a parent's constitutional rights: (1) when a parent is unfit; and (2) when actual detriment to the child's growth and development would result from placement with an otherwise fit parent. Shields, 157 Wn.2d at 142-43 (citing In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981)).

In so holding, this Court endorsed an extremely restrictive view of what may constitute parental unfitness. Shields, 157 Wn.2d at 142. An unfit parent "generally cannot meet a child's basic needs." Id. Examples of unfitness include "the fault or omission by the parent seriously affecting the welfare of a child, preserving of the child's right to freedom from physical harm, illness, or death, or the child's right to an education." Id. at 143 (citing ch. 13.34 RCW and RCW 26.44.010).

This Court indicated that the "actual detriment" standard likely would not apply outside of a custody determination, as this is a "less drastic limitation on parental rights than the dependency or abuse or neglect situations involving parental unfitness determinations." Id. at 143 n. 7 (citing Allen). And where a custody transfer is based on "actual detriment," rather than unfitness, the trial court must indulge the

presumption that a fit parent will act in a child's best interests, the nonparent must make a "substantial" showing to overcome this presumption, and a nonparent will generally be able to meet this test only in "extraordinary circumstances." Id. at 144-45.

RCW 13.34.180, the statute setting forth the elements the State must prove to terminate parental rights, contains no express requirement of unfitness.¹¹ However, recent decisions of the courts of appeals of this

¹¹ RCW 13.34.180 requires the Department to prove:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.
-
- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180.

state have engrafted an express “current unfitness” requirement onto the statute. See, e.g., In re Dependency of T.L.G., 126 Wn. App. 181, 203-04, 108 P.3d 156 (2005) (reiterating termination “must be based on current unfitness,” and reversing termination order based on DSHS’s failure to identify parental deficiencies); In re Dependency of S.G., 140 Wn. App. 461, 468-69, 166 P.3d 802 (2007) (where DSHS never specified parental deficiencies, order terminating parental rights had to be reversed).

This construction is consistent with the Legislature’s intent, which is to safeguard the family as a fundamental resource to be nurtured unless a child’s right to “conditions of basic nurture, health, or safety” is in jeopardy. RCW 13.34.020. More importantly, this construction gives intelligible content to the constitutional mandate that an action to terminate parental rights be accompanied by adequate procedural safeguards to reduce the risk of erroneous factfinding. Santosky, 455 U.S. at 760-61.

As the Santosky Court noted, in a termination proceeding,

Numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor,

uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.

Santosky, 455 U.S. at 762-63.

c. Alternatively, to sustain RCW 13.34.180's constitutionality, this Court must construe "conditions to be remedied" to mean "parental deficiencies". The decisions in T.L.G. and S.G., while in line with this Court's more recent decisions in Smith and Shields, arguably conflict with this Court's opinion in In re Dependency of K.R., 128 Wn.2d 129, 904 P.2d 1132 (1995), in which this Court held a finding of current unfitness is implicit in proof of the statutory termination factors by clear, cogent, and convincing evidence. K.R., 128 Wn.2d at 142 (citing Santosky). However, to the extent application of the statutory factors permits parental rights to be terminated without the juvenile court ever requiring the State to prove current parental unfitness, the statute is unconstitutional. See Santosky, 455 U.S. at 760 n. 10 ("Nor is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness" (emphasis in original)).

Alternatively, the ambiguous statutory reference to "conditions" that must be remedied to permit reunification must be construed to mean "parental deficiencies." See RCW 13.34.180(1)(e).

The primary goal of statutory interpretation is to ascertain

and give effect to the legislature's intent and purpose. This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and it is appropriate to resort to principles of statutory construction to assist in interpretation. Strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided. If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute.

In re Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005)

(citations omitted).

If the imprecise term “conditions” is construed to mean any “conditions preventing reunification,” such as a child’s failure to bond with her biological parent, then courts and the Department can neatly circumvent any inquiry into parental unfitness. This construction is contrary to the statute as a whole. See RCW 13.34.025(2) (discussing requirement under federal adoption and safe families act to provide services to remedy parental deficiencies and facilitate reunification); RCW 13.34.030(5) (defining “dependent child”). Moreover, this construction will overwhelmingly disfavor parents who have not been granted custody or sufficient visitation during the dependency.¹²

¹² In a 2004 study, the federal Department of Health and Human Services

In K.R., this Court appeared to construe “conditions” to mean parental deficiencies. 128 Wn.2d at 144 (“The focus of allegation (5)^[13] is whether parental deficiencies have been corrected.”) 128 Wn.2d at 144. This construction sustains the statute’s constitutionality by properly ensuring termination of parental rights is based on current unfitness, and thereby reduces the risk of erroneous factfinding. Santosky, 455 U.S. at 762-63; cf. S.G. (Court finds Department’s failure to determine conditions to be remedied – which court construes to mean parental deficiencies – precluded entry of order terminating father’s parental rights). 140 Wn. App. at 468-69. To sustain the statute’s constitutionality and ensure termination is based on current unfitness, this Court should hold the statutory requirement that the State prove little likelihood “conditions” will be remedied so that the child can be returned to the parent in the near future refers to parental deficiencies.

found that DSHS “was not consistent in its efforts to assess the service needs of children and families and provide necessary services, involve parents and children in the case planning process, and establish face-to-face contact between agency social workers and the children and parents in their caseloads.” Department of Health and Human Services, Washington Child and Family Services Final Report at 6 (February 2004). Importantly, the Report noted, “A particular concern identified in some cases was the lack of effort to incorporate father into any aspect of the case process”, Id. at 34; the failure to provide fathers with sufficient visitation, id. at 27; the dramatic failure to assess or provide services to address fathers’ needs (15 and 16 out of 39 cases assessed, respectively); id. at 34; the failure to involve fathers in case planning (51% of cases assessed), id. at 36-37; and insufficient social worker contacts with fathers, including preadoptive fathers. Id. at 40.

¹³ Recodified as RCW 13.34.180(1)(e).

2. BECAUSE THEY EXCUSED THE STATE FROM PROVING CURRENT PARENTAL UNFITNESS, BOTH THE TRIAL COURT AND COURT OF APPEALS MISAPPLIED THE STATUTORY TERMINATION FACTORS.

In this case, both the trial court and the court of appeals loosely construed “conditions” to mean any conditions preventing reunification, even conditions having no bearing on Salas’s fitness as a parent. This error caused both courts to substitute the requirement of parental unfitness with a “best interests of the child” standard, in derogation of due process. This Court should reverse the termination order and remand with direction Salas be reunified with his daughter.

a. The lower courts improperly frontloaded the child’s best interests into their consideration of the statutory termination elements contained in RCW 13.34.180. The lower courts hinged their decision not to reunify Salas with his daughter on A.B.’s insufficient bond with her father as contrasted to her attachment to her foster parent. The trial court noted A.B. “has been living with [Luna] virtually all of her life,” and is “fully integrated into that home,” whereas, by comparison, Salas had not developed a “significant relationship” with his daughter. The trial court observed that various professionals expressed “bewilderment” at the “wall that seems to exist between the father and his family and the child,” and concluded A.B.’s problems in this regard were “profound and intractable.”

In so concluding, the court discounted Lanthorn's findings that A.B.'s resistance likely stemmed from parental alienation syndrome (PAS), and so could only be addressed by appropriate therapeutic intervention.¹⁴ 7RP 1371-74. See Ira Turkat Parental Alienation Syndrome: A Review of Critical Issues, 18 J. Am. Acad. Matrimonial Law 131 (2002)¹⁵ (explaining effects of parental alienation on affected child's relationship with alienated parent and advocating courts closely involve a mental health professional with expertise in the area).¹⁶

¹⁴ The court's findings in this regard are particularly astonishing given the strong evidence of PAS during visits. See Ex. 14 (parenting evaluator Soto documents Luna's discomfort with visits and resistance to transition to Salas's custody); 2RP 320 (Upon being asked to leave visit by social worker, Luna responded she would not be leaving the lobby and would not leave "her" baby); Ex. 31 (visitation supervisors observed Lopez trying to "work up" A.B. by repeatedly telling her she loved her and lingering longer than appropriate during visits); 7RP 1371 (following visit where A.B. demonstrated pleasure in the company of her father and paternal grandmother, A.B. crawled in Lopez's lap and asked, "was I bad, grandma?").

¹⁵ No pin citations to this document were available on LEXIS, thus counsel is unable to provide pin citations to quoted excerpts from Turkat's article.

¹⁶ Turkat discusses the result of subtle PAS programming on visits with the alienated parent as follows:

Visitation with the targeted parent is often sabotaged with subtle PAS programming. For example, a child in a PAS environment becomes attuned to the alienating parent's desire for the child to despise the other parent. To secure acceptance, the child may make statements that suggest an uncertainty about visiting with the targeted parent or a lack of desire to do so; the alienator may then act in a "neutral" manner by instructing the child to believe that it is the child's decision whether or not to visit with the other parent. This "neutrality maneuver" serves to further alienate the targeted parent by "passively" discouraging the child from

More critically, by substituting an inquiry into whether it was in A.B.'s best interests to be transitioned to Salas's care for an analysis of Salas's parental unfitness, both courts wrongly allowed their judgment of what was "better" for A.B. to supplant Salas' constitutional rights.¹⁷ See Troxel, 530 U.S. at 72-73 ("the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made"); Santosky, 455 U.S. at 753 (the State's intervention in the parent-child relationship through a dependency action does not diminish a parent's liberty interest in his child); Smith, 137 Wn.2d at 20.

In Smith, this Court reiterated,

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life ... is not justified where the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state to make significant decisions concerning the custody of children merely

participating in visitation. Under these circumstances, the child is likely to learn quickly to avoid open expressions of interest in visiting the "hated" parent.

¹⁷ The courts also apparently decided A.B.'s "better interest" included permanently ending the prospect of all benefits stemming from the legal relationship with her father. As the Court in Santosky observed in a similar context, "Some losses cannot be measured." Santosky, 455 U.S. 760 n. 11.

because it could make a “better” decision.

Smith, 137 Wn.2d at 20.

Even in the circumstance of a third-party custody determination, which does not irrevocably sever the legal bond between parent and child, this Court has found a “best interests” analysis, standing alone, cannot substitute for an inquiry into parental unfitness. Shields, 157 Wn.2d at 143. In “extraordinary circumstances,” a court can make a third-party custody determination if the court applies a “focused test” to find an “actual detriment” to the child if placed with an otherwise fit parent. Id. at 145, 150. But in this instance, to ensure that parents’ constitutional rights are fully respected, the court is required to indulge a presumption that “a fit parent will act in the best interests of her child.” Id. at 146. Thus, even if an “actual detriment” standard could apply to the termination of parental rights – which Shields properly suggests is unconstitutional¹⁸ – the court must presume a fit parent acts in his child’s best interests. This did not occur here.

b. The requirement of an individualized determination of parental unfitness prevents the absence of a bond between parent and child from being considered a parental deficiency; this is a factor which bears solely on the child’s best interests. As discussed supra, the Supreme Court

¹⁸ Shields, 157 Wn.2d at 147.

has held an individualized determination of parental unfitness is essential to ensure termination is not based on imprecise subjective standards or a scant determination of a child's "better interests." Santosky, 455 U.S. at 762-23; Stanley, 405 U.S. at 652-63. Rather, "unfitness" must be limited an inability to meet a child's basic needs. Shields, 157 Wn.2d at 143.

The narrow construction is crucial in part because of the vast resources the State can mount in an action to terminate parental rights. As the Court in Santosky recognized, the State's ability to assemble its case "almost inevitably dwarfs the parents' ability to mount a defense." Santosky, 455 U.S. at 763. The State possesses superior resources in experts, caseworkers, and other professionals, whom it empowers both to investigate the family and to testify against the parents. Id. "Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." Id.

Thus, to label a child's failure to bond with her father a "parental deficiency" as the State has sought to do, where the father is an otherwise fit, competent, and loving parent, fundamentally mistakes the State's duty to reunify biological families. "[The] State registers no gain toward its declared goals when it separates children from the custody of fit parents." Stanley, 405 U.S. at 652. The State's claim that Salas, a fit parent, cannot

be reunited with his child must be viewed with particular skepticism where the State, through its placement decision and the restrictions it imposed on contact between Salas, his family and A.B., created the situation it now defends as the reason for terminating Salas's parental rights.¹⁹ See Santosky, 455 U.S. at 763.

Instead, to minimize the risk of erroneous factfinding, the question of whether and how much the child has bonded with her biological parent as contrasted to her foster home must be reserved for the "best interests" determination. Santosky, 455 U.S. at 760. "After the State has established parental unfitness at [the factfinding], the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge." Id. (emphasis in original). Here, because Salas remedied the "conditions" preventing reunification, the question of "best interests" should not have been considered. The court should have dismissed the termination petition and ordered A.B. be transitioned to her father's custody.

¹⁹ After dragging its feet on coordinating visitation and failing to arrange the individualized counseling recommended by Soto at the inception of the dependency, following Salas's release from custody in December 2003, DSHS maintained a rigid status quo of two two-hour visits per week or less, all with a supervisor and a caretaker present. Salas received his only visit without Lopez or Luna being present after the court ordered DSHS to arrange this visit during the November termination proceedings. When the visit did not result in the instantaneous transformation of A.B.'s attitude toward visits, DSHS contended further efforts to transition the caretakers out of visits would have been futile. 8RP 1521-22. For further details regarding this visit, see Br. App. at 43-44.

c. A result which gives precedence to Salas's constitutional rights is consistent with other state court decisions and serves the interests of public policy. Other state courts grappling with the difficult situation facing the trial court here have held that absent a showing of parental unfitness, a child must be reunited with her natural parents. See e.g. In re Adoption of J.M.H., 215 S.W.2d 793 (Tenn. 2007) (evidence that child would be harmed by change in custody where she lived and bonded with foster parents did not constitute the substantial harm required to prevent natural parents from regaining custody), cert. denied, Baker v. Shiao-Quiang He, 2007 U.S. LEXIS 8357 (2007); In re Guardianship and Custody of Terrance G., 731 N.Y.S.2d 832 (2001) (termination of parental rights of fit parent based on finding that child should be placed with his foster parent to whom he was bonded effected a subtle presumption that child's best interests were promoted by termination of parental rights, violating due process); In re the Adoption of J.J.B., 894 P.2d 994 (N.M. 1995) (termination on the grounds of the child's interests alone, without a showing of unfitness, failed to satisfy due process); In re J.L. and D.L., 891 P.2d 1125 (Kan. App. 1995) (reversing termination order where statutory presumption of unfitness arose from termination of mother's rights as to another child).

It is true that removal of a child from a home to which she has

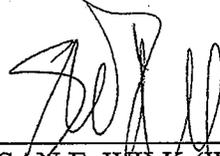
formed a bond is an unhappy corollary of the orders entered in these cases. However, honoring the rights of a fit parent to the care and custody of his child properly recognizes that “the parents and child share an interest in avoiding erroneous termination.” Santosky, 455 U.S. at 765. Requiring a termination order be based on proof of current unfitness also reduces the likelihood the order will be infected by institutional, class, or racial bias, inappropriate partiality of social workers and other professionals, or the machinations of foster parents eager to push their temporary status into permanency. Thus, a decision from this Court that reverses the termination order based on the Department’s failure to prove Salas was an unfit parent serves the interests of public policy as well.

E. CONCLUSION

This Court should hold a parent's fundamental interest in his child cannot be terminated without a showing of unfitness. To the extent RCW 13.34.180 permits courts to relieve the Department of its obligation to prove unfitness, this Court should construe the statute to require proof of current parental deficiencies. Here, Salas was a fit parent who was ready to immediately take custody of his daughter and provide her a safe, nurturing home. This Court should hold the order terminating his parental rights violated due process.

DATED this 22nd day of May, 2008.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE A.B.)

ROGELIO SALAS,)

PETITIONER.)

NO. 80759-1

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF MAY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **(CORRECTED) SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KIMBERLY LORANZ, AAG
ATTORNEY GENERAL'S OFFICE
1433 LAKESIDE CT, SUITE 102
YAKIMA, WA 98902-7354

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF MAY, 2008.

x _____

