

RECEIVED

FEB 07 2007

In the Office of the Clerk of Court
Washington Court of Appeals, Division Three

jsd

NO. 24923-9-III

80759-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Received
7

DIVISION THREE

IN RE THE DEPENDENCY OF A.B.

STATE OF WASHINGTON,

Respondent,

v.

ROGELIO SALAS,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
FEB - 2 2007

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Michael Schwab

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. THE JUVENILE COURT FOUND SALAS HAD ADDRESSED HIS PARENTAL DEFICIENCIES, THUS THE STATE'S CLAIM THAT SALAS WAS "CURRENTLY UNFIT" AT THE TIME OF THE TERMINATION TRIAL IS CONTRARY TO THE JUVENILE COURT'S EXPRESS FINDINGS2

a. In claiming that Salas was currently unfit to parent A.B., the State misrepresents the record and the juvenile court's findings..... 2

b. The juvenile court found the State's allegation that Salas had an issue with domestic violence unpersuasive; the State's contrary claim on appeal is a red herring 4

c. The unchallenged findings of fact do not support the court's termination order 7

d. Assuming for the sake of argument lack of bonding is a parental deficiency, the State did not meet its burden of proving it provided all necessary services in light of its abject failure to provide individual counseling or family therapy to Salas and A.B. 8

e. The State's attacks on the integrated family unit and loving home that Salas presented to the juvenile court as a placement for A.B. are baseless 10

i. The provision of childcare by Salas's mother while Salas was at work would not render her the "primary caregiver" as alleged by the State; instead this plan demonstrates the family's careful efforts to address A.B.'s needs for care and supervision 11

ii. The transition plan and home environment proposed by Salas and his family evinced a sophisticated understanding of the difficulties A.B. might have transitioning, was workable, and was approved by experts 12

2. IN THE ABSENCE OF PROOF OF CURRENT UNFITNESS, THE ORDER TERMINATING SALAS'S PARENTAL RIGHTS VIOLATED DUE PROCESS..... 13

B. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	3
<u>In re Hudson</u> , 13 Wn.2d 673, 126 P.2d 765 (1942).....	13
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1992)	8

Washington Court of Appeals Decisions

<u>In re Churape</u> , 43 Wn. App. 634, 719 P.2d 127 (1986)	13-16
<u>In re Gibson</u> , 4 Wn. App. 372, 483 P.2d 131 (1971).....	13
<u>In re Hendrickson</u> , 7 Wn. App. 485, 487, 499 P.2d 908 (1972).....	16, 17
<u>In re the Dependency of T.L.G.</u> , 126 Wn. App. 181, 108 P.3d 156 (2005)	13, 14, 15
<u>In re Welfare of C.B.</u> , 134 Wn. App. 942, 143 P.3d 846 (2006).....	5, 6, 7, 13

Statutes

RCW 13.34.020.....	16
RCW 13.34.180.....	5, 8, 9

Other Authorities

<u>In re the Interest of Reed</u> , 8 Kan. App. 2d 602, 663 P.2d 675 (1983)	13
--	----

A. ARGUMENT IN REPLY

Rogelio Salas has challenged the termination of his parental rights in his daughter, A.B. Salas was a competent and loving parent who was ready to immediately resume custody of his daughter. During the dependency proceedings and at the termination trial, instead of working to reunify Salas with his daughter as is its statutory mandate, the Department of Social and Health Services (“DSHS” or “Department”), strenuously opposed removing the child from her foster placement – a placement the Department hoped would become her adoptive home. On appeal, DSHS has not departed from this position although the Department has marshaled new arguments, not presented to the juvenile court, in support of its position. As set forth below, the Department has also misrepresented pertinent facts, omitted others, and mischaracterized the juvenile court’s findings and conclusions in granting the State’s termination petition. Salas requests this Court reject the Department’s claims and reverse the order terminating his parental rights.

1. THE JUVENILE COURT FOUND SALAS HAD ADDRESSED HIS PARENTAL DEFICIENCIES, THUS THE STATE'S CLAIM THAT SALAS WAS "CURRENTLY UNFIT" AT THE TIME OF THE TERMINATION TRIAL IS CONTRARY TO THE JUVENILE COURT'S EXPRESS FINDINGS.

a. In claiming that Salas was currently unfit to parent

A.B., the State misrepresents the record and the juvenile court's findings. The State has claimed that Salas was "currently unfit" to parent A.B., and asserts the juvenile court credited the DSHS witnesses in this regard over the many experts who testified on Salas' behalf during the trial proceedings. Br. Resp. at 13-14. However, the trial court's written memorandum opinion belies the State's assertion. The court noted,

[T]he father has presented some excellent credentials as a responsible adult[.]

(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 frequent and loving commitment to visitations with his child despite 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

CP 37-38.

There simply is no evidence to support the State's claim that the juvenile court "accepted the opinions of DSHS' witnesses" and found Salas to be "currently unfit" to parent A.B. Br. Resp. at 14. In fact, a review of the juvenile court's memorandum opinion and findings of fact and conclusions of law evinces no concerns on the court's part regarding any deficiencies or problems with Salas's parenting ability, and in its brief, the State can point to no finding by the court that Salas was currently unfit to parent A.B. See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue").

The impediment to reunification, rather, was rooted not with Salas himself, but with A.B.'s lack of bonding with him as evidenced during visitations, as well as her caretakers' interference in the visits:

After careful review of the record, including a very intense evaluation of the testimony of the witnesses,

the Court continues to have concerns regarding numerous issues connected to the visitations. The subject of visitations is very important in this case because it is the only way to determine if an attachment and bond can be established between the father and child, given that the father did not begin to have contact with the child until she was over one year old. The father has had over 100 visitations with the child, including many where his mother was also present. The father and his family have made almost heroic efforts to participate in these visits and to try and make them meaningful, but despite their efforts the visitations have not established a close attachment between father and child.

Specifically, the Court is concerned about:

- (a) the location of the visits
- (b) the participation of the caregivers
- (c) certain behaviors of the child during visits
- (d) lack of affectionate physical contact between the father and child during visits
- (e) sharing of food during visits
- (f) utilization of toys, books and other activities during visits
- (g) comments by the child during the visits.

CP 34-35.

In sum, as shown by the court's findings and memorandum opinion, the court made no finding that Salas was an unfit parent.

b. The juvenile court found the State's allegation that Salas had an issue with domestic violence unpersuasive; the State's contrary claim on appeal is a red herring. On appeal, as it did below, the State makes much of Salas's alleged issue with domestic violence, using this as a straw man to justify DSHS's

continued intractability on transitioning Salas and A.B. to reunification. The court, however, was satisfied with Salas's efforts to sever his relationship with Christina Scott. CP 38. At the court's direction after the June proceedings, Salas (1) completed a domestic violence assessment on July 27, 2005; (2) identified a service provider and engaged in domestic violence treatment in Nevada; (3) followed all recommendations and was compliant in treatment, as attested by his provider at the November proceedings; (4) formalized his relationship with his and Scott's son; and (5) finalized his divorce from Scott. Salas's domestic violence treatment provider testified Salas was compliant with treatment and that he had no concerns about Salas having continued contact with Scott as there was no protective order in place between the two. 9RP 1765, 1775-76. In short, the State's claimed concerns were based on historical events, rather than current circumstances, and thus cannot support affirmance of the termination order. Compare, In re Welfare of C.B., 134 Wn. App. 942, 953-55, 143 P.3d 846 (2006).

In C.B., Division Two of this Court analyzed RCW 13.34.180(1)(e), which provides that a parent's failure to substantially improve deficiencies within twelve months of entry of

dispositional order gives rise to a rebuttable presumption that there is little likelihood conditions shall be remedied so the child can be returned to the parent in the near future. C.B., 134 Wn. App. at 955. The Court held that because it implicates a parent's constitutional rights, this presumption operates to shift only the burden of production to the parent. Id. ("It is inappropriate to shift the ultimate burden of persuasion where a parent's constitutional rights are at stake.")

In C.B., the State sought to rely on the mother's past history of substance abuse despite concrete evidence she was improving. Id. at 957-59. The Court noted the State's contention was the mother's improvement was "too little, too late," and so found it "puzzling that the State did not produce any evidence to substantiate that position." Id. at 959. Because substantial evidence did not support the juvenile court's finding this condition would not be remedied, the Court reversed. Id.

Here, similarly, the State focused below on an allegation of domestic violence between Salas and Scott dating from July 2004, and preceding Salas's disengagement from the relationship and participation in domestic violence treatment. See e.g. Br. Resp. at 6, 13. It bears mention that although the State faults Salas on

appeal for not completing his domestic violence treatment program, the State fails to discuss testimony establishing the prior domestic violence allegation involving Scott was a *non sequitur* to Salas's ability to parent A.B., and that any delay in Salas's entry into the Nevada domestic violence treatment program was due to a waiting list at the agency providing treatment, rather than any recalcitrance on Salas's part. 9RP 1775-76, 1778. Further, the State does not acknowledge that the juvenile court commended Salas on his resolution of the situation with Scott and disengagement from the relationship. CP 38.

As in C.B., this Court should find Salas amply rebutted any presumption that his history with Scott should preclude reunification with A.B. The State's claim that termination of Salas's parental rights should somehow be predicated on his failure to remedy a "domestic violence issue," Br. Resp. at 13, is belied by the record, contrary to caselaw, and so without merit.

c. The unchallenged findings of fact do not support the court's termination order. The State asserts the unchallenged findings of fact "overwhelmingly" establish the legal requirements necessary for termination of parental rights. Br. Resp. at 20. However, these findings do not identify a parental deficiency, do not

identify the services that were offered or provided or elaborate how these services were targeted at particular deficiencies, and do not address the likelihood conditions will be remedied or the impact of continuation of the parent-child relationship on A.B.'s early integration into a stable and permanent home. Stated differently, the State fails to correlate the unchallenged findings to the statutory elements of RCW 13.34.180(1), neglects to explain how these findings suffice to meet its constitutional burden of proof, and does not cite any authority for its argument – save for authority generally supporting the proposition that unchallenged findings are verities on appeal, a tenet Salas does not contest. The State's argument that the unchallenged findings support the court's order is without merit. See State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1992).

d. Assuming for the sake of argument lack of bonding is a parental deficiency, the State did not meet its burden of proving it provided all necessary services in light of its abject failure to provide individual counseling or family therapy to Salas and A.B. The State claims lack of bonding is a parental deficiency, but in the same breath concedes it did not offer counseling or family therapy to Salas or A.B. Br. Resp. at 23-24. Assuming *arguendo* the State's dubious claim that an absence of bonding between a parent

and child is a parental deficiency has merit, the State's failure to offer or provide individualized or family counseling critically undermines the State's contention that it met its statutory burden of providing services. From the outset of the dependency process, the State resisted providing this service: social worker Marshall did not refer Salas to counseling when it was initially recommended and subsequently elected not to prioritize it because she felt the case was moving toward termination of Salas's parental rights, not reunification. 2RP 316-19, 334. As argued in Salas's opening brief, once the Department decided termination of Salas's parental rights should be the outcome of the action, the Department maintained a rigid status quo, balking even at increasing visitation, even though this might have overcome A.B.'s resistance to bonding with her father.

The State alternately attempts a waiver-type argument, noting that Salas did not seek interlocutory review or revision of the permanency planning orders which did not order counseling. It must be reiterated that the Legislature places upon the State the burden of proving it has offered or provided all necessary services capable of rectifying parental deficiencies before a petition for parental rights may be granted. RCW 13.34.180. The parent bears

no burden of proof whatsoever at the termination hearing. Thus, even assuming lack of bonding was a parental deficiency, the State failed to offer a key service that could have rectified the issue. Salas is entitled to reversal of the termination order and remand for reinstatement of the dependency.

e. The State's attacks on the integrated family unit and loving home that Salas presented to the juvenile court as a placement for A.B. are baseless. The State criticizes the reunification plan proposed by Salas on a variety of grounds. The State's principal complaints center on the integrated family unit presented by Salas, his mother, and his step-father, who presented themselves to the juvenile court as a unified whole, committed to working together to provide A.B. with a stable, loving home.

The State's criticisms present a "heads I win, tails you lose" scenario. Had Salas presented himself as a sole caretaker without an external support system, the State no doubt would contend this was a deficiency that rendered Salas an unfit parent. Moreover, as discussed below, Salas's reunification plan was practical, realistic, and evinced a sophisticated understanding of the needs of a small child such as A.B.

i. The provision of childcare by Salas's mother while Salas was at work would not render her the "primary caregiver" as alleged by the State; instead this plan demonstrates the family's careful efforts to address A.B.'s needs for care and supervision. The State alleges that Salas's mother will be the "primary caretaker" if A.B. is returned to Salas's care. Br. Resp. at 28-29. In truth, the thoughtful and thorough transition plan presented by Salas to the court envisioned Salas as the primary caretaker, performing the role of both mother and father, and provided that Salas's mother would offer *daycare* while Salas was at work. See Ex. 56 at 2 (Home Study of Alton "Jack" Cathey¹); Ex. 59 (reunification plan); 8RP 1387-88.

Contrary to the State's assertions, this plan shows Salas thought realistically about how to care for his daughter while he was at work. Surely, the State would not expect Salas, a single parent and breadwinner, not to work. Moreover, Luna, A.B.'s foster placement, testified A.B.'s maternal grandmother's boyfriend provided daycare for A.B. while Luna was at work and that DSHS

¹ Jack Cathey, the only expert who did a home study of Salas's proposed placement, did not find fault with Salas's living arrangements and commended his daytime care plan for his daughter.

paid for this service. 9RP 1623. The State's criticism of a similar arrangement in Salas's home is thus disingenuous.

ii. The transition plan and home environment proposed by Salas and his family evinced a sophisticated understanding of the difficulties A.B. might have transitioning, was workable, and was approved by experts. Salas's transition plan reflected an understanding both of the short-term issues that might present themselves as A.B. adjusted to living with him and of her long-term needs. He thought of not only her need for day care but for counseling. He identified a pediatrician and elementary school near his home. His home itself had a fenced yard and was in a safe neighborhood with other single-family homes. Both Cathey, who visited the home, and Lanthorn, who met A.B., thought this would be a workable plan.

The State cites no authority for its claim that "This is not a 'return home' as contemplated by the statute," because there is none. In short, the State's criticisms of Salas's reunification plan miss the mark.

2. IN THE ABSENCE OF PROOF OF CURRENT UNFITNESS, THE ORDER TERMINATING SALAS'S PARENTAL RIGHTS VIOLATED DUE PROCESS.

The due process right of a parent to the custody and control of his child is a "sacred" right, In re Hudson, 13 Wn.2d 673, 678, 685, 126 P.2d 765 (1942), "more precious to many people than the right of life itself." In re Gibson, 4 Wn. App. 372, 379, 483 P.2d 131 (1971). Given the powerful interests at stake, it is axiomatic that a parent's constitutional right to the custody of his child may be terminated only upon a showing that the parent is currently unfit. C.B., 134 Wn. App. at 957; In re the Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005); In re Churape, 43 Wn. App. 634, 637-38, 719 P.2d 127 (1986); see also In re the Interest of Reed, 8 Kan. App. 2d 602, 604, 663 P.2d 675 (1983) (reversing termination order and reinstating dependency based on State's failure to prove current unfitness). Here, in light of the absence of *any* finding by the trial court that Salas was unfit to parent A.B., the order terminating his parental rights violated his fundamental due process right to the care, custody and nurturance of his natural child.

The State attempts to distinguish Churape and T.L.G., cited in Salas's opening brief; however, the State's analysis evinces a misunderstanding of these cases. See Br. Resp. at 13-15. The State claims – without citation to the record – that “the expert testimony” established Salas's “deficiencies involved more than just lack of contact with the child.” Br. Resp. at 13. It bears repeating that the State's claim of “a domestic violence issue that was not remedied” is expressly contradicted by the trial court's ruling. CP 38 (“[Salas] 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.”). In short, as articulated in argument 1b, supra, this claim is a red herring.

Contrary to the State's assertion, in all significant respects, Salas's case is identical to Churape. As in Churape, the only significant impediment to reunification was the lack of bonding between father and child – a function of interruptions in the visitation schedule. Cf., Churape, 43 Wn. App. at 637-38. The DSHS witnesses in this case opposed reunification almost exclusively because of the absence of bonding, and not because of concerns about Salas's parenting ability.

Unlike in Churape, the DSHS social worker here did not do a home study, so could not opine as to the adequacy of Salas's home as a placement for A.B. See Churape, 43 Wn. App. at 638. This deficiency on the part of the Department, however, was more than compensated by the thoughtful testimony and report of Alton "Jack" Cathey. Ex. 56; 7RP 1244-69. Cathey unreservedly recommended Salas's home as a safe, nurturing and loving home for A.B. Id.

T.L.G., recently decided by Division One, also is dispositive. T.L.G. states unequivocally, "Termination must be based on current unfitness." T.L.G., 126 Wn. App. at 203. The State urges this Court not to apply this holding, claiming T.L.G. was "reversed primarily" because of a violation of the Indian Child Welfare Act (ICWA). Br. Resp. at 14.

But the State misreads T.L.G. See T.L.G., 126 Wn. App. at 185 ("This termination of parental rights case involves two distinct issues. . ."). Only the mother argued ICWA required notice of the dependency action be provided to the Cherokee nation. Id. at 186-93. Both parents, however, contended the State failed to provide necessary services to correct parental deficiencies, failed to identify the deficiency to be corrected, and failed to prove current unfitness. Id. at 193-206. The Court of Appeals devoted significant attention

to these latter arguments, as well as to the mother's challenge to the ICWA, and reversed the termination order as to both the mother and the father. The State's suggestion, therefore, that the holding of T.L.G. upon which Salas relies is merely dicta is unavailing.

The subtext of DSHS's arguments is an apparent belief it was selfish for Salas to seek his daughter's custody, given that she apparently was happy in Luna's home. See e.g. 3RP 555-56; 4RP 640; 6RP 993. But neither a child's adoptability nor her transitory happiness in her foster placement are just considerations in a termination proceeding. Churape, 43 Wn. App. at 639-40; In re Hendrickson, 7 Wn. App. 485, 487, 499 P.2d 908 (1972).

The unfairness of this type of comparison is especially striking where a parent has corrected his deficiencies, as it essentially renders the parent's efforts meaningless. The State's statutory mandate is to preserve the family unit and reunify dependent children with their natural parents. RCW 13.34.020. As a matter of basic constitutional principle, the natural parent and foster placement do not have equal footing in a dependency action; the foster home by definition is a temporary measure in the process of alleviating parental deficiencies, and the parent cannot be criticized for pursuing what is both his statutory and constitutional

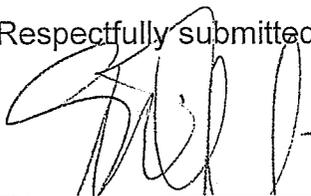
right to the care and custody of his child. As the Court stated in Hendrickson, "We wish the best for the children -- their welfare is the paramount consideration -- but there is no statutory authority for these standards which are too high to be set for parents in a deprivation case." Hendrickson, 7 Wn. App. at 487. Here the State ignored its statutory and constitutional mandate, in derogation of Salas's rights. Because Salas had remedied his parental deficiencies and was ready to assume custody of A.B., the order terminating his parental rights violated due process.

B. CONCLUSION

For the reasons set forth herein, and for the reasons articulated in his opening brief, Rogelio Salas requests this Court grant his motion for accelerated review, reverse the order terminating his parental rights, and remand with direction the parties proceed toward reunification.

DATED this 2nd day of February, 2007.

Respectfully submitted:



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

