IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN RE ADOPTION OF BRITTANY NATASHA FRAZER and BREONA NICOLE FRAZER, Persons under the age of 18. SAMUEL JAMES EVANS, Respondent, DENISE MARIE EVANS, aka Denise Marie Frazer, Defendant, and JEFFREY JON FRAZER, Appellant.	)	No. 63873-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 2, 2009

Grosse, J. — If parental unfitness is established by clear, cogent, and convincing evidence in an adoption proceeding pursuant to chapter 26.33 RCW, a specific finding of harm or risk of harm to the child is not required before terminating parental rights. Here, Frazer was incarcerated for first degree sexual molestation of his daughter from another relationship and had, in fact, been accused of sexually molesting one of these adoptees. The court's unchallenged findings demonstrate that

the termination was based on present parental unfitness. Accordingly, we affirm.

FACTS

Brittany and Breona Frazer (twins) were born on December 6, 1993, to Denise and Jeffery Frazer. The marriage was dissolved on September 24, 1996. Frazer was initially granted visitation every other weekend, but in 1998 that visitation was reduced to twice a month for one hour of supervised visitation after an allegation that he had molested Breona. Denise testified that Frazer did not always show up for his supervised visits.

In 2004, Frazer pleaded guilty to two counts of first degree sexual molestation for molesting his seven-year-old daughter from another relationship. After determining that Frazer was not a good candidate for SSOSA (Special Sex Offender Sentencing Options), he was sentenced to 96 months in prison. Frazer is currently serving that sentence in Twin Rivers Correctional Center near Monroe, Washington; his earliest possible release date would be in April, 2011, when the twins are 17 years of age. As a condition of his sentence, Frazer is ordered to have no contact with children under the age of 18. He has had no contact while serving his sentence.

In 2006, Denise married Samuel Evans. In July of 2007, Samuel, with Denise's consent, filed a petition to adopt the twins. Frazer objected and a hearing was held. Frazer appeared via telephone and was represented by counsel. After hearing testimony from both parties, the court found Frazer unfit by clear, cogent, and

convincing evidence, terminated Frazer's parental rights, and issued an order of adoption. Frazer appeals.

ANALYSIS

Frazer argues that RCW 26.33.120 violates the due process clause because it allows a parent's rights to be terminated without a showing of harm or risk to the child. This harm, he argues, is the sine qua non of the State's compelling governmental interest which justifies termination. Whether a statute violates the constitution is an issue of law that is reviewed de novo.[1] Legislative enactments are presumed constitutional, and the burden of establishing that a statute is unconstitutional rests with the party challenging the statute.[2]

It is true that natural parents possess a fundamental liberty interest in the care, custody, and management of their children and that this interest is protected by the Fourteenth Amendment.[3] But the protection against State interference with this relationship is not absolute.[4] The "State has an urgent parens patriae interest in providing the child with a safe, stable and permanent home . . . ."[5] Where there is clear, cogent, and convincing evidence that parents are "unfit" to raise their own

[1] In re Parentage of C.A.M.A, 154 Wn.2d 52, 57, 109 P.3d 405 (2005).
[2] In re Dependency of T.C.C.B., 138 Wn. App. 791, 796-97, 158 P.3d 1251 (2007); In re Infant Child Skinner, 97 Wn. App. 108, 114, 982 P.2d 670 (1999).
[3] In re Interests of H.J.P., 114 Wn.2d 522, 526, 789 P.2d 96 (1990).
[4] In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).
[5] In re Welfare of C.B., 134 Wn. App. 942, 951, 143 P.3d 846 (2006).

children, courts have held that the parents' rights may be terminated without violating the Constitution.[6]

RCW 26.33.120(1) provides in pertinent part:

> Except in the case of an Indian child and his or her parent, the parent-child relationship of a parent may be terminated upon a upon a showing by clear, cogent, and convincing evidence that it is in the best interest of the child to terminate the relationship and that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations and is withholding consent to adoption contrary to the best interest of the child.

In In re H.J.P., the court upheld this statute against a due process challenge by finding the statute implicitly required a finding of parental unfitness:

> [I]n order for the court to terminate the parental rights of a nonconsenting parent, it must find parental unfitness on the part of the nonconsenting parent. Parental unfitness is established by showing that the nonconsenting parent "has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations . . . ."[7]

Since H.J.P. was decided, Skinner and McGee have reiterated that a finding of parental unfitness based on a parent's "substantial lack of regard for his or her parental obligations" is sufficient to support termination of that parent's rights.[8]

Here, Frazer has had no visitation or relationship with the children for the past ten years. While incarceration in and of itself is not necessarily sufficient to find parents unfit, the circumstances here—allegations of child molestation coupled with a

---

[6] See Skinner, 97 Wn. App. at 114-115; In re Adoption of McGee, 86 Wn. App. 471, 477-78, 937 P.2d 622 (1997); H.J.P, 114 Wn.2d at 527-31.
[7] H.J.P., 114 Wn.2d at 531 (quoting former RCW 26.33.120(1) (1985)).
[8] Skinner, 97 Wn. App. at 108; McGee, 86 Wn. App. at 476.

conviction for child molestation of another daughter—necessarily lead one to the conclusion of unfitness. Frazer has clearly failed to perform his parental duties. He has paid no child support. Nor can Frazer provide any parental support as he is prohibited from contacting the children.

Recognized parental obligations include more than a desire to maintain the status quo. The obligations of parenthood have been described as including

> (1) express love and affection for the child; (2) express personal concern over the health, education and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance.[9]

In its oral ruling the trial court found no merit to Frazer's argument that the children are safe in their status quo and there would be no impact on them if the relationship was not terminated. The trial court noted that the best interests of the children would be served by their having access to health insurance, inheritance, and social security benefits as Samuel Evans' adopted children. Frazer's withholding of consent was not in the best interests of the children. Frazer's conduct removed him from the sphere of parenthood. Because the adoption statute requires a showing of parental unfitness by clear, cogent, and convincing evidence in addition to a demonstration that termination is in the child's best interests, the statute does not violate the requirements of due process.

Frazer argues that the state interest justifying termination of parental rights is the

[9] In re Adoption of Lybbert, 75 Wn.2d 671, 674, 453 P.2d 650 (1969).

prevention of harm to the child, and that RCW 26.33.120 violates due process because it does not require a showing of harm or risk of harm. To support this argument, he relies on In re Custody of Smith.[10] But parental fitness was not an issue in Smith. There the court struck down a third party visitation statute because it did not require a finding that the child would be harmed by a denial of third party visitation rights.[11] The court rejected the contention that the best interest of the child was sufficient justification for state intervention "regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child."[12] The court held:

> 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 through third party visitation is not justified where the child's circumstances are otherwise satisfactory.[13]

Frazer's situation is not similar to Smith, which involved state interference with a fit parent's rights. Here, the court determined that Frazer was unfit by clear, cogent, and convincing evidence. Where a child's parent is unfit, the child's circumstances are not "otherwise satisfactory." Neither is Frazer's reliance on C.A.M.A. and Sumey justified. C.A.M.A., like Smith, addressed third party visitation against the wishes of a fit parent. Sumey held that the State could impose a temporary residential placement of a child

---

[10] In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
[11] Smith, 137 Wn.2d at 20.
[12] Smith, 137 Wn.2d at 17.
[13] Smith, 137 Wn.2d at 20.

away from his or her parents even in the absence of a finding that the parents were unfit in order to protect the child from physical, mental, or emotional harm.

Likewise, Frazer's argument that he must be afforded the same rights as parents who are subjected to dependency petitions fails. As Evans points out, this argument is more akin to an equal protection argument. The State's role in the context of a dependency proceeding is fundamentally different from its role in the context of a private adoption. The parents in each type of action are not similarly situated, and there is no equal protection violation.[14]

Affirmed.

Grosse, J.

WE CONCUR:

Becker, J.

Ajid, J.

[14] See Skinner (parent in adoption proceeding was not similarly situated to parent in dependency proceeding); see also McGee (holding that differences between RCW 26.33.120 (adoption) and RCW 13.34.180 (dependency) did not preclude termination of nonconsenting parent's rights under adoption statute where no dependency existed). Because they are not similarly situated they are not accorded like treatment, nor are they required to be given like treatment.