In re Matter of A.B. v. Dep't of Soc. & Health Servs.

No. 80759-1

Chambers, J. (dissenting) — It is not appropriate for this court to reverse the trial court based on its "failure" to make a finding no one asked it to make and that, at the time, it reasonably believed it had impliedly made by following this court's jurisprudence. I would affirm the Court of Appeals' well reasoned decision. I respectfully dissent.

Rogelio Salas posed two questions for our consideration:

> 1. Where a parent is presently fit, competent, and able to immediately take custody of his child, does the entry of an order terminating that parent's parental rights violate his fundamental, constitutionally-protected liberty interest in the care and custody of his child, requiring reversal of that order?
>
> 2. Should the Court grant review and hold that absent proof of a current parental deficiency, consideration of the statutory factors set forth in RCW 13.34.180(1) and whether termination of parental rights is in the child's best interests violates due process?

Mot. for Discretionary Review at 1-2. These questions presume a present fitness that was not found by the trial court. Put another way, Salas contends that the termination of his parental rights violated due process because the trial court did not explicitly find that he was an unfit parent on the day the termination decision was made. I tend to think that making that finding would be good practice, if requested. But Salas did not request it, and making such a finding is not required by

constitutional, case, or statutory law.

Instead, our law establishes that termination of parental rights is appropriate once the State has met its burden of proving by clear, cogent, and convincing evidence that (a) the child has been found dependent; (b) a dispositional order has been entered; (c) the child has been removed from the parent for at least six months under a dependency order; (d) all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been meaningfully offered; (e) there is little likelihood conditions can be remedied so that the child can be returned to the parent in the near future (from the child's perspective); and (f) continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. *In re Dependency of K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995). Our case law also establishes that once the trial court finds that the State has carried its burden, it *has* impliedly found that the parent is unfit. *Id.* at 142 ("Because the termination statute requires proof by clear, cogent, and convincing evidence, which necessarily and implicitly includes evidence of current parental unfitness, it comports with the constitutional due process requirement that unfitness be established by clear, cogent, and convincing evidence." (citing *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982))). In this case, the trial court made those statutory findings. Clerk's Papers (CP) at 93 ("All elements of RCW 13.34.180 have been established by clear, cogent, and convincing evidence."). Therefore, as a matter of law, it found Salas unfit. *K.R.,* 128 Wn.2d at

142. None of the cases cited by the majority are to the contrary.

The majority asserts that the basis for the trial court's finding of factor (e), that there is little likelihood that the conditions will be remedied in the future, is not indentified in the trial court's finding. Majority at 15 n.20. But there is ample evidence that the conditions that make Salas an unfit parent are not likely to be remedied in the near future. It is true that Salas has made significant efforts to reunite with his daughter. However, the majority overlooks that Salas's own drug use, history of violence toward loved ones, and involvement with the criminal justice system, is a significant cause of the factors that cannot be remedied in the near future and that persuaded the trial judge that continuation of the parent-child relationship diminished A.B.'s prospects for integration into a stable and permanent home. *See* RCW 13.34.180(1)(e), (f). There is evidence that Salas was a drug dealer and introduced A.B.'s mother to heroin. Salas assaulted his girl friend and threw the family dog against a wall. The record indicates he never finished his assigned domestic violence treatment. Salas testified that he did not need domestic violence treatment, which makes me concerned that he is unwilling to accept the seriousness of his misconduct or the necessity of changing it. At the time of trial, at least one of his other children was being cared for by his mother and stepfather. About the time A.B. and Salas seemed to be making progress, he was arrested and thrown in jail. A parent educator testified that he had major concerns about A.B.'s safety if she were placed with Salas. Based on these and many other facts, the trial judge found:

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

CP at 91 (Finding of Fact (FF) 1.32) (emphasis added). That is what the statute and our case law requires. That is what the trial judge found. The court also found:

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

CP at 92 (FF 1.34).

Given that the emphasized language in finding of fact 1.32 mirrors the statutory factor, I conclude the main condition to be remedied was the lack of attachment between Salas and A.B. None of the findings that the majority contends "affirmatively conflict" with Salas's unfitness are relevant to this sad fact. *See*

majority at 15-16 (canvassing evidence of Salas's fitness). Salas's sobriety, his continued employment, and his efforts to be involved in A.B.'s life are worthy of praise. But they do not change the fact that despite over 100 visits, the child continued to be traumatized by his visits and no attachment has formed.

A.B.'s inability to form an attachment with Salas is extraordinary and tragic, but also real and severe. This is not a case of a parent and child who were temporarily not getting along. It was not a case of a new relationship that needed time to grow and develop. After 100 visits over the course of years, A.B. was still traumatized when she was required to visit with Salas. This is not a case about a parent and child failing to bond because one parent, through no fault of his or her own, not being present in the child's life. That case would raise very different legal issues. Instead, this case demonstrates the inability, throughout many years and many sincere efforts, of Salas and his daughter to forge the emotional attachment necessary to her well-being. Regrettably, I believe that that inability renders Salas an unfit parent for this child.

The idea that the trial court's failure to explicitly make a finding of unfitness that at the time it reasonably should have believed it had implicitly made should act as a finding of *fitness* confounds me and is inconsistent with modern appellate practice. *See, e.g., State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007); *State v. Souza*, 60 Wn. App. 534, 543, 805 P.2d 237 (1991) (remanding after finding a necessary element was missing but supported by disputed evidence in the record).

The court's order today also confounds me. A.B. is living with her family.

She has been raised by her mother's cousin almost since birth. Her mother's cousin has also adopted A.B.'s younger half brother, who has lived with his eldest sister his entire life. The "prompt but orderly transfer" ordered by the court today will wrench this child out of the only home she has ever known and deprive a brother of his sister. Even if the trial judge did err by following this court's well settled case law, the proper remedy would be remand for further proceedings.

I would affirm the courts below, and thus, respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Gerry L. Alexander