IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Welfare of A.B., a minor child.	)	
ROGELIO SALAS,	)	
Appellant,	)	No. 80759-1
v.	)	En Banc
THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
Respondent.	)	Filed June 10, 2010

MORGAN, J.* — The trial court granted the State's petition to terminate the parent-child relationship between Rogelio Salas and his daughter, A.B. The Court of Appeals affirmed by unpublished opinion. *In re Welfare of A.B.*, 140 Wn. App. 1024 (2007). We granted Salas' motion for discretionary review. *In re Welfare of A.B.,* 164 Wn.2d 1001 (2008). Salas now argues (1) that he has a due process right not to have his relationship with his natural child terminated unless the trial court first finds that he, at the time of trial, is currently unfit to be a parent, (2) that the

*Judge J. Dean Morgan is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

trial court in his case did not make such a finding, and thus (3) that the trial court's order terminating his relationship with his daughter violated his right to due process. The State responds to the second of these propositions by asking us to imply such a finding if none was expressed and by claiming that the record in this case contains evidence sufficient to support the trial court's findings. In addition, Salas argues that the trial court misapplied the six termination factors of RCW 13.34.180(1) by mixing considerations involving A.B.'s best interests and considerations involving his parental rights. Holding that Salas is correct on both scores and rejecting the State's responses, we reverse and remand for further proceedings consistent herewith.

By virtue of RCW 13.34.180(1) and RCW 13.34.190, a Washington court uses a two-step process when deciding whether to terminate the right of a parent to relate to his or her natural child. The first step focuses on the adequacy of the parents[1] and must be proved by clear, cogent, and convincing evidence.[2] The second step focuses on the child's best interests[3] and need be proved by only a preponderance of the evidence.[4] Only if the first step is satisfied may the court reach the second.[5]

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[1] RCW 13.34.180(1); *In re Interest of S.G.*, 140 Wn. App. 461, 467, 166 P.3d 802 (2007) (citing *In re Welfare of C.B.,* 134 Wn. App. 942, 952, 143 P.3d 846 (2006); *In re Welfare of Churape,* 43 Wn. App. 634, 638-39, 719 P.2d 127 (1986).
[2] *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); RCW 13.34.180(1).
[3] RCW 13.34.190; *S.G.,* 140 Wn. App. at 467 (citing *C.B.,* 134 Wn. App. at 952); *Churape,* 43 Wn. App. at 638-39.
[4] RCW 13.34.190.
[5] *Churape,* 43 Wn. App. at 638-39.

According to RCW 13.34.180(1), the first step involves six termination factors, each of which must be proved clearly, cogently, and convincingly. They are

> (a) That the child has been found to be a dependent child;
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> (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
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> (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;
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> (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 future . . . . ; [and]
>
> (f) That the 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(1). According to RCW 13.34.190, the second step is for the court to ascertain the best interests of the child. Because the parent's rights will already have been observed in the first step, this second step need be proved by only a preponderance of the evidence.

With this statutory scheme in mind, we turn to the facts here. On October 27, 2001, A.B. was born at a hospital in Yakima, Washington. The hospital quickly discovered that A.B. had cocaine in her system, deduced that her mother, J.B., had been abusing that drug, and notified the Washington State Department of Social and Health Services (DSHS).

On October 29, 2001, DSHS took custody of A.B. and placed her temporarily

in a licensed foster home. Soon thereafter, DSHS commenced dependency proceedings and promptly notified Salas, whom J.B. had named as A.B.'s father. J.B.'s parental rights were later terminated, and she is not a party to this appeal. Salas' paternity of A.B. was confirmed on June 25, 2002.

Never married to J.B., Salas was living in Las Vegas, Nevada, at the time A.B. was born. Due to his own prior drug abuse, he was being supervised by a Nevada drug court and was prohibited from leaving Nevada. As a result, he initially was unable to attend the Yakima dependency hearings in person, although appeared and participated through court-appointed counsel.

According to the trial court's written findings of fact, Salas last abused drugs in late 2001. Around that same time, Salas and his mother asked DSHS to arrange for a Nevada home study, in the hope that A.B. could be placed in the home that Salas, his mother, and her husband (Salas' stepfather) were then sharing. Nevada declined, citing his criminal history and the fact that his paternity had not yet been confirmed.

On February 4, 2002, the trial court entered an order finding that A.B. was dependent. It also ruled that Salas could visit A.B. so long as he did so in Yakima. About the same time, DSHS removed A.B. from the foster home where she had been living since late October and placed her in the home of T.L., a distant cousin of J.B.'s. A.B. has resided with T.L. ever since.

While these events were taking place, Salas continued to participate in the Nevada drug court program, and he found steady employment in Las Vegas.

Shortly after his paternity was confirmed, he reiterated his request for a Nevada home study. Nevada again denied the request, this time citing his criminal history and prior drug use.

By February 25, 2003, Salas had successfully completed his drug court program and was no longer prohibited from leaving Nevada. On that date, he came to Yakima and had his first supervised visit with A.B., who by then was almost 16 months old.

On June 11, 2003, Salas moved from Las Vegas to Yakima. On June 13, two days later, he presented himself to the DSHS caseworker, and she arranged for urinalyses, a parenting assessment, and supervised visits three times a week for an hour each time. That same month, Salas began visiting A.B. regularly and frequently, albeit under supervision.

Visitation progressed so well over the summer that by September 2003, the DSHS caseworker thought that A.B. had come to see Salas as "someone who was in her life consistently . . . [a]nd so she began to trust."[6] At a September meeting called to plan where A.B. should be permanently placed, the caseworker noted that she was planning to arrange increased visitation without supervision, and that she was moving toward placing A.B. in Salas' home, despite T.L.'s apparent opposition.

On September 16, 2003, Salas' first unsupervised visitation was scheduled to take place at a Yakima park. The caseworker and A.B. were there on time, but

[6] Report of Proceedings (RP) at 248; State's Am. Suppl. Br. at 5.

Salas never arrived. An hour after the appointed time, Salas' stepfather called to say that Salas was in jail for pushing a police officer who had tried to intervene in a fight between Salas and his then-girlfriend, C.S.

Due in part to an immigration hold, Salas remained in jail for the next four months. During that period, he did not see A.B., and the DSHS caseworker changed her permanent plan from one that would have reunited A.B. and Salas, to one that would terminate their parent-child relationship and make A.B. available for adoption by T.L.

Visitation resumed in January 2004, but it was different from before. A.B. seemed not to recognize Salas, and she treated him like a stranger. Rather than showing any sort of attachment to Salas, one observer noted, A.B. constantly turned to T.L., who was also present at the visitations. According to the April 2003 report of another observer, A.B. seemed not to want to leave T.L.'s side during the visitations. At trial, the DSHS caseworker explained that four and a half months can be a very long time to a child of A.B.'s age, and that A.B.'s reluctance to interact with Salas was likely due to the gap between visits that had occurred while Salas was in jail. Nonetheless, Salas visited A.B. every week from February 2004 through most of February 2005.

Meanwhile, in May 2004, Salas married C.S, the girlfriend with whom he had been fighting the previous September. Their relationship was "dysfunctional and unhealthy,"[7] and they separated in July 2004, after only three months of marriage.

[7] Clerk's Papers (CP) at 89.

On January 1, 2005, C.S. gave birth to Salas' child, A.S. When C.S. left the hospital, the heat at her house was turned off, and she had nowhere to go. Consequently, Salas allowed her and the three persons living with her (A.S., the new baby; G.S., C.S.'s older child from another relationship; and C.S.'s disabled adult sister) to move in with him. In February 2005, C.S. was convicted for criminally mistreating her disabled sister—an event of which Salas disclaims all knowledge, and for which he was never charged.

In late February 2005, Salas moved back to Las Vegas, where he resumed living with his mother and stepfather and working at the steady job he previously had held. His mother and stepfather having been made guardians of A.S., the baby born on January 1, 2005, and Salas having received custody of G.S., C.S.'s older child from another relationship, by virtue of a tribal court order, the five of them, three adults and two children, have since resided together in the home of his mother and stepfather.

Although Salas visited A.B. regularly from February 2004 until February 2005, his return to Las Vegas caused him to miss a visitation that was scheduled for February 25, 2005. He next saw A.B. in May, when he called the DSHS caseworker and requested weekend visitation because he would now have to travel from Las Vegas. When the caseworker told him that weekend visits were not available, they agreed that Salas and A.B. would visit on Friday afternoon, May 20, 2004. Although the visit took place as scheduled, A.B. continued to refuse to interact with him, and he did not visit again before trial.

On June 13-17, 2005, a bench trial was held on a petition for termination that the State had filed in September 2004. On June 17, 2005, the trial court exercised its discretion not to resolve the case at that time. The court orally stated that it was "not satisfied that all necessary services have been identified and provided,"[8] and that there "is some likelihood that conditions can be remedied, so that this father can continue to be involved in this child's life."[9] The court decided that it would continue the trial so as to give Salas time "to convince me that I should not terminate the relationship with this child. And the way you can do that is by coming up with some plan. I want it in writing, and I want some evidence between now and then that's not just on paper."[10] Cautioning Salas not to "heave a sigh of relief, yet," the court stated that A.B. "is ok" at T.L.'s house, and that "it's going to take an unbelievable effort for you to dislodge [her] from that home."[11]

From mid-June until trial reconvened in November, Salas attempted to meet the trial court's concerns. He visited A.B. every two weeks. He obtained a new domestic violence evaluation in Las Vegas and began a new 26-week domestic violence treatment program. On August 4, 2005, he presented the court with a plan for continuing substance abuse treatment and testing, maintaining his domestic violence program, managing his relationship with C.S., paying child support for A.B., and obtaining parenting and personal assessments. He identified a Las Vegas

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[8] 5 RP at 908.
[9] *Id.*
[10] *Id.* at 909.
[11] *Id.* at 908-09.

family counselor, pediatrician, and elementary school, and, on August 21, 2005, he divorced C.S.

On November 16-22, 2005, the rest of the trial was held. On November 22, 2005, the trial court took the case under advisement, and on January 5, 2006, it filed a 16-page memorandum opinion, the contents of which are discussed below. The court concluded that it was satisfied DSHS had presented clear, cogent, and convincing evidence establishing the criteria set forth in RCW 13.34.180(1), and that it was satisfied by a preponderance of the evidence that A.B.'s permanent placement with T.L. would be in A.B.'s best interests. The court was also satisfied, it said, "that it is in the child's best interest to maintain a relationship with her father and his family provided that the continuation of that relationship does not constitute a perpetual challenge to the legitimacy of the placement with [T.L.]."[12] Nowhere in its opinion did the court state that Salas was then unfit to parent. Believing that "the only way to resolve this dilemma is through the creation of an open adoption" and that "open adoption would allow for the child and for the continuation of the father-child relationship," the court concluded by directing the parties

> to engage in discussions to determine whether an open adoption is possible and then to report back to the Court within thirty days from the date herein. If it turns out that the parties cannot agree on this alternative, then the Court will hear further argument and will decide if the best interests of the child in having a permanent home with [T.L.] require the termination of the father-child relationship.[13]

[12] Mem. Op. at 15.
[13] Mem. Op. at 16.

Although neither party has furnished us with a record of any subsequent court proceedings, it is apparent that the parties were unable to reach agreement. Thus, on March 31, 2006, the court entered formal written findings of fact and conclusions of law. Parroting the language of RCW 13.34.180(1)(d) and (e), the court found that "[a]ll services ordered under RCW 13.34.136 and all necessary and reasonable available services capable of correcting parental deficiencies within the foreseeable future have been offered or provided in an express and understandable manner,"[14] and that "[t]here is little likelihood that conditions will be remedied so that the child could be returned to or placed with her father in the near future."[15] Nowhere in its findings and conclusions, however, did the court expressly find that Salas was then unfit to be a parent.

Also on March 31, 2006, the trial court entered an order terminating Salas' relationship with his daughter. Salas appealed to the Court of Appeals, which affirmed, and then to this court, which granted discretionary review.

I

As noted at the outset, Salas now argues (a) that a parent has a due process right to have his or her relationship with a natural child terminated only if the trial court makes a finding of current parental unfitness, and (b) that in this case the trial

[14] CP at 93.
[15] *Id*.

court did not make such a finding. Thus, he concludes that the trial court's order terminating his relationship with his daughter violated his right to due process. In addition to arguing the flip side of Salas' issues, the State responds that we must imply the necessary finding and that it trumped Salas' right to such a finding by presenting substantial evidence. Rejecting these responses, we agree with Salas.

A

The first question here is whether a parent has a due process right not to have the State terminate his or her relationship with a natural child in the absence of an express or implied finding that he or she, at the time of trial, is currently unfit to parent the child. According to the United States Supreme Court, this court, and our Court of Appeals, the answer is yes.

In *Santosky v. Kramer,* 455 U.S. 745, 760, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), the United States Supreme Court said that "[v]ictory by the state [i.e., the entry of an order terminating parental rights] entails a judicial determination that the parents are unfit to raise their own children." Moreover, the Court went on to say that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.*[16] Concluding that this interest required more protection from error than was afforded

[16] *See also Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (quoting *Smith v. Org. of Foster Families,* 431 U.S. 816, 862-63, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (Stewart, J., concurring in judgment) ("We have little doubt that the Due Process Clause would be offended '[i]f 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.'")).

by a mere preponderance-of-evidence standard of proof, the Court held that the State had to prove the elements of its case that were necessary to terminate the parent-child relationship by a standard of proof "equal to or greater than" clear and convincing evidence. *Id.* at 769.

In *In re Dependency of K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995), this court cited and followed *Santosky*. We held that Washington's termination statute, RCW 13.34.180(1), implicitly requires evidence of current parental unfitness, and thus "comports with the constitutional due process requirement that unfitness be established by clear, cogent, and convincing evidence."[17] We further held that "after reviewing the entire record and examining the requirements of RCW 13.34.180 and 13.34.190,"[18] the trial judge had made the required findings, albeit implicitly.

In at least six cases, our Court of Appeals has ruled or noted similarly. In *In re Dependency of S.G.*, 140 Wn. App. 461, 468-69, 166 P.3d 802 (2007), Division Three ruled, "The court must first conclude that the parent is deficient before it can terminate the parent's legal relationship with his child. . . . Without a problem, there can be no solution." In *In re Dependency of T.L.G.,* 126 Wn. App. 181, 203, 108 P.3d 156 (2005), Division One stated, "Termination must be based on current unfitness; children may not be removed from their homes merely because their parents are mentally ill." In *In re Dependency of A.S.,* 101 Wn. App. 60, 70-71, 6

[17] *K.R.*, 128 Wn.2d at 142.
[18] *Id.* at 146.

P.3d 11 (2000) (citing *Santosky,* 455 U.S. 745; *K.R.,* 128 Wn.2d at 141-42), Division One noted that it is a "constitutional due process requirement that unfitness be established by clear, cogent and convincing evidence." In *In re Dependency of A.W.,* 53 Wn. App. 22, 29, 765 P.2d 307 (1988) (citing *Krause v. Catholic Cmty. Servs.,* 47 Wn. App 734, 743, 737 P.2d 280 (1987)), Division One said that "termination decisions are predicated upon present parental unfitness." In *In re Welfare of C.B.,* 134 Wn. App. 942, 143 P.3d 846 (2006), Division Two essentially held that where the evidence was insufficient to support finding that the mother of child was currently deficient, the trial court could not make such a finding, and without such a finding, the trial court could not terminate the mother's relationship with her child. In *In re Welfare of Churape,* 43 Wn. App. 634, 638, 719 P.2d 127 (1986), Division Three essentially held that the trial court could not terminate the relationship between a father and his children where the evidence was insufficient to support a finding that the father was currently deficient at the time of trial, even if the evidence showed that the father was deficient at an earlier time. Based on the rulings of all of these courts, we hold that a parent has a constitutional due process right not to have his or her relationship with a natural child terminated in the absence of a trial court finding of fact that he or she is currently unfit to parent the child.

B

The next question is whether the trial court actually made such a finding here. Neither party has pointed us to anything in the record demonstrating that the trial

court made the required finding expressly. Nor have we ourselves discovered anything to that effect. Necessarily then, we conclude that the trial court did not make the required finding *expressly*.

The State asks us to fill the void by *implying* that the trial court found Salas was not currently fit to parent A.B. at the time of trial. As support for its request, the State relies on *K.R.,* 128 Wn.2d 129, wherein we implied a finding of current parental unfitness even though the trial court had not made the finding explicitly. In *K.R.*, as discussed above, we agreed that a finding of current parental unfitness is necessary to sustain a judgment terminating parental rights, but we then stated, "[N]o explicit finding of current parental unfitness is required. However, if the State proves the allegations [set forth in RCW 13.34.180], an implicit finding of current parental unfitness has been made." *Id.* at 141-42 (citing *Krause*, 47 Wn. App. at 742).

At issue here is whether this language from *K.R. always*, or only *sometimes*, permits an appellate court to imply or infer a finding of current parental unfitness. Because the facts and circumstances under which an appellate court is asked to imply or infer a finding of current parental unfitness can vary so dramatically from case to case, it cannot reasonably be asserted that just because an implication or inference can *sometimes* be drawn, it can *always* be drawn. Accordingly, we conclude that when an appellate court is faced with a record that omits an explicit finding of current parental unfitness, the appellate court can imply or infer the omitted finding if—but only if—all the facts and circumstances in the record

(including but not limited to any boiler plate findings that parrot RCW 13.34.180) clearly demonstrate that the omitted finding was actually intended, and thus made, by the trial court. To hold otherwise would be illogical, and it would permit trial and appellate courts easily to sidestep the due process requirement that a judgment terminating parental rights be grounded on an actual (as opposed to a fictional) finding of current parental unfitness.[19]

Significantly, the trial court in this case made a number of findings that affirmatively conflict. Although the trial court entered boiler plate findings that parroted each element of RCW 13.34.180(1)—in finding of fact 1.32, for example, the court parroted RCW 13.34.180(1) (e) by finding "little likelihood that conditions will be remedied so that the child can be returned to or placed with her father in the near future"[20]—it also entered individually tailored findings to the contrary. It stated, for example, that Salas had been "clean and sober" since late 2001;[21] that he had "participated in a variety of services" since early 2002;[22] that he had been steadily employed since returning to Las Vegas in 2005; that he had "indicated from the very beginning a strong desire to have custody of the child and to also have his own family involved in her life;"[23] and that despite Salas and his family having

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[19] *Cf. State v. Stein,* 140 Wn. App. 43, 66, 165 P.3d 16 (2007) (appellate court implied finding where record showed that trial court had actually made it, even though trial court had not explicitly stated that it was making finding); *State v. Souza*, 60 Wn. App. 534, 543, 805 P.2d 237 (1991) (appellate court could not imply finding where evidence was disputed).
[20] CP at 91. The finding did not identify the conditions to which the court was referring.
[21] *Id.* at 88.
[22] *Id.* at 87.
[23] *Id.* at 89.

"made almost heroic efforts" to make their visits with A.B. meaningful, they had been unable to establish a "close attachment" between Salas and A.B.[24] Although the trial court also found that the problems between Salas and A.B. were "profound and intractable," it strongly implied that those problems were not attributable to Salas when, in the very same finding by which it exonerated DSHS from responsibility for such problems, it speculated, *without mentioning Salas*, that the problems were perhaps "the result of subtle changes in the child's relationship with her caretaker and her original status as a drug-affected newborn."[25] Given their conflicting nature, these individually tailored findings make it impossible to discern that the trial court actually found that Salas was currently unfit to parent his daughter, and, as a result, we may not now imply such a finding.

We confirm this conclusion by looking to the trial court's memorandum opinion, which contains many additional statements inconsistent with an actual finding that Salas was currently unfit at the time of trial. It states, for example, that "the 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 required[.]
>
> (c) He has participated in domestic violence and anger management counseling[.]
>
> (d) He has maintained a patient and loving commitment to

[24] *Id.* at 90-91.
[25] *Id.* at 91.

> visitations with his child, despite frequent indications of resistance by the child[.]
>
> (e) He is a 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 [C.S.] and taken appropriate steps to care for two children from that relationship.[26]

It also states, for example:

> [C]ertain legal troubles in Las Vegas and Yakima, as well as financial difficulties, have hampered [Salas'] ability to successfully complete all treatment recommendations and to maintain consistent and meaningful contact with the child. Despite these circumstances he has demonstrated a sincere and conscientious commitment in this case regarding his child.[27]

> 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 the visits and to try and make them meaningful, but despite their efforts the visitations have not established a close attachment between father and child.[28]

> There have been indications over the last two and a half years of great potential for an attachment between the father and child in this case. Given the father's significant progress and his potential to be a positive male figure in the child's life, it would not be in the child's best interest to completely sever the relationship with his child at this time so long as this relationship does not conflict with the permanent placement for the child.[29]

Reading this record as a whole, we cannot conclude that the trial court was actually making a finding that Salas was currently unfit to parent A.B., and, accordingly, we

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[26] Mem. Op. at 14-15.
[27] *Id.* at 10.
[28] *Id.* at 11.
[29] *Id.* at 15.

may not imply such a finding here.

The State contends that it presented substantial evidence of Salas' current unfitness to parent. The effect, the State seems to conclude, is to adversely impact Salas' argument that the trial court violated his right to due process when it terminated his relationship with his daughter without first finding that he was currently unfit to parent. We cannot agree.

To ask whether the State presented substantial evidence is to ask whether the trial court *could* have found for the State.[30] To ask whether Salas' due process right to a finding of unfitness was violated is to ask what the trial court *did* find. But to hold that the trial court *could* have found Salas currently unfit says nothing about whether the trial court *did (or did not)* find that. Thus, even if we assume the contention is correct, it is nonresponsive and irrelevant to Salas' due process argument,[31] and it can have no impact here, adverse or otherwise. Accordingly, we decline to address it further.

II

In addition to arguing that the trial court violated his right to due process by not actually finding that he was currently unfit, Salas argues that the trial court

[30] *E.g.*, *In re Dependency of C.B.*, 61 Wn. App. 280, 283-85, 810 P.2d 518 (1991) (in a termination case, evidence is substantial (or, equivalently, sufficient to support a trial court finding) if, taking the evidence in the light most favorable to the party who prevailed below, a rational and reasonable trier of fact *could* find each element of the case in accordance with the applicable burden of persuasion); *see also Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (same formulation in a criminal case).

[31] Although Salas argued in the Court of Appeals that the evidence was not substantial, he abandoned that argument when he moved this court for discretionary review. Mot. for Discretionary Review at 1-2. We also did not grant discretionary review on that question.

misapplied the two-step statutory scheme embodied in RCW 13.34.180-.190. To reiterate part of what we said near the outset of this opinion, when a Washington court applies the first step of that scheme, it is obliged to focus on the alleged unfitness of the parent,[32] which must be proved by clear, cogent, and convincing evidence,[33] and when it applies the second step, it focuses on the child's best interests,[34] which need be proved by only a preponderance of the evidence.[35] But it is "premature" for the trial court to address the second step before it has resolved the first.[36]

Parenthetically, Washington's two part scheme seems to be based at least in part on *Santosky.*[37] While addressing the constitutionality of New York's statutory termination scheme, the United States Supreme Court characterized the scheme as having two phases: a "factfinding" phase designed to deal with terminating the parent's rights, and a "dispositional" phase designed to deal with the child's best interests. The Court then said, "The factfinding [between parent and the State] is not intended to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parent would provide the better home."[38] Rather, the

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[32] RCW 13.34.180(1); *S.G.*, 140 Wn. App. 461; *Churape,* 43 Wn. App. at 638-39.
[33] *Santosky,* 455 U.S. at 749 n.3; RCW 13.34.180(1).
[34] RCW 13.34.190(1); *S.G.,* 140 Wn. App. at 467; *Churape,* 43 Wn. App. at 638-39.
[35] RCW 13.34.190.
[36] *Churape,* 43 Wn. App. at 639 ("Here, it appears the trial court made a premature 'best interest' determination without first fully examining the reunification factors.").
[37] 455 U.S. at 759-60.
[38] *Id*. at 759.

Court said, it is designed to focus on whether "the natural parents are at fault" and litigate questions of "what the State did" and "what the natural parents did not do."[39] In contrast, the dispositional phase is when the court can base its order "'solely on … the best interests of the child,'" and it comes "[a]fter the State has established parental unfitness."[40]

In the course of deciding whether to terminate Salas' parental rights, the trial court in this case reasoned in part that A.B had been living with T.L. all of her life; that A.B. was fully integrated into T.L.'s home and had not developed a significant relationship with Salas; and "that it is in [A.B.'s] best interest to maintain a relationship with her father and his family provided that the continuation of that relationship does not constitute a perpetual challenge to the legitimacy of the placement with [T.L.]."[41] In making these and other similar statements, the trial court was obviously focusing on A.B.'s best interests, as opposed to Salas' current unfitness. Accordingly, we are required to hold that the trial court reasoned erroneously.

In conclusion, a judgment terminating parental rights cannot stand absent a

[39] *Id.* at 759-60.
[40] *Id.* at 760 (quoting N.Y. Family Court Act § 631(c) (McKinney 2007)); *see also Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (due process clause does not permit the State to infringe on parents' child-rearing decisions merely because judge believes those decisions could have been better); *In re Custody of Shields*, 157 Wn.2d 126, 143, 136 P.3d 117 (2006) ("best interests" analysis, standing alone, cannot substitute for an inquiry into parental unfitness); *In re Custody of Smith,* 137 Wn.2d 1, 20, 969 P.2d 21 (1998) ("best interest of the child" is insufficient to overrule a parent's right to raise his or her child); *Churape*, 43 Wn. App. at 639 ("trial court made a premature 'best interest' determination without first fully examining the reunification factors").
[41] Mem. Op. at 16.

finding of current parental unfitness. An appellate court may imply the existence of such a finding if—but only if—the facts and circumstances clearly demonstrate that the finding was actually made by the trial court. Given that the facts and circumstances here do not so show, and that lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof,[42] we reverse the judgment entered below and remand to the trial court with directions that unless the parties agree otherwise in writing or on the record of the court, it shall supervise the prompt but orderly transfer of A.B. to Salas' home and, once that is accomplished, dismiss the case with prejudice.

[42] *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 sustain their burden on this issue."); *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986) ("[W]e presume from the absence of further findings in that regard that second purchasers [who had the burden of proof] failed to sustain their burden.); *Golberg v. Sanglier,* 96 Wn.2d 874, 880, 638 P.2d 1347, 647 P.2d 489 (1982) (same); *Pilling v. E. & Pac. Enters. Trust,* 41 Wn. App. 158, 165, 702 P.2d 1232 (1985) (same).

AUTHOR:
J. Dean Morgan, Justice Pro Tem.

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice James M. Johnson

Justice Richard B. Sanders