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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re CHARLOTTE D., a Minor.	2d Civil No. B183788 (Super. Ct. No. A14917) (Ventura County)
CORNELIUS D. et al., Petitioners and Respondents, v. RONALD D., Objector and Appellant.	

Ronald D., the father of a child born out of wedlock, appeals from a judgment declaring his child free from his custody and control. The judgment was entered pursuant to recently enacted Probate Code section 1516.5, which applies in guardianship proceedings.[1] This statute provides for the termination of parental rights without a finding of parental unfitness. We conclude that the statute is not unconstitutional on its face. It does not violate the due process or the equal protection clauses of the federal and state constitutions. We also conclude that, because section 1516.5 permits the termination of parental rights without a finding of parental unfitness, it is unconstitutional to the extent it is applied to unwed fathers who have

[1] All statutory references are to the Probate Code unless otherwise stated.

made a full commitment to their parental responsibilities.[2] We reverse and remand the matter to the trial court to determine whether appellant has demonstrated the requisite commitment to his parental responsibilities.

Factual and Procedural Background

Charlotte D. (minor) was born in August 1995 to unwed parents – appellant and Linda C. (mother). Since June 1995, mother had been living with minor's paternal grandparents, Cornelis D. and Brigitte D. (respondents), in their home in Camarillo, California. In December 1995, the parents and minor moved to Nevada. Both parents had problems with alcohol and drugs, and mother physically abused minor.

Appellant stated that he "went on the run with [minor] and turned her over to [respondents] on December 24, 1997 for her safety." Since that date, minor has resided with respondents in Camarillo. Appellant lived with minor and respondents for approximately three years after his release from a Nevada jail in late 1998.

On February 23, 1998, respondents filed an action in Nevada seeking custody of minor. The verified complaint alleged that appellant and mother "have never been married." On March 24, 1998, the District Court of Clark County, Nevada, entered the following order in the custody action: "[Appellant] has acknowledged paternity and is hereby ordered to be the father of [minor] . . . ."

On March 17, 1999, the District Court of Clark County, Nevada, ordered that respondents be appointed guardians of minor. The order was pursuant to the stipulation of respondents, appellant, and mother. Mother was granted visitation with minor. As to appellant, the order of guardianship states: "The parties acknowledge that [appellant] currently resides with [respondents] in Camarillo, California. As a result, [appellant] has continuous and regular contact with [minor], and no order of visitation between [appellant] and [respondents] is necessary." Appellant was ordered

[2] We do not determine the constitutionality of section 1516.5 insofar as it is applied to parents other than unwed fathers. (See *infra*, pp. 19, fn. 11.)

to pay respondents monthly child support of $300. Appellant, however, made only one child support payment of $175.

On August 30, 2002, respondents filed a domestic violence action in the Ventura County Superior Court seeking a restraining order against appellant. (*Cornelis D. v. Ronald D.*, No. D291893.)[3] On September 23, 2002, the court ordered appellant to stay at least 200 yards away from respondents and minor. The restraining order expired on January 1, 2003.

On April 1, 2003, appellant filed an application in the domestic violence action for custody of and reasonable visitation with minor. The court issued an order to show cause why the relief sought in the application should not be granted.

On June 20, 2003, the parties stipulated that mother resided in Riverside, California. The court found: "Neither the [minor] nor the [minor's] parents nor any person acting as a parent resides in Nevada per Family Code [section] 3423(b)." The court determined that "California is now the home state of the minor." A minute order states: "The parties are advised that for modifications of the Nevada order the parties may file their applications in this court for determination."

On July 11, 2003, the superior court ordered that respondents retain sole legal custody of minor. On November 20, 2003, the court approved a written settlement concerning visitation. Appellant was permitted to visit minor on alternate Saturdays.

On September 27, 2004, respondents filed a request to adopt minor. On January 5, 2005, they filed a petition to declare minor free from the custody and control of her parents pursuant to section 1516.5.[4]

On May 23 and 24, 2005, a trial was conducted on the section 1516.5 petition. Appellant contended that section 1516.5 was unconstitutional, in violation of

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[3] Pursuant to Evidence Code sections 452, subdivision (d), and 454, we have taken judicial notice of the documents in the superior court file in case number D291893.

[4] "[A]n order declaring a minor free from the control of a parent . . . 'terminates all parental rights and responsibilities with regard to the child' [citation] and leaves the child eligible for adoption. [Citations.]" (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 227.)

substantive due process, both on its face and as applied to him. He also contended that the statute "perhaps" violates equal protection. The court stated, " . . . I'm not going to find the statute unconstitutional, but I have some significant reservations about whether it's going to survive." The court found "that it would be in [minor's] best interest to be adopted by the guardians and that she would clearly benefit from being adopted by her guardians, and that it is really against her best interest for the father . . . to maintain [his] parental rights." The court declared minor "free from the custody and control of the father as provided in Probate Code section 1516.5." (RT 182)

Section 1516.5

Section 1516.5 was enacted in 2003 by Senate Bill No. 182 (hereafter SB 182). (Stats. 2003, c. 251, § 11.) The statute provides:

"(a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding pursuant to Part 4 (commencing with Section 7800) of Division 12 of the Family Code, if all of the following requirements are satisfied: [¶] (1) One or both parents do not have the legal custody of the child. [¶] (2) The child has been in the physical custody of the guardian for a period of not less than two years. [¶] (3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including but not limited to, the nature and extent of the relationship between all of the following: [¶] (A) The child and the birth parent. [¶] (B) The child and the guardian, including family members of the guardian. [¶] (C) The child and any siblings or half-siblings.

"(b) The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code.

"(c) The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.

"(d) This section does not apply to any child who is a dependent of the juvenile court."

In construing section 1516.5, "[o]ur role . . . is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*In re Reeves* (2005) 35 Cal.4th 765, 770.) In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees. (*People v. Benson* (1998) 18 Cal.4th 24, 34, fn. 6.)[5]

An analysis of SB 182 by the staff of the Senate Judiciary Committee notes that, under existing law, "a guardian who wishes to adopt a ward may file a petition in juvenile court, if the ward is a dependent of the court, or file a petition in family court if the child's birth parent or parents would voluntarily consent to the adoption by the guardian, or first file a petition in family court to have the child be freed from the custody and control of a birth parent or parents in conjunction with a petition to adopt the child." (Sen. Com. on Judiciary, Analysis of SB 182 (2003-2004 Reg. Sess.) as amended Mar. 26, 2003, pp. 7.) The analysis observes that, pursuant to Family Code section 7800 et seq., the "last avenue is available to the guardian" only under circumstances indicating parental unfitness. (*Id.*, at pp. 7-8.)[6]

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[5] We grant respondents' request for judicial notice of legislative analyses of SB 182. (See *Martin v. Szeto* (2004) 32 Cal.4th 445, 452, fn. 9.)

[6] Pursuant to Family Code section 7800 et seq., a child under the age of 18 years may be declared free from the custody and control of either or both parents if: (1) the child has been abandoned (*Id.*, § 7822); (2) the child has been neglected or cruelly treated, has been a dependent child of the juvenile court, and the parent or parents have been deprived of the child's custody for one year before the filing of a petition to terminate parental rights (*Id.*, § 7823, subd. (a)); (3) the parent or parents are "morally depraved" or suffer from a disability because of the habitual use of alcohol or controlled substances that "renders the parent or parents unable to care for and control the child adequately," the child has been a dependent child of the court, and the parent or parents have been deprived of the child's custody for one year before the filing of a petition to terminate parental rights (*Id.*, § 7824, subds. (a) & (b)); (4) the parent or

The analysis states that SB 182 "would create yet another avenue for a guardian where the child has been in the custody of the guardian for a long time and the parent or parents are not likely to reclaim the child but the parent or parents do not fall under one of the categories covered by existing law. The situation that this bill intends to cover, for example is where one parent cannot be found, and the other voluntarily gave the child to the guardian in a written guardianship agreement that may or may not have been entered in a formal court proceeding. Years later it became apparent that the child has bonded with the guardians as parents, but since the birth parents visited occasionally, abandonment could not be established. Another example given by the sponsor is where a drug addicted mother gives the child in guardianship, hoping to get herself rehabilitated but repeatedly failed, creating a situation where the child is in the custody of the guardian for years without being in the foster care system. The sponsor contends that in either case, a guardian should be able to adopt the child without having to obtain consent or prove neglect, abandonment, or the mental disorder or

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parents have been convicted of a felony the facts of which "are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child" (*Id*., § 7825, subd. (a)(2)); (5) the parent or parents have been declared by a court to be developmentally disabled or mentally ill and have been certified as not "capable of supporting or controlling the child in a proper manner" (*Id*., § 7826); (6) the parent or parents are "unable to care for and control the child adequately" because of a mental disability (*Id*., § 7827, subds. (a) & (b)); (7) the "child is one who has been in out-of-home placement under the supervision of the juvenile court, the county welfare department, or other public or private licensed child-placing agency for a one-year period," and the "court finds that return of the child to the child's parent or parents would be detrimental to the child and that the parent or parents have failed during the one-year period, and are likely to fail in the future, to maintain an adequate parental relationship with the child, which includes providing both a home and care and control for the child" (*Id*., § 7828, subd. (a)); or (8) the child has been found to be a dependent child of the juvenile court, which "has determined, pursuant to paragraph (3), (4), or (5) of subdivision (b) of Section 361.5 of the Welfare and Institutions Code, that reunification services shall not be provided to the child's parent or guardian." (*Id*., § 7829.)

mental illness of the parent who gave them [*sic*] guardianship in the first place." (Sen. Com. on Judiciary, Analysis of SB 182, *supra*, at pp. 8-9.)

In determining legislative intent, we may also consider a senate floor analysis. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948.) A senate floor analysis of SB 182 states that section 1516.5 "is intended to institute a new procedure for the court to terminate parental rights when a child has been in the custody of a guardian for at least two years but there is no basis for the termination of parental rights except that it would be in the best interest of the child to be adopted by the guardian. There are some constitutional problems with this procedure that may be curable. [¶] The author's office and ACAL [Academy of California Adoption Lawyers] state that this bill is necessary in order to fill a gap in the adoption area, especially with regards to children (who are not dependents of the court) who have been in the custody of guardians and whose birth parents are not likely to regain custody." (Sen. Rules Com., Off. Of Sen. Floor Analyses, Analysis of SB 182 (2003-2004 Reg. Sess.) as amended Apr. 8, 2003, p. 4.)

The bill analyses show that, to facilitate a guardian's adoption of his or her ward, the Legislature intended that section 1516.5 permit the termination of parental rights in guardianship proceedings without a finding of unfitness, provided that (1) the termination is in the best interest of the ward, and (2) the guardian has had custody of the ward for at least two years.

Parental Rights Are a Fundamental Liberty
Interest Protected by Substantive Due Process

"The due process clause of the Fourteenth Amendment to the federal Constitution provides that '[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .' [Citation.] The United States Supreme Court has long recognized that this provision is not only a guarantee of procedural due process, but also substantively protects certain liberties from state infringement except when justified by the most compelling reasons: '[A] "substantive due process" claim

relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' [Citation.]" (*Dawn D. v. Superior Court (Jerry K.)* (1998) 17 Cal.4th 932, 939-940.)

" 'Parental rights . . . are a fundamental liberty interest . . . [Citation.]' " (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 251.) "The United States Supreme Court has long recognized the substantive due process right of parents to raise their children. [Citation.]" (*In re Marriage of W.* (2003) 114 Cal.App.4th 68, 73.) In *Santosky v. Kramer* (1982) 455 U.S. 745, 753, the United States Supreme Court observed, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." The Supreme Court therefore rejected the "claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest." (*Id*., at p. 754, fn. 7.) "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.' [Citation.]" (*Id*., at p. 758.)

A guardianship "does not *extinguish*" parents' fundamental liberty interest in the care, custody, and management of their children. (*Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1426.) A guardianship "completely *suspends* it for an indefinite period. (Fam.Code, § 7505, subd. (a) ['The authority of a parent ceases on . . . [t]he appointment, by a court, of a guardian of the person of the child.']; Prob.Code, § 2351,

subd. (a) [upon appointment, guardian 'has the care, custody, and control of, and has charge of the education of, the ward. . . .'].) In the absence of further court intervention, this suspension will continue until the child is no longer subject to parental control. [Citations.] Therefore the guardianship will persist, and parental rights will remain suspended, for the remainder of the child's minority unless the court acts to terminate it sooner." (*Ibid*.) However, a guardian is subject to the regulation and control of the court (§ 2102), and "[t]he court has the continuing power to grant visitation rights in a probate guardianship proceeding. [Citation.]" (*Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 61.) "Upon petition of the guardian, a parent, or the ward, the court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is in the ward's best interest to terminate the guardianship." (§ 1601.)

An Unwed Father's Parental Rights are Entitled to
Constitutional Protection Only If He has Demonstrated
A Full Commitment to his Parental Responsibilities

In *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 830-831, our Supreme Court considered the showing necessary to terminate parental rights. Our Supreme Court noted that the "statutory scheme creates three classifications of parents: mothers, biological fathers who are presumed fathers, and biological fathers who are *not* presumed fathers (i.e., natural fathers)." (*Id*., at p. 825.) A man achieves presumed father status by falling within one of several categories set forth in Family Code section 7611, formerly Civil Code section 7004.[7]

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[7] Family Code section 7611 is part of the Uniform Parentage Act. (Fam. Code, §§ 7600-7730.) Family Code section 7611 provides: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) [child of wife cohabiting with husband who is not impotent or sterile] or Chapter 3 (commencing with Section 7570) of Part 2 [voluntary declaration of paternity] or in any of the following subdivisions:

"(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated

The *Kelsey S.* court observed that, if a biological father is not a presumed father (i.e., he is a natural father), "his parental rights may be terminated under [Civil Code] section 7017, subdivision (d)(2) [now Family Code section 7664, subdivision (b)[8]] merely by showing that termination would be in the child's best interest. No showing

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by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

"(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

"(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to support the child under a written voluntary promise or by court order.

"(d) He receives the child into his home and openly holds out the child as his natural child.

"(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

"(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied."

[8] Family Code section 7664, subdivision (b), provides: "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the

of . . . unfitness is required under the statutes." (*Id*., at p. 831.) On the other hand, "a mother or a presumed father must consent to an adoption absent a showing by clear and convincing evidence of that parent's unfitness." (*Id*., at p. 825.) "Parental unfitness is considerably more difficult to show than that the child's best interest is served by adoption." (*In re Adoption of Kelsey S., supra,* 1 Cal.4th at p. 848.)

The unwed, biological father in *Kelsey S.* could have achieved presumed status by receiving the child into his home and openly acknowledging his paternity. (Fam. Code, § 7611, subd. (d), formerly Civ. Code, § 7004, subd. (a)(4).) The father had made "diligent and legal attempts to obtain custody of his child and to rear it himself . . . ." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 821.) Because of the mother's objections, his attempts had been unsuccessful. Pursuant to Civil Code section 7017, subdivision (d)(2) [now Family Code section 7664, subdivision (b)], the lower court had terminated his parental rights based on a finding that the termination was in the child's best interest.

The *Kelsey S.* court opined that the decision of the United States Supreme Court in *Quillon v. Walcott* (1978) 434 U.S. 246, "strongly suggests that the parental rights of a father in petitioner's position may not properly be terminated absent a showing of his unfitness as a father." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 833.) The *Kelsey S.* court also opined that, in *Stanley v. Illinois* (1972) 405 U.S. 645, "the [United States Supreme Court] seemed to indicate that a father's parental rights could not be terminated absent a showing of his unfitness, and that a showing of the child's best interest would be an insufficient basis for termination of the father's rights. . . . [¶] . . . The [California] statutory scheme . . . appears to conflict with the emphasis in *Stanley* . . . on the need for a *particularized finding of unfitness.*" (*Id*., at pp. 830-831.)

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father it is in the child's best interest that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption. This finding terminates all parental rights and responsibilities with respect to the child. Section 3041 does not apply to a proceeding under this chapter."

After reviewing the relevant United States Supreme Court decisions, our Supreme Court in *Kelsey S.* concluded: "Although the . . . high court decisions do not provide a comprehensive rule for all situations involving unwed fathers, one unifying and transcendent theme emerges. *The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship*." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 838, italics added.)

The *Kelsey S.* court held "that [Civil Code] section 7004, subdivision (a) [now Family Code section 7611] and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers *to the extent that* the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interest. *If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities - emotional, financial, and otherwise - his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.* Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 849, first italics in original, second italics added, fn. omitted.)

The *Kelsey S.* court emphasized that the statutory scheme allowing termination of a natural father's parental rights based only on the child's best interest "is constitutionally invalid *only to the extent* it is applied to an unwed father who has sufficiently and timely demonstrated a full commitment to his parental responsibilities. Our statutes . . . are constitutionally sufficient when applied to a father who has failed to make such a showing." (*Adoption of Kelsey S., supra,* 1 Cal.4th at pp. 849-850.)

Thus, "[i]f the trial court finds on remand that petitioner failed to demonstrate the required commitment to his parental responsibilities, that will be the end of the matter. He will not have suffered any deprivation of a constitutional right. If, however, the required commitment is found, the result under our constitutional analysis will necessarily be a decision that petitioner's rights to equal protection and due process under the federal Constitution were violated to the extent that he was deprived of the same statutory protections granted the mother." (*Id*., at p. 850.)

Kelsey S. makes clear that an unwed father's parental rights are entitled to constitutional protection only if he demonstrates a full commitment to his parental responsibilities. If he carries his burden of proof, his parental rights may not be terminated absent a showing of his unfitness as a parent. On the other hand, if he fails to carry his burden of proof, there is no constitutional impediment to the termination of his parental rights without a showing of unfitness. In *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1052, our Supreme Court explained: "We held in *Kelsey S.* . . . that an unwed father who has no statutory right to block a third party adoption by withholding consent may nevertheless have a constitutional right to do so under the due process and equal protection clauses of the Fourteenth Amendment and thereby to preserve his opportunity to develop a parental relationship with his child. Under such circumstances, however, the unwed father's constitutional interest is merely inchoate [citation] and does not ripen into a constitutional right that he can assert to prevent adoption unless he proves that he has 'promptly come [] forward and demonstrate[d] a full commitment to his parental responsibilities . . . .' [Citation.] This is so because 'the mere existence of a biological link does not merit . . . constitutional protection' [citation]; rather, the federal Constitution protects only the parental *relationship* that the unwed father has actively developed by ' "com[ing] forward to participate in the rearing of his child" ' [citation] and 'act[ing] as a father' [citation]."

Section 1516.5 Does Not Require an Adjudication of Unfitness

Respondents contend that section 1516.5 "requires a pre-existing guardianship," which in turn "requires a finding that parental custody would be detrimental to the child, supported by clear and convincing evidence." Respondents consider this finding of detriment to be equivalent to an "adjudication of unfitness."

Respondents' reasoning is flawed. The court may appoint a guardian "if it appears necessary or convenient" to do so. (§ 1514, subd. (a).) Family Code section 3041, subdivision (a), provides that, if the court grants custody to a nonparent "*over the objection of a parent*, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child." (Italics added.) No finding of detriment is required where, as here, the parents consent to the guardianship.[9] Even where a finding of detriment to the child is necessary because a parent objects to the guardianship, the finding "does not require any finding of unfitness of the parents." (*Id*., subd. (c).)

Respondents nevertheless maintain that, pursuant to *In re Cody W.* (1994) 31 Cal.App.4th 221, a finding of detriment to the child under Family Code section 3041 is the functional equivalent of a finding of unfitness. The *Cody W.* court declared that, in *In re Jasmon O.* (1994) 8 Cal.4th 398, 423, our Supreme Court "reaffirmed" that a finding of detriment to the child is " 'the equivalent of a finding of unfitness' with respect to the child involved. [Citation.]" (***Id***., at p. 225.)

Cody W. is distinguishable because it involved the termination of parental rights at the selection and implementation hearing in a dependency proceeding. The *Cody*

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[9] Nevada law similarly does not require a finding of detriment if the parents consent to an order awarding custody to a nonparent: "Before the court makes an order awarding custody to any person other than a parent, *without the consent of the parents*, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child." (Nevada Revised Statutes (hereafter NRS) § 125.500, subd. 1, italics added.)

W. court observed that, " '[b]y the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established that there is no longer "reason to believe that positive, nurturing parent-child relationships exist" [citation], and the *parens patriae* interest of the state favoring preservation rather than severance of natural familial bonds has been extinguished.' [Citation.]" (*In re Cody W.*, *supra*, 31 Cal.App.4th at p. 225, quoting from *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

Moreover, we disagree with *Cody W.'s* interpretation of *Jasmon O*. In *Jasmon O.* our Supreme Court did not equate a finding of detriment to a finding of unfitness. The relevant passage from *Jasmon O.* is as follows: "Former Civil Code section 232, subdivision (a)(7) [now Family Code section 7828, subdivision (a)(2)] requires a finding, as a prerequisite to termination of parental rights, that the parents have failed, and are likely to fail in the future, to maintain an adequate parental relationship with the child. This finding is the equivalent of a finding of unfitness, a finding that is necessary at some point in the proceedings as a matter of due process before parental rights may be terminated. (*Adoption of Kelsey S., supra,* 1 Cal.4th at pp. 850-851.)" (*In re Jasmon O., supra,* 8 Cal.4th at p. 423.)

A finding of unfitness - "that the parents have failed, and are likely to fail in the future, to maintain an adequate relationship with the child" (*In re Jasmon O., supra,* 8 Cal.4th at p. 423) - is different from a finding of detriment to the child. "Our Supreme Court has held that the detriment requirement of [former Civil Code section 4600, now Family Code section 3041] requires a finding that placement away from the parent 'is essential to avert harm to the child.' (*In re B. G.* (1974) 11 Cal.3d 679, 699 . . . .)" (*In re Rodrigo S.* (1990) 225 Cal.App.3d 1179, 1185.) Former Civil Code section 232, subdivision (a)(7), now Family Code section 7828, subdivision (a)(2), distinguished between the two findings. As a prerequisite to the termination of parental rights, it required that the court find "that return of the child to the child's parent or parents

would be detrimental to the child *and* that the parent or parents have failed . . ., and are likely to fail in the future, to maintain an adequate parental relationship with the child . . . ." (***Ibid***., italics added.)

In any event, the legislature distinguished between the two findings by providing in Family Code section 3041, subdivision (c), that "[a] finding of detriment does not require any finding of unfitness of the parents." Subdivision (c) was added in 2002, seven years after the *Cody W.* decision. (Stats.2002, c. 1118, § 3.) The 2002 amendment of Family Code section 3041 supersedes any suggestion in *Cody W.* that a finding of detriment under that section is equivalent to a finding of unfitness.

Section 1516.5 is not Unconstitutional on its Face

Appellant contends that section 1516.5 is unconstitutional on its face, in violation of substantive due process, because it allows the termination of parental rights in the absence of a finding of unfitness. Appellant also contends that section 1516.5 is facially unconstitutional in violation of equal protection because it discriminates between parents whose children have not been placed in a guardianship and parents whose children have been in the physical custody of a guardian for two years or longer.

"A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] . . . ' "[P]etitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) "The majority opinion in *United States v. Salerno* (1987) 481 U.S. 739, 745 . . . explained the standard for reviewing facial constitutional challenges to statutes as follows. 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the Act would be valid*.' " (*City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 742-743; see also *Reno v. Flores* (1993) 507

U.S. 292, 301, [to prevail in a facial challenge to a regulation, "respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid' "]; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 168 ["the general rule is that a statute must be incapable of constitutional application in any circumstance in order for it to be found facially invalid"].)[10]

Section 1516.5 is not unconstitutional on its face. It may be constitutionally applied to an unwed father who has failed to demonstrate "the necessary commitment to his parental responsibilities . . . ." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 850.) "Under such circumstances . . . the unwed father's constitutional interest is merely inchoate [citation] and does not ripen into a constitutional right that he can assert to prevent adoption." (*Adoption of Michael H., supra,* 10 Cal.4th at p. 1052.) "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation], his interest in personal contact with his child acquires substantial protection under the

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[10] Our Supreme Court, however, has noted: "The precise standard governing facial challenges 'has been a subject of controversy within this court.' [Citations.]" (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39; accord *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.) In a case involving the issue of abortion - *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 - a plurality of our Supreme Court rejected the "defendant's claim that a statute whose broad sweep directly impinges upon the fundamental constitutional privacy rights of a large class of persons may not be found invalid on its face so long as there are *any* circumstances in which the statute's restrictions constitutionally may apply." (*Id*., at p. 344, plur. opn. of George, C.J.) The plurality opinion noted: "No California decision has taken such a restrictive approach in evaluating a facial constitutional challenge to a law . . . that directly and substantially impinges upon fundamental constitutional privacy rights in the vast majority of its applications." (*Id*., at p. 343.) The plurality opinion is not binding precedent. (*People v. Karis* (1988) 46 Cal.3d 612, 632.) In any event, the instant case is distinguishable because it does not involve privacy rights. In *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 345, our Supreme Court indicated that a procedural due process challenge to the facial validity of a statute may be based on unconstitutional applications in the " ' "*generality of cases*." ' " The instant case involves a substantive due process, not a procedural due process, challenge to section 1516.5.

due process clause. At that point it may be said that he 'act[s] as a father toward his children.' [Citation.]" (*Lehr v. Robertson* (1983) 463 U.S. 248, 261.)

Furthermore, no equal protection violation could occur merely because parents whose children have been in the physical custody of a guardian for two years or longer are treated differently from parents whose children have not been placed in a guardianship. " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

For purposes of the law concerning the termination of parental rights and adoption, parents whose children have been in the physical custody of a guardian for two years or longer are not similarly situated to parents whose children have not been placed in a guardianship. As previously explained, a guardianship "completely *suspends*" the fundamental liberty interest of parents in the care, custody and management of their children. (*Guardianship of Stephen G.*, *supra*, 40 Cal.App.4th at p. 1426.) "The authority of a parent ceases on . . . [t]he appointment, by a court, of a guardian of the person of the child." (Fam.Code, § 7505, subd. (a).) The guardian "has the care, custody, and control of, and has charge of the education of, the ward . . . ." (§ 2351, subd. (a).) In many cases, a minor who has been in the physical custody of a guardian for two years or longer will have developed close emotional and psychological bonds to the guardian.

Constitutionality of Section 1516.5 as Applied to Appellant

An as applied challenge to a statute "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances

the application deprived the individual to whom it was applied of a protected right. [Citations.]" (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.)

We hold that section 1516.5 is unconstitutional to the extent it is applied to unwed fathers who have demonstrated a full commitment to their parental responsibilities. Absent a finding of unfitness, substantive due process protects such unwed fathers from the termination of their parental rights. On the other hand, section 1516.5 is constitutionally valid to the extent it is applied to unwed fathers who have failed to demonstrate a full commitment to their parental responsibilities. (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at pp. 849-850.)[11]

"Our decision shall be given retroactive effect as to all cases not yet final as of the date this decision is filed." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 851.) "Our decision shall . . . have *no* effect in adoption proceedings in which a final

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[11] We do not determine the constitutionality of section 1516.5 insofar as it is applied to parents other than unwed fathers. Because appellant is an unwed father, that issue is not before us. We note, however, that during the trial respondents' counsel claimed that appellant had married mother in August 2004. Appellant did not dispute the claim, but no evidence was presented to support it. Even if appellant had legally married mother in August 2004, the marriage would not have altered appellant's status as an unwed father for substantive due process purposes. The marriage would have occurred nine years after minor's birth, almost seven years after minor had started living on a permanent basis with respondents, and more than five years after the establishment of the guardianship. Mother had abandoned minor by failing to contact her for more than six years. Although the guardianship order granted mother visitation rights and "reasonable phone contact" with minor, a report from a psychologist (Dr. Ellen Yates) dated August 24, 2004, stated that mother had "initiated no contact [with minor] for over six years until the past week." The August 2004 contact consisted of a telephone conversation in which appellant and mother told minor that they were " 'getting back together . . . .' " Minor told Dr. Yates, " '[O]ther people don't get calls like that from their dad or their mom acting like . . . she'd been seeing me all the last six years!' " Mother's parental rights were terminated in April 2005. Although the guardianship order required appellant to pay respondents monthly child support of $300, he made only one payment of $175. In these circumstances, if appellant had legally married mother in August 2004, the belated marriage would not have provided him with any additional constitutional protection. We would still have considered him to be an unwed father for purposes of our analysis.

judgment has been entered. Such judgments cannot be challenged either directly or collaterally." (*Id*., at p. 852.)

The trial court did not have the benefit of this opinion and therefore did not decide the threshold issue of whether appellant had demonstrated, by a preponderance of the evidence, that he had made a full commitment to his parental responsibilities. Accordingly, we reverse and remand the matter to the trial court for the purpose of making this determination. On remand, the parties may present additional evidence on this issue.

"[T]he trial court must take into account [appellant's] conduct throughout the period since he learned he was the biological father, including his conduct during the pendency of this legal proceeding, both in the trial and appellate courts, up to the determination in the trial court on remand by this court. We recognize that during these proceedings petitioner may have been restricted, both legally and as a practical matter, in his ability to act fully as a father. Nevertheless, the trial court must consider whether petitioner has done all that he could reasonably do *under the circumstances*." (*Adoption of Kelsey, supra*, 1 Cal.4th at p. 850.).

If appellant carries his burden of proof, the trial court shall deny the petition brought pursuant to section 1516.5 to have minor declared free from the custody and control of appellant. But such a denial shall not preclude the filing of an action to terminate appellant's parental rights under any statutory authority other than section 1516.5. If appellant does not carry his burden of proof, the trial court shall again declare minor free from the custody and control of appellant.

We reject respondents' contention that, "at the time of the initiation of the guardianship, there was a judicial determination that [appellant] was unfit to care for [minor], and it would be detrimental for her to remain in his care." Because appellant consented to the guardianship, the Nevada court never considered these issues. (See fn. 9, *supra*.)

Disposition

The judgment declaring minor free of appellant's custody and control is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

Richard C. Gilman, under appointment by the Court of Appeal, for Objector and Appellant.

Douglas R. Donnelly, John L. Dodd; John L. Dodd and Associates, for Petitioners and Respondents.