Supreme Court No. 101177-6

In the
Supreme Court of the State of Washington

In re visits with:

A.R.W.

TAMARA SWEREN, Petitioner

v.

SEAN WEHNERT and JORDAN DELAPLANE,

Respondents/Defendants.

PETITION FOR REVIEW

Court of Appeals No. 56066-6-II;
Pierce County Superior Court No. 20-3-01574-1

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I. IDENTITY OF PETITIONER

The Petitioner in this proceeding is Tamara Sweren ("Ms. Sweren"), the natural maternal Grandmother of A.R.W. and the Appellant in the Court of Appeals. The Superior Court denied Ms. Sweren visitation with A.R.W. and the Court of Appeals affirmed.

II. DECISION

Ms. Sweren seeks this Court's review of the decision of the Court of Appeals, Division Two, in Case No. 56066-6-II, dated July 19, 2022, affirming the Superior Court's decision to deny Ms. Sweren's petition for visitation of A.R.W. A true and correct copy of the Court of Appeals' decision is appended hereto as Attachment "A".

III. ISSUE PRESENTED FOR REVIEW

Ms. Sweren seeks review of the Court of Appeals' decision pursuant to RAP 13.4 (b)(4) based on the following issue:

1. WHETHER THE CURRENT STANDARD UNDER RCW 26.11.040 IS UNREASONABLE PERTAINING TO VISITATION WITH A GRANDPARENT AND SHOULD BE CHANGED.

IV. STATEMENT OF THE CASE

While the circumstances of the proceedings and facts of the case are summarized in the attached Court of Appeals opinion, Ms. Sweren would like to emphasize certain facts that were disregarded in the Court of Appeals.

Ms. Sweren has been intimately involved in A.R.W.'s life since birth. CP 12, 41. Ms. Sweren is the person who has hosted birthday parties for A.R.W. and celebrated holidays with her until visitation ceased in December of 2019. CP 11, 13. These events involved Ms. Sweren's parents and extended family, who share her love for A.R.W. CP 13, 40-41.

Ms. Sweren stepped into a maternal role for A.R.W. after her mother abandoned her. CP 11-14, 52-53, 66-80. Over that period of time, Ms. Sweren developed a strong and loving relationship with A.R.W. CP 11-14, 40-41. The trial court's

order that authorizes A.R.W.'s parents to deprive her of that relationship is a detriment to her wellbeing and against her best interests. CP 7. The trial court's decision to dismiss Ms. Sweren's petition without even so much as an evidentiary hearing to evaluate her relationship with A.R.W. was in error and should be reviewed by this Court.

V. ARGUMENT

A. DISCRETIONARY REVIEW SHOULD BE GRANTED AS THE CURRENT STANDARD IMPOSED BY RCW 26.11.040 IS UNREASONABLE AS IT PERTAINS TO VISITATION WITH A GRANPARENT AND SHOULD BE CHANGED.

This Court should grant discretionary review because the Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4); *see State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Specifically, the public interest is that the current standard under RCW 26.11.040 is unreasonable as it presumes that a parent's choice to deny visitation with a grandparent does not cause any harm or a substantial risk of

harm to a child. As a result, Ms. Sweren requests that this Court use its discretionary powers to grant review and change the current standard for granting visitation with a grandparent.

1. Washington's Current Standard for Granting Grandparents Visitation

Washington law recognizes the important relationship of grandparents with their grandchildren by providing a mechanism for relatives to petition for visitation rights when there is an ongoing and substantial relationship with the child and the child is likely to suffer harm or there is a substantial risk of harm from the denial of visitation. *See* RCW 26.11. This Chapter contains a presumption that "a parent's decision to deny visitation is in the best interest of the child and does not create a likelihood of harm or a substantial risk of harm to the child," but allows petitioners to rebut that presumption through clear and convincing evidence. RCW 26.11.040 (2)-(3). After considering the petition and affidavits, when the trial court

"finds that it is more likely than not visitation will be granted," an evidentiary hearing should be held. RCW 26.11.030 (8).

Even though Washington law acknowledges that the relationship between a child and grandparent is important, the aforementioned standard under RCW 26.11.040 is unreasonable as it presumes a parent's choice to deny visitation with a grandparent is in the best interest of a child and will not be harmful. Moreover, the standard under this statute is so unreasonable that it is difficult to hypothesize a situation where a grandparent could overcome it in order to obtain visitation with a grandchild.

2. Washington's Current Standard for Granting Grandparents Visitation Presents An Issue of Substantial Public Interest That Should Be Reexamined by this Court

While it may be argued that the trial court correctly applied this current standard, that does not mean the standard itself is reasonable and does not warrant change. "If the trial court applies the correct legal standard to the supported facts

but adopts a view no reasonable person would take, its decision is manifestly unreasonable. *Richardson v. Gov't Emps. Ins. Co*., 200 Wash. App. 705, 711, 403 P.3d 115, 120 (2017).

In this case, the trial court dismissed the matter before a hearing was held, finding that Ms. Sweren did not establish a risk of harm because the loss of a familial relationship alone does not constitute harm or a substantial risk of harm. CP 214-15. Ms. Sweren requests that this Court grant discretionary review to reexamine the current standard.

The case law relied upon by the trial court applied the current unreasonable standard under RCW 26.11.040. For example, the trial court relied on the case *Matter of RV,* 14 Wn.App.2d 211, 470 P.3d 531 (2020), in its decision. *RV* is a case of first impression interpreting RCW Chapter 26.11. *Id.* at 219. The children in *RV* had been living with their mother until she left them with her mother (the children's grandmother) and stepfather a few months before tragically committing suicide. *Id.* at 215. Upon her death, the children's father made plans to

take custody of them, but ultimately learned that grandparents had commenced proceedings seeking non-parental custody, necessarily claiming that the father was unfit as a parent or actual detriment would occur to the children. *Id.* As part of the custody matter, "[t]he superior court conducted an adequate cause hearing . . . [and] found no adequate cause and dismissed the Naravanes' petition." *Id.* at 216.

Following the custody case in *RV*, the father regained custody of his children and cut off communication with the grandparents, ultimately resulting in the Petition for Nonparental Visitation that was the basis of the appeal. The grandparents, however, did not allege any specific facts about a risk of harm to their grandchildren with the exception of a loss of connection to one half of their heritage and the father's decision to quickly pursue another relationship shortly after separating from the children's mother. *Id.* at 225. Sadly, the court in *RV* denied visitation to the grandparents despite the risk of loss of a familial relationship.

Ms. Sweren demonstrated to the trial court the specific risks of harm to A.R.W. if her visitation was denied that included the severing of a familial connection. Ms. Sweren set forth that she has an ongoing familial relationship with A.R.W. and that the child was likely to suffer harm or a substantial risk of harm if the Petition for Visitation was denied. CP 11-14. She also asserted that maintaining a relationship with her granddaughter is in the best interest of the child. CP 11-14.

Additionally, Ms. Sweren set forth in detail the risk arising from A.R.W. being required to share a bedroom with boys to whom she is unrelated. CP 13. Ms. Sweren raised the risk of violence as Sean Wehnert, the father, had demonstrated violent behavior toward A.R.W.'s mother and Ms. Sweren's daughter, Jordan Deplane, when she was pregnant. CP 14.

In its decision, the trial court made no mention of these specific facts raised by Ms. Sweren in her petition and declaration. Moreover, the trial court stated that "It is not lost on the Court that there may potentially be the loss of a familial

relationship between the child and the Petitioner and possibly other family members as well. While this could potentially be unfortunate, the case law does not support this as being harm or substantial risk of harm." CP 215. The trial court acknowledged that the current standard under the law did not afford it the authority to grant Ms. Sweren visitation as loss of a familial relationship is not currently considered harmful to a child. This is despite the fact that the trial court also acknowledged that its decision to deny visitation may ultimately severe familial relationships, including the relationship between Ms. Sweren and her grandchild.

Due the trial court denying Ms. Sweren's petition for visitation, Ms. Sweren thereafter requested that the Court of Appeals reverse the trial court's order dismissing her petition, or, in the alternative, remand the case for a full evidentiary hearing on the issue of potential future harm to A.R.W. The Court of Appeals affirmed the trial court's order denying Ms. Sweren's petition for visitation. The Court of Appeals held that

Ms. Sweren failed to show that A.R.W. would suffer harm or the risk of substantial harm if the trial court did not order visitation.

Additionally, the Court of Appeals noted that RCW 26.11.040(2) "begins with a presumption that 'a fit parent's decision to deny visitation is in the best interest of the child and does not create a likelihood of harm or a substantial risk of harm to the child.'" Attachment A at 3-4. It is this presumption that is unreasonable because it encourages the destruction of familial relationships between grandparents and their grandchildren. This is far from being in the best interest of a child.

As noted by courts in other states, cutting off a child's contact with a grandparent may have a dramatic, and even traumatic, effect upon the child's well-being. *See, e.g., Rideout v. Riendeau*, 2000 ME 198, ¶ 26, 761 A.2d 291, 301 (2000). "Delaware has a compelling interest in protecting minors from traumatic loss by permitting the maintenance of an

established grandparent-grandchild relationship when a petitioning grandparent seeks continued contact with a child . . . . ." *R. M. v. V. H.*, Nos. CN02-09991, 04-25714, 2006 Del. Fam. Ct. LEXIS 4, at *35 (Fam. Ct. Jan. 19, 2006).

As a result of the trial court dismissing Ms. Sweren's petition for visitation, and the Court of Appeals' decision affirming that ruling, this case now presents an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4 (b)(4). As demonstrated above, the standard under RCW 26.11.040(2) is unreasonable and should be changed to a presumption that denial of visitation to a grandparent creates a likelihood of harm or substantial risk of harm to a child. Therefore, this Court should grant discretionary review of the Court of Appeals decision pursuant to RAP 13.4.

VI. CONCLUSION

For the foregoing reasons, Ms. Sweren respectfully requests that this Court grant discretionary review of the Court of Appeals' decision pursuant to RAP 13.4.

This document contains 1810 words, excluding the parts of the documents exempted by the word count by RAP 18.17.

Respectfully submitted this 16th day of August 2022.

THE APPELLATE LAW FIRM

Spencer Babbitt,
WSBA #51076
Attorney for Petitioner,
Tamara May Sweren

PROOF OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on August 16, 2022 I caused the following document(s):

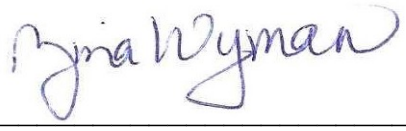
PETITION FOR REVIEW

To be served on the following via Email through the Courts E-service.

Andrew K. Helland, WSBA# 43181 Helland Law Group 960 Market Street Tacoma, WA 98402 253-572-8684	andrew@hellandlawgroup.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on August 16, 2022.



Zina Wyman
Senior Appellate Paralegal
The Appellate Law Firm

THE APPELLATE LAW FIRM

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Washington State
Court of Appeals
Division Two

July 19, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Visits of A.R.W., Minor child, TAMARA MAY SWEREN, Appellant, v. SEAN MICHAEL WEHNERT, Respondent, JORDAN MARIE DELAPLANE, Defendant.	No. 56066-6-II UNPUBLISHED OPINION

GLASGOW, C.J.—Tamara May Sweren filed a petition for nonparental visitation with her granddaughter, ARW. The trial court ordered dismissal of her petition without a hearing after concluding that she had failed to provide sufficient evidence to show that a decision to deny visitation would cause a likelihood of harm or a substantial risk of harm to ARW. Sweren argues that the trial court erred by dismissing her petition for visitation. We disagree and affirm.

FACTS

ARW is a six year old who was born addicted to opiates due to her mother's substance abuse during pregnancy. After ARW was born in 2015, she and her parents, Sean Michael Wehnert

and Jordan Marie Delaplane, lived in Sweren's home. In 2016, Wehnert and ARW moved out of the home after discovering Delaplane was using drugs again.

In the custody case that followed, Wehnert was granted full custody of ARW. The final parenting plan called for no contact between Delaplane and ARW until Delaplane could demonstrate an extended period of sobriety, employment, and stability. The parenting plan further identified Sweren's home as inappropriate housing for Delaplane and restricted Sweren from driving ARW "because of her long term DUI history." Clerk's Papers (CP) at 86. Following the custody case, Wehnert permitted Delaplane's grandparents to visit ARW, and they occasionally took ARW to visit Sweren. Sweren intermittently joined Wehnert's family for holidays and ARW's birthday parties. After Sweren's interactions with Wehnert and his girlfriend became increasingly tense over disagreements about spending time with ARW and how to tell her about Delaplane, and as concerns about Sweren's alcohol use grew, Wehnert decided to limit Sweren's interactions with ARW.

In 2020, Sweren filed a petition for visitation with ARW. Sweren emphasized the significant emotional relationship between herself and ARW, explaining that she had set up a bank account for ARW and provided ARW her own bedroom at her house. Sweren expressed concern about ARW living with Wehnert and sharing a bedroom with Wehnert's girlfriend's young sons.

Wehnert and Delaplane both opposed Sweren's petition for visitation. In her declaration, Delaplane opposed Sweren having supervised or unsupervised visits with ARW on account of Sweren's alcohol dependency and volatile behavior.

After reviewing the petition and multiple declarations submitted by both parties, the trial court entered an order dismissing Sweren's petition for visitation, concluding that Sweren failed

to show that it was more likely than not that her petition would be granted. The trial court found that Sweren had presented insufficient evidence to show that a decision to deny visitation would cause a likelihood of harm or a substantial risk of harm to ARW. The court explained, "It is not lost on the Court that there may potentially be the loss of a familial relationship between the child and the Petitioner and possibly other family members as well. While this could potentially be unfortunate, the case law does not support this as being harm or substantial risk of harm." CP at 215.

Sweren appeals.

ANALYSIS

I. NONPARENTAL VISITATION

Sweren argues that the trial court erred by finding that she did not present evidence of a substantial risk of harm to ARW sufficient to warrant a hearing. We disagree.

We review a trial court's decision on a petition for nonparental visitation for an abuse of discretion. *In re Visits with R.V.*, 14 Wn. App. 2d 211, 221, 470 P.3d 531 (2020). "'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.'" *Id*. (quoting *In re Custody of L.M.S.*, 187 Wn.2d 567, 574, 387 P.3d 707 (2017)).

It is well established that parents have a fundamental right to make decisions concerning the rearing of their children, including the right to make decisions about visitation with grandparents. *Troxel v. Granville*, 530 U.S. 57, 69-70, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Washington's nonparental visitation statute begins with a presumption that "a fit parent's decision to deny visitation is in the best interest of the child and does not create a likelihood of harm or a

substantial risk of harm to the child." RCW 26.11.040(2). A petitioner must rebut this presumption with "clear and convincing evidence that the child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child were not granted." RCW 26.11.040(3). Only if the petitioner successfully rebuts this presumption does a court consider whether visitation is in the best interest of the child. RCW 26.11.040(4).

It is not enough to argue that the custodial parent is causing harm. The harm a petitioner must allege and substantiate is harm that the child will suffer if visitation is not granted. *In re Visits with A.S.A.*, 21 Wn. App. 2d 474, 482, 507 P.3d 28 (2022). Stated another way, a petitioner must show that "continued contact with the nonparent is necessary to prevent the harm alleged." *Id*. "Demonstrating harm from the denial of visitation should focus on the relationship between the petitioner and the child and the harm that will come to the child if they are denied contact with the petitioner." *Id*. The petitioner must support the petition with an affidavit setting forth "'specific facts'" that establish visitation is warranted. *R.V.*, 14 Wn. App. 2d at 219; RCW 26.11.030(5), (6). The trial court does not hold an evidentiary hearing unless it finds it is more likely than not the petition will be granted, even if there are disputed facts in the record. *R.V.*, 14 Wn. App. 2d at 222; RCW 26.11.030(8).

It is undisputed that Wehnert is a fit parent. As such, under RCW 26.11.040(2), we presume that Wehnert's decision to deny visitation is in ARW's best interest and does not harm or create a substantial risk of harm to her. Accordingly, Sweren must show more than just a loving relationship with ARW—she must make a threshold showing of clear and convincing evidence that ARW would suffer harm or the substantial risk of harm if the trial court did not order visitation. Sweren fails to do so.

In her petition, Sweren primarily focused on her relationship with ARW and critiques of Wehnert's parenting decisions. But these issues are not the focus of the nonparental child visitation statute. The only allegation of potential harm in Sweren's petition is her concern that ARW shares a bedroom with Wehnert's girlfriend's young sons and a vague reference to Wehnert being violent with Delaplane during her pregnancy. These contentions lack specifics, but more importantly they do not amount to an allegation that denying Sweren visitation will cause ARW harm.

Accordingly, we hold that the trial court did not abuse its discretion by finding that Sweren failed to set forth facts sufficient to meet a threshold showing that she was likely to prevail on her petition for nonparental visitation.

II. ATTORNEY FEES ON APPEAL

Wehnert requests attorney fees under RCW 26.11.050(1)(a) and RAP 18.9.

RAP 18.1(a) states that a party may recover "reasonable attorney fees or expenses on review" if "applicable law grants to [the] party the right to recover" such fees or expenses. Under RCW 26.11.050(1)(a), the court shall order the petitioner to pay respondent's attorney fees before a hearing unless the financial resources of the parties make such an award unjust. *R.V.*, 14 Wn. App. 2d at 228.

An award of attorney fees under RCW 26.11.050(1)(a) requires consideration of the parties' financial resources. Wehnert submitted a financial affidavit and Sweren did not. Considering the circumstances of the case as well as the evidence provided about financial resources, we conclude that an award of attorney fees to Wehnert would not be unjust under RCW 26.11.050(1)(a). Accordingly, we award Wehnert attorney fees on appeal in an amount to be determined by a commissioner of this court.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Cruser, J.

Veljacic, J.