FILED
JULY 13, 2015
Court of Appeals
Division III
State of Washington

No. 32367-6-III

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

In re the Custody of S.F-T.C,

Child,

Janet Carey, Nick Carey, Laura Carey,

Respondents,

and

Jasmine Rose Carey, Mother,
Kyle Carey, Father, Deceased

Appellant.

REPLY BRIEF

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INTRODUCTION

Jasmine's straightforward point is that the trial court's findings – as made – do not satisfy the heightened standard that our appellate courts have imposed when determining whether a trial court may deprive a fit parent of her fundamental right to the care and custody of her child. More simply, the findings are constitutionally insufficient. The Respondents never really engage on this key point.

Instead, they mischaracterize Jasmine's argument as challenging the findings for lack of substantial evidence. While two findings – which are actually legal conclusions – are challenged, the vast majority are not. Therefore, the vast majority of the Respondents' arguments are irrelevant.

Not only do the Respondents fail to respond to the key argument, but they also fail to respond to the most recent apposite authority, ***In re Custody of A.F.J.***, 179 Wn.2d 179, 183-84, 314 P.3d 373 (2013). While some distinctions certainly could be drawn (*e.g.*, there, the contesting parties were both women, so a "de facto" parent claim was at issue, but not so here) those distinctions make no difference here. In every material respect, ***A.F.J.*** supports reversal. The Respondents' silence regarding that decision is deafening. The Court should reverse and remand for appropriate orders.

REPLY RE STATEMENT OF THE CASE

The Respondents first say that Jasmine's past is irrelevant. BR 1, 3. But then they talk about it for five pages, while revealing no more than the opening brief disclosed. *Compare* BA 4-9 *with* BR 16-20. They apparently just want to blame Jasmine for the abuse that she has suffered, for the illnesses that she has suffered, and even for the miscarriages that she has suffered. BR 16-20.

Yet they admit that S sees Jasmine as her mother – which she is. BR 4. They also admit – as the trial court found – that S is "doing amazingly well for everything that she has gone through . . . ." BR 22; CP 340 (F/F 18). But they quite literally fail to acknowledge – anywhere – that Jasmine has had substantial visitation with her daughter over the past several years, which has also contributed to the child's wellbeing, as the trial court expressly found. *Compare* BR *with* CP 340 (F/F 16: "The court feels that it's extremely important that [S] be allowed to continue to have contact with Jasmine Carey and to help develop that relationship").

They also fail to acknowledge that the trial court found Jasmine so fit that it waived the mandatory parenting seminar for her because of "all of the services that she has gone through over the last few years" and because she "demonstrated to this court that she

has embraced those opportunities and has learned from" them. CP 340 (F/F 19 & 20). By contrast, the trial court required Nick and Laura Carey to enroll in the mandatory parenting seminar. *Id.* (F/F 21).

The Respondents argue that they are giving S a good life. BR 4-6. They also rely on expert Leifhelt, who never met Jasmine, and whose testimony is solely about the Careys. BR 9-11. But they fail to acknowledge that all of this is irrelevant: as further discussed *infra*, a trial court is not legally empowered to deny a fit parent's constitutional right to custody simply because a third party might provide a good – or even a better – home. And again, they fail to acknowledge that Jasmine is a big and positive part of S's life now.

As expected, the Respondents remain determined to punish Jasmine for her past. They focus on the traumas in S's life from 2006 to 2009, including a sexual assault that the trial court expressly found was not Jasmine's fault. *Compare* BR 7-8 *with* CP 339 (F/F 5). They also mention two traumas in 2011 (the father and his fiancee separated, and S was separated from her stepmother) and the father's suicide in 2012, none of which is attributable to Jasmine. BR 8. But Jasmine accepts responsibility for her past mistakes, has "made great strides in dealing with those issues," and is now "able to safely provide for her children." CP 338 (F/F 4).

ARGUMENT

A. The United States Constitution requires extraordinary circumstances in order to deprive a fit mother of her fundamental right to parent her daughter, but the Respondents fail to answer this crucial point, preferring misdirection.

Jasmine's key point is that "state interference with a fit parent's fundamental right to autonomy in child-rearing decisions is subject to strict scrutiny" in Washington. ***In re Custody of Shields***, 157 Wn.2d 126, 144, 136 P.3d 117 (2006) (citing ***In re Parentage of C.A.M.A.***, 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005) (citing ***In re Custody of Smith***, 137 Wn.2d 1, 13, 969 P.2d 21 (1998), *aff'd on narrower grounds sub nom.* ***Troxel v. Granville***, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000))). The "State cannot interfere with the liberty interest of parents in the custody of their children unless a parent is unfit or custody with a parent would result in 'actual detriment to the child's growth and development.'" ***In re Custody of B.M.H.***, 179 Wn.2d 224, 235, 315 P.3d 470 (2013) (citing ***In re Custody of E.A.T.W.***, 168 Wn.2d 335, 338, 227 P.3d 1284 (2010); ***Shields***, 157 Wn.2d at 142-43). This "heightened standard" is met "only if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development." ***Shields***, 157 Wn.2d at 144. And "only under

"'extraordinary circumstances'" does there exist a compelling state interest that justifies interference . . . with parental rights." ***B.M.H.***, 179 Wn.2d at 235 (quoting ***Shields***, 157 Wn.2d at 145 (quoting ***In re Marriage of Allen***, 28 Wn. App. 637, 649, 626 P.2d 16 (1981)). The Respondents have not overcome these strong protections.

Perhaps that is why they fail to address this argument. They instead attempt to convert Jasmine's constitutional challenges into a mere "substantial evidence" challenge. *See, e.g.*, BR 22-42. But their misdirection is transparent: Jasmine challenges only two findings, both of which are actually legal conclusions. *See* BA 2 (challenging F/F 2.7A, the improper "Best Interests of the Child" conclusion; and F/F 2.7C, the "Actual Detriment" conclusion); BA 22-29.

The crux of Jasmine's unanswered argument is that the unchallenged findings do not support the trial court's legal conclusions (that placing S with Jasmine will cause an "actual detriment" that is sufficient to overcome strict scrutiny). BA 2-3, 15-29. And Jasmine goes on to argue that if they were sufficient under the nonparental custody statute to deprive Jasmine of her fundamental rights, then the statute would be unconstitutional as applied in this case. BA 29-30. But again, the Respondents do not engage on these key arguments.

Perhaps most tellingly, the Respondents also fail to even address – much less to distinguish – the most recent authority from our Supreme Court, ***A.F.J.***, 179 Wn.2d at 183-84. *Compare* BA 17-18, 29 *with* BR. That precedent – apposite in all material respects – affirms that a biological parent whose very severe drug problems threatened the child's safety could use the services offered to overcome those problems and become a fit parent. 179 Wn.2d at 183-84. The same is true here. This Court should reverse.

B. The Respondents have failed to show any extraordinary circumstances sufficient to justify this massive infringement upon Jasmine's fundamental rights.

Jasmine's second key point is that no extraordinary circumstances exist that justify destroying her fundamental rights as a fit parent. BA 21-22. The trial court found that the Respondents failed to show Jasmine's unfitness, either by preponderant or by clear, cogent and convincing evidence. CP 338 (F/F 5). The trial court appropriately noted that it must assess Jasmine's fitness now, and not (where most of the Respondents' evidence focused) at some point in the past. CP 338 (F/F 4). While she "arguably" was unfit at one time, Jasmine "has made great strides in dealing with those issues" and is now "able to safely provide for her children." *Id.* at F/F 2 & 4.

This is the opposite of the extraordinary circumstances present in ***Allen***, *supra* (parent(s) could not provide for child's special needs); ***In re Custody of R.R.B.***, 108 Wn. App. 602, 31 P.3d 1212 (2001) (same); and ***In re Custody of Stell***, 56 Wn. App. 356, 783 P.2d 615 (1989) (same). *See, e.g.*, BA 16-22. A fit parent who can "safely provide for her children" may not be deprived of her constitutional rights absent extraordinary circumstances. No such circumstances exist in this case.

C. The trial court's findings do not justify this gross intrusion on a fit parent's fundamental right to parent her daughter, and neither do the Respondents' arguments.

In an apparent effort to justify this gross intrusion on a fit parent's fundamental right to parent her daughter, the Respondents argue at length about "best interests," past history, alleged "extraordinary circumstances," and an alleged sufficiency of the evidence (rather than the sufficiency of the findings under strict scrutiny). BR 24-42. None of these claims can justify depriving Jasmine of her constitutional right to parent her child.

The Respondents first claim that the trial court's "best interests" finding is not improper because RCW 26.10.100 – whose underpinnings have been destroyed in a series of cases – still calls for it. *See* BR 25-26. Our Supreme Court has expressly held that the

"best interests" standard is insufficient to protect a fit parent's constitutional rights against a third party's claims. *See, e.g.*, ***B.M.H.***, 179 Wn.2d at 237 ("Facts that merely support a finding that nonparental custody is in the "best interests of the child" are insufficient to establish adequate cause" (citing ***In re Custody of S.C.D.-L.***, 170 Wn.2d 513, 516-17, 243 P.3d 918 (2010); ***In re Custody of Anderson***, 77 Wn. App. 261, 266, 890 P.2d 525 (1995))); ***C.A.M.A.***, 154 Wn.2d at 61 ("'[S]hort of preventing harm to the child, the standard of "best interests of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights'") (quoting ***Smith***, 137 Wn.2d at 20).

The Respondents simply fail to address the controlling precedents. The trial court erred in entering a "best interests of the child" finding. Even the Respondents concede that it is inadequate. BR 26 ("Had the trial court stopped with a 'best interests' finding, its order would be inadequate"). Adding findings that are insufficient to establish actual detriment does not cure the inadequacy. The Court should strike this finding.

The Respondents then claim that testimony from Holden, Leifheit and Lang evidenced the "extraordinary circumstances" necessary to prove that placing S with her fit parent will cause actual

detriment to her. BR 26-30 (citing ***Allen***, ***Stell, R.R.B.***, ***B.M.H.***, and ***Shields***, all *supra*, and ***In re Mahaney***, 146 Wn.2d 878, 51 P.3d 776 (2002)). The opening brief explains why the first five cases do not support making an actual detriment finding here – either because they inappositely concern much more extraordinary circumstances than in this case, or because they appositely found no such circumstances. BA 16-22.

In ***Mahaney***, the issues before the Court were (a) the interrelationship between the Indian Child Welfare Act (ICWA) and RCW ch. 26.10; (b) whether the trial court applied the correct standard of proof under ICWA; and (c) whether the evidence was sufficient under ICWA. 146 Wn.2d at 886. Whether those findings met the heightened constitutional standard required here was not at issue. ***Mahaney*** is neither apposite nor controlling. And ***A.F.J.*** is more recent, more apposite, and thus controlling in any event.

The Respondents again argue that Jasmine is merely making a substantial evidence challenge. BR 30-42. As explained above, that is not the issue. Yes, the evidence that the Respondents adduced is stale, largely irrelevant, of questionable veracity (as the trial court specifically noted with Lyn Lang at CP 340 (F/F 13)), and fails to support an actual detriment finding.. *See* BA 22-29. But the

issue on appeal is whether – accepting the findings as arguably supportable in the record – do they amount to the extraordinary circumstances required to deprive a fit parent of her fundamental right to parent her child? They do not, and this Court should reverse.

The Respondents finally grapple with the actual issue at BR 40-42, however briefly. They suggest that the constitutional protections for fundamental parental rights established over decades in hundreds of cases are easily defeated if the trial court just enters a few findings. *Id.* They even suggest that because the Court of Appeals deemed a different constitutional challenge insufficient in ***R.R.B*** in the year 2001, Jasmine's must be insufficient today. BR 40.

The father seeking third-party custody in ***R.R.B.*** had voluntarily relinquished his custody, consented to an adoption, and terminated his parental rights many years earlier; but the petitioners (a) had no real appreciation for his mentally disturbed child's problems; and (b) the 13-year-old child had threatened to harm herself if she was forced to return to their custody. 108 Wn. App. at 606. On the specific issue of whether the statute was unconstitutional as applied, Division Two held that evidence that the child had improved while with the father, that she wanted to stay with him, and that she threatened to harm herself if she was forced to return to the

petitioners, was sufficient to support an actual detriment finding. *Id.* at 615 & n.7. But here, S has improved while spending significant and important time with Jasmine, has not consistently said that she wants to stay with the Respondents, and has never threatened to harm herself if she is returned full-time to Jasmine. And that last point is crucial, as the standard requires that placement with Jasmine would "'conflict with the physical or mental health of the child.'" *Id.* at 614 (quoting ***Smith***, 137 Wn.2d at 18 (citation omitted)).

In sum, the Respondents point to no extraordinary circumstances sufficient to overcome a fit parent's fundamental right to parent her child. As ***R.R.B.*** notes, "Washington courts have long recognized parents' fundamental right to the care and custody of their children." *Id.* at 612 (citing and quoting ***In re Neff***, 20 Wash. 652, 655, 56 P. 383 (1899) (emphasis added)):

> The fact that the children might be better educated, and better clothed, and have a more pleasant home with someone else than the parent ***can have no weight with the court*** as against the natural rights of the parent.

United States Supreme Justice Stephens made the same point in denying a stay application:

> [No law] authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education.

Darrow v. Deboer, 509 U.S. 1301, 114 S. Ct. 1, 125 L. Ed. 2d 755 (1993). This Court should reverse.

D. If the evidence adduced here is sufficient, then the nonparent custody statute is unconstitutional as applied.

Jasmine has been clean and sober since October 2011. RP 1226. Jasmine's child J came back into her care on May 17, 2012. RP 620. There have been no problems since. RP 786-89, 819, 872-73, 876-80, 1091-92, 1223-28.[1] The trial court found not only that Jasmine is a fit parent, but that she is "able to safely provide for her children." CP 338 (F/F 4 & 5). If the Respondents' facts – as found by the trial court – are sufficient under RCW 26.10, then that chapter is unconstitutional as applied in this case.

Again, it defies common sense to say that S needs stability, so it is a good idea to put her into yet another unstable, temporary status. See ***A.F.J.***, 179 Wn.2d at 186 (quoting ***In re Parentage of J.A.B.***, 146 Wn. App. 417, 426, 191 P.3d 71 (2008)). This Court should reverse and remand for an order that sensitively, and with due time and regard for S's stability, further reintegrates her into her mother's home. That will give S true stability.

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[1] Counsel apologizes for omitting these cites from the opening brief at page 29, and repeats the point here in order to provide them.

CONCLUSION

For the reasons stated, this Court should reverse and remand for an order to carefully and sensitively reintegrate S into her mother's home.

RESPECTFULLY SUBMITTED this 13th day of July, 2015.

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing **REPLY BRIEF** on the 13th day of July 2015 to the following counsel of record at the following addresses:

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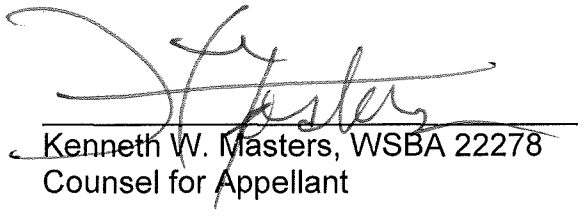

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