S. Ct. No.
COA No. 33013-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Custody of:

H.A.R.

PAMELA and THEODORE SUCHLAND,

Petitioners,

and

AMANDA MARIE SUCHLAND (Mother);

JEREMY JOHN REYNOLDS, (Father);

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Pamela and Theodore Suchland ask this Court to accept review of the Court of Appeals opinion designated in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which the Suchlands want reviewed was filed on October 17, 2017. A copy of is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err by dismissing the Suchlands' de facto parentage action when the court determined the father did not consent to and foster the parent-like relationship with the grandparents?

2. Did the court err by dismissing the nonparental custody petition when substantial evidence did not support its determination that the Suchlands failed to prove by the requisite quantum of proof the father was an unfit parent and/or placement with the father would result in actual detriment to the child?

3. Did the court err by using a "preponderance of the evidence" standard instead of the "clear and convincing evidence" standard in the nonparental custody action?

D. STATEMENT OF THE CASE

The Suchlands filed a nonparental custody petition on August 7, 2014. (CP 3). It was later amended to include a de facto parentage action. (CP 47).

An adequate cause hearing was held on October 15, 2014, on both the nonparental custody petition and the de facto parentage action. (10/15/14 RP 11). Although finding no adequate cause to proceed on the de facto parentage, the court stated the Suchlands had made more than a prima facie showing of abuse and found adequate cause to go to trial on the nonparental custody petition. (*Id*. at 34-38). The court dismissed the de facto parentage action. (CP 200). The case proceeded to bench trial on the nonparental custody petition.

Father Jeremy Reynolds testified Amanda Suchland had not been at the grandparents' home since his first visit with H.A.R. (12/12/14 RP 118). He acknowledged taking no action in Adams County to have his daughter placed with him. (*Id*.). He did not know anything about who was caring for H.A.R. and had not called the Suchlands to check on her. (*Id*. at 118-19).

Dr. Linda Powell saw H.A.R. for a well-child examination on June 7, 2013. (12/12/14 RP 135). There were no issues. (*Id*.).

One week later on June 14 at Pam Suchland's request, the doctor checked on H.A.R. before a visit with Mr. Reynolds. (*Id*. at 136). She had a faint discoloration on her forehead, a healing scratch, and a small bruise. (*Id*. at 137). On October 29, 2013, bruising was seen by Ms. Suchland and a visit ensued to Dr. Powell. (*Id*. at 139). There were some knee scratches from when H.A.R. said she fell on the sidewalk. As to a thigh bruise, her father hit her there and it hurt. (*Id*.). Even though having concerns, Pam Suchland did not ask Dr. Powell to make a report to CPS. (*Id*. at 141). The doctor did make a CPS report as a mandatory reporter. (*Id*.).

On November 12, 2013, after another visit with her father, H.A.R. came home complaining of an injury. (12/12/14 RP 143). She said her dad struck her bottom and scratched her because he and his girlfriend, Kristy Pierce, did not want her to touch the cat. (*Id*. at 145). He grabbed her hard on the left upper leg and it hurt enough to make her cry. (*Id*.). H.A.R. also indicated her stepsister, Hannah, hit her in the back. (*Id*.). All the while, Ms. Suchland sat quietly in the room and did not make eye contact with her granddaughter. (*Id*.). Dr. Powell noted a one-inch scratch on H.A.R.'s right buttock, but saw no bruises. (*Id*. at 146). The doctor called CPS again. (*Id*.).

On November 25, 2013, Dr. Powell saw a bruise below H.A.R.'s right knee and a smaller bruise mid-shin. (12/12/14 RP 147). She said her father kicked her in the shin. (*Id*.). Dr. Powell again called CPS. (*Id*. at 148). On a December 31, 2013 visit to the doctor, H.A.R. had a new scratch on her nose. She said her dad did it when she was jumping on the couch. (*Id*. at 149). On a January 14, 2014 visit to Dr. Powell, H.A.R. said her father slapped her on the back of the head and kicked her. (*Id*. at 150-51). The doctor felt H.A.R. was more guarded this time than on previous occasions. (*Id*. at 151). She believed H.A.R. when she said she was kicked and hit by her father. (*Id*. at 153).

Ritzville Police Chief David McCormick was contacted by Ana Schultz of CPS regarding child abuse and controlling behavior allegations against Mr. Reynolds involving H.A.R. (12/12/14 169). Although Ms. Schultz had pictures of H.A.R.'s bruises and scratches, she did not show any to the chief. (*Id*. at 172). If she had, Chief McCormick would have investigated. (*Id*. at 173).

Susan Elg, a licensed mental health professional, focuses her practice on family therapy for children and their parents. (12/2/14 RP 197-99). She had meetings with Mr. Reynolds and H.A.R. on October 28, 2014; November 4, 2014; November 11,

2014; and November 18, 2014. (*Id* at 200). At the first visit, Mr. Reynolds and H.A.R. did not greet each other when they arrived. (*Id*. at 202). She did not hug her father, but rather pushed him away. (*Id*. at 203). Ms. Elg observed there was no eye-contact between them and felt there was no intimate parent-child relationship. (*Id*. at 205). Even after the fourth visit, Ms. Elg believed there was a lack of familiarity and a connection between Mr. Reynolds and H.A.R. (*Id*. at 209-10). She noted a lack of emotional availability and the lack of attachment was more significant. (*Id*. at 210-11).

Ms. Elg did not see any coaching by the adults "in this particular family." (12/2/14 RP 212). As for the father-daughter relationship, Ms. Elg saw the father trying to look good to her and his daughter, but his responses did not reflect the nature of their relationship. (*Id*. at 216). Ms. Elg was court-appointed to do these visits. (*Id*. at 217-18). Although she could not say if Mr. Reynolds was an unfit parent, she opined it would be an actual detriment to H.A.R. if she were placed in his care. (*Id*. at 228, 235). Ms. Elg further noted there were occasions of emotional abuse by the father in his competitiveness with H.A.R. when playing keep-away,

laughing at her, and making her frustrated and upset. (*Id*. at 233). The allegations of abuse concerned her. (*Id*. at 235).

Mr. Suchland said H.A.R. lived with them full time the last 2 ½ to 3 years. (12/2/14 RP 255). Between February 2013 and January 2014, he had concerns about her after visits with her father. (*Id*. at 261). She would be quiet and silent for a couple of days sometimes before she snapped out of it. (*Id*.). The bruises and marks on H.A.R. also concerned him. (*Id*. at 262-63). He suspected she was being abused by her father. (*Id*. at 268). Mr. Reynolds did not pay child support. (*Id*. at 269). Mr. Suchland made no CPS or law enforcement calls. (*Id*. at 270). He saw more signs of abuse after overnights with her father started. (*Id*. at 272).

Pam Suchland said Mr. Reynolds did not try to get his daughter between February 2013 and January 2014. (12/2/14 RP 324). Under the residential plan, H.A.R. lived with her mother and Mr. Reynolds had visits. (*Id*. at 325-26). At various times in 2013, Ms. Suchland saw H.A.R. had bruises after visits with her father. (*Id*. at 330-40). On February 24, 2013, H.A.R. had a bruise and she said she was hit on the head by Hannah, her stepsister. (*Id*. at 334). On October 13, 2013, H.A.R. had another bruise after Hannah kicked her. (*Id*. at 340).

On September 5, 2012, the father came to the grandparents' home drunk and Amanda Suchland let him see H.A.R. (12/3/14 RP 451). With a seal puppet H.A.R. got at a yard sale, Mr. Reynolds grabbed her hand and would not let go. (*Id*.). Pam Suchland then realized everything her daughter said about Mr. Reynolds hurting H.A.R. was true. (*Id*.). After visits with father, she noted a bruise on H.A.R.'s upper left knee on May 18, 2013; bruises on her shin on October 28, 2013, after her father hit her; bruising on October 29, 2013; a scratch inflicted by the father on November 11, 2013; bruises on her right knee on November 24, 2013; bruising on the bridge of H.A.R.'s nose on December 30, 2013; and bruising on her leg on January 12, 2014. (*Id*. at 453-69). Ms. Suchland believed Mr. Reynolds was hurting H.A.R. (*Id*. at 473).

The mother testified Mr. Reynolds hurt H.A.R. (12/3/14 RP 374). In an apology letter to Amanda, he said he had been mean, insulting, degrading, and demeaning to her. (*Id*. at 402-04). Between February 2013 and January 2014, the father did not try to get H.A.R. back. (*Id*. at 408-09). Amanda Suchland consented to her parents being the legal guardians of H.A.R. (*Id*. at 411).

Dr. Teresa McDowell, a psychologist with the Spokane School District, also had a private practice and met H.A.R. the first

week of August 2013. (12/3/14 RP 577). Pam Suchland contacted Dr. McDowell. (*Id*. at 584). There was intake with Ms. Suchland over two sessions. (*Id*. at 585). The first session with H.A.R. was on August 7, 2013. (*Id*.). After more sessions, H.A.R. said her father hit her on several occasions and caused bruises. (*Id*. at 589-607). Dr. McDowell made at least three reports to CPS and wrote letters of concern. (*Id*. at 598, 600, 606). She opined it was very likely H.A.R. was being abused by her father, who was an unfit parent. (*Id*. at 608, 618).

Ms. Elg was re-called to give her views on July 2014 SCAN visitations. (12/4/14 RP 649-50). She was concerned about what was not stated in the SCAN reports and the presence of other people besides Mr. Reynolds at visitation. (*Id*. at 651). Since the parent-child relationship was at issue, Ms. Elg wondered why Ms. Pierce, the girlfriend, was there. (*Id*.). It appeared she was the one who facilitated the interactions and played a significant role. (*Id*. at 651-52). H.A.R.'s karate-chopping her father was of concern and hitting him with her flip-flops concerned Ms. Elg as this behavior was perhaps a reflection of how the two interacted with each other and it was unusual for children H.A.R.'s age to be physically aggressive with parents in visits. (*Id*. at 652-54). The father also

did not take a role in discouraging her from hitting him. (*Id*. at 655). Ms. Elg noted the father had regular visitation from February to December 2013, but stopped January 14, 2014, and did not resume until July 2014. She was concerned Mr. Reynolds did not see his daughter for over six months. (*Id*. at 660).

Ms. Pierce said Mr. Reynolds and H.A.R. had a normal father-daughter relationship and the abuse allegations were untrue. (12/4/14 RP , 665, 667). The allegations began to escalate October, November, and December 2013 to January 14, 2014. (*Id*. at 670). She acknowledged Mr. Reynolds did not pay child support in 2014 for H.A.R. (*Id*. at 674-75). The allegations started after the overnight visits started in June 2013. (*Id*. at 676).

Jeremy Reynolds met Amanda Suchland in the summer of 2007 and they separated around September 2012. (12/4/14 RP 679). H.A.R. was born on April 21, 2009. (*Id*.). A parenting plan was in place in Adams County. He had exercised visitation with his daughter. (*Id*. at 680-81). He was notified of the abuse allegations in June 2013. (*Id*. at 681). Mr. Reynolds testified the grandparents had made the allegations. (*Id*. at 682). CPS told him his daughter was seeing Dr. Powell. (*Id*.). He became aware H.A.R. was going to a therapist, Dr. McDowell, around September or October 2013.

(*Id*. at 683). Mr. Reynolds said he did not hit, pinch, kick, or physically harm his daughter. (*Id*. at 689-90). Each time he returned H.A.R. to the grandparents, she had no bruises. (*Id*. at 729). When asked by the social worker if the grandparents were the primary caretakers for H.A.R., Mr. Reynolds said she was living at the grandparents' home. (*Id*. at 706).

In its oral decision as to certain issues, the court determined Amanda Suchland was an unfit parent. (12/4/14 RP 786, 788). The court also stated Pam Suchland was not credible and Susan Elg had no credibility at all. (*Id*. at 784, 789-90).

On January 12, 2015, the court entered findings and conclusions on the nonparental custody petition. (CP 539). It denied and dismissed the petition for nonparental custody and de facto parentage action. (CP 544). An order of dismissal was filed, denying and dismissing both. (CP 573).

On appeal, the court affirmed the orders dismissing the de facto parentage action and nonparental custody petition. (App.). The Suchlands seek review of the Court of Appeals' opinion.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is warranted because the Court of Appeals decision

conflicts with decisions of the Supreme Court and other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

A person petitioning for de facto parentage must show that (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, personal in nature. *In re Parentage of J.B.R.*, 184 Wn. App. 203, 208, 336 P.3d 648 (2014). The only element at issue was whether the father consented to and fostered the parent-like relationship with the grandparents. (CP 93).

The relevant undisputed fact is that the grandparents "from the time the Mother moved into their home in 2012 until the present . . . have provided almost all of the physical care and most of the financial support for the child." (CP 196). Mr. Reynolds "found out" about this parent-like relationship in late 2013 or early 2014 because he had not been involved with H.A.R. (CP 198). From then to the present is the appropriate time frame to see whether the father consented to and fostered that relationship with the

Suchlands. *See J.B.R.*, 184 Wn. App. at 205-07 (prior attempts to visit not determinative).

Mr. Reynolds' conduct speaks for itself. The evidence is undisputed that he chose not to be involved in H.A.R.'s life until supervised visitation was agreed to in lieu of a shelter care hearing in a related dependency that was dismissed in October 2014. (CP 196-98). The court's conclusion did not flow from the findings as Mr. Reynolds' inaction shows he did indeed consent to and foster H.A.R.'s relationship with the Suchlands. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Review should be accepted under RAP 13.4(b)(1) and (2).

On the nonparental custody petition, the trial court decided the Suchlands failed to prove by a preponderance the requirements for granting a nonparental custody action that the father was an unfit parent and/or placement with the father would result in actual detriment to the child. *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013). By employing a preponderance of the evidence standard, the court did not use the correct quantum of proof for a third-party custody action. The proper standard is clear and convincing evidence. *In re Custody of A.L.D.*, 191 Wn. App. 474, 501, 363 P.3d 604 (2015). This was an error of law and was

itself is an abuse of discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

The Court of Appeals, however, determined use of the incorrect standard of proof did not matter because the Suchlands could not even meet their burden by a preponderance, much less by clear and convincing evidence. But the analysis is not so simple. It is true that credibility determinations are solely the province of the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). But the existence of facts cannot be based on guess, speculation, or conjecture. *Belli v.* Shaw, 98 Wn.2d 569, 574, 657 P.2d 315 (1983). Indeed, the findings must be supported by more than a scintilla of evidence. *Smith v. Yamashita*, 12 Wn.2d 580, 582, 123 P.2d 340 (1942).

Contrary to the Court of Appeals' conclusion that the evidence of abuse and parental unfitness was not so overwhelming that it compelled a decision in the grandparents' favor, there was such overwhelming evidence presented by the Suchlands that, more likely than not, the father physically abused H.A.R. Dr. Powell, a physician, and Dr. McDowell, a psychologist, both had concerns about H.A.R.'s safety. Dr. Powell made at least three

CPS reports after she saw bruises and scratches on H.A.R., who stated her father hit her, following visits with him. (12/2/14 RP 141, 146, 147). Dr. McDowell saw H.A.R. for counseling from August 2013 to December 2014. (12/3/14 RP 587, 615). There was already an open CPS referral. (*Id*. at 594). H.A.R. told Dr. McDowell her father hit her on several occasions and grabbed her face. (*See, e.g., id*. at 598, 600, 604, 606). The psychologist opined it was highly likely the father was abusing his daughter. (*Id*. at 608). H.A.R. consistently reported abuse by her father and never recanted. (*Id*.). After visits stopped in January 2014, H.A.R. no longer had marks or bruises and was doing well. (*Id*. at 611).

Ritzville Police Chief McCormick would have investigated child abuse allegations against the father if Ana Schultz of CPS had shown him pictures of H.A.R.'s bruises. (*Id*. at 169-173). Odessa Police Chief Coubra told Pam Suchland to document every time she noticed an injury on H.A.R. (*Id*. at 282-84). Ms. Suchland observed bruises and scratches on H.A.R. following visits with her father and was concerned Mr. Reynolds was hurting her. (12/2/14 RP 334, 338, 340; 12/3/14 RP 448, 452, 459-60, 463, 473). The controverting evidence was the father's testimony he had not hurt his daughter. (12/4/14 RP 686, 689-90).

The undisputed physical evidence and unbiased observations of mandatory reporters along with H.A.R's consistent disclosures about her father hitting her certainly was substantial evidence under a clear and convincing standard of his physically abusing her. *Ridgeview Properties*, *supra*. The evidence to the contrary came from the father's self-serving testimony; whether it should thus be discounted is also a credibility issue. *Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015).

Even though credibility is for the finder of fact, its resolution must still be based on more than a scintilla of evidence. *Smith*, 12 Wn.2d at 582. In light of the unbiased evidence showing the father had physically abused his daughter, the court's determination to the contrary was impermissibly supported by only a mere scintilla and was therefore insufficient. *Id*. Physical abuse of a child by her father makes the parent unfit. *See In re Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001).

In its findings, the trial court equated "danger" with "actual detriment," thus unduly limiting its consideration of "actual detriment" to that one factor. *See*, *e.g.*, *In re Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008); *In re Interest of Mahaney*,

146 Wn.2d 878, 51 P.3d 776 (2002). This was legal error and an abuse of discretion. *Spreen*, 107 Wn. App. at 349-50.

A trial court's custody disposition will not be disturbed absent a manifest abuse of discretion. *A.L.D.*, 191 Wn. App. at 504. Here, the court used the wrong standard of proof:

> I believe the law is very clear that the burden is on the – it could be very significant in close cases on the nonparents; however, I think the law is also clear it's not clear, cogent, and convincing evidence or beyond a reasonable doubt; it's the preponderance of the evidence standard that applies. (12/4/14 RP 781).

This is a legal mistake constituting an abuse of discretion and is reversible error. *Spreen*, *supra*.

Whether it was harmless as found by the Court of Appeals cannot be supported as the trial judge's on-the-record disdain for the opinions of guardians ad litem and experts in general and the grandmother in particular as "less than candid and less than credible" violates the appearance of fairness. (12/4/14 RP 778, 784-85). The court also disparaged court-appointed Ms. Elg's testimony:

> At the end of the day, regardless of what I decide in the case, I'm going to tell you this right now, it's not going to be based on anything that Ms. Elg testified to. I found no credibility with that lady at all. She was lobbied by the grandmother here

> very effectively. She had her mind made up and she was extremely biased. What did she say about that keep-away with the ball? Controlling and it was karate chops and these things. I found her testimony uncredible [*sic*]. I found it absurd. (*Id*. at 789).

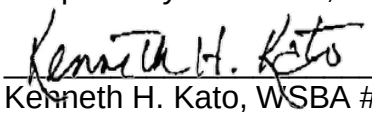
These statements on the record have nothing to do with whether the court found her credible based on her testimony, but rather whether the court's bias prevented it from assessing the evidence impartially no matter what the standard of proof. The Court of Appeals did not even address this issue. As a whole, remand is required as it cannot be said the error in the standard of proof used was harmless. The court manifestly abused its discretion when it committed legal error by employing the incorrect standard of proof. Review is warranted as the Court of Appeals decision conflicts with those of the Supreme Court and other decisions of the Court of Appeals. RAP 13.4(b)(1) and (2).

F. CONCLUSION

Based on the foregoing facts and authorities, petitioners Suchland respectfully urge this Court to grant their motion for discretionary review.

DATED this 14th day of November, 2017.

Respectfully submitted,



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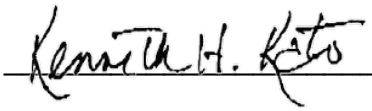
CERTIFICATE OF SERVICE

I certify that on November 14, 2017, I served a copy of the petition for review by USPS on Amanda Suchland, PO Box 171, Odessa, WA 99159; Jeremy Reynolds, 415 E. Broadway, Ritzville, WA 99169; and through the eFiling portal on Gloria Porter at her email address.



APPENDIX

FILED
OCTOBER 17, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Custody of H.A.R.,[†] Child.	No. 33013-3-III
PAMELA and THEODORE SUCHLAND, Appellants, and AMANDA MARIE SUCHLAND and JEREMY JOHN REYNOLDS, Respondents.	UNPUBLISHED OPINION

[†] To protect the privacy interests of H.A.R., a minor, we use her initials throughout this opinion. General Order of Division III, *In Re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

PENNELL, J. — Theodore and Pamela Suchland appeal the dismissal of the de facto parentage action and nonparental custody petition they filed to gain custody of their granddaughter, H.A.R. We affirm.

FACTS

The facts are known to the parties and need not be recounted in detail. Jeremy Reynolds and Amanda Suchland are H.A.R.'s biological parents. They have never been married. When H.A.R. was approximately two and one-half years old, Mr. Reynolds and Ms. Suchland separated and H.A.R. began living with her mother and her maternal grandparents. Shortly after the separation, Mr. Reynolds brought a parentage action seeking a residential schedule for H.A.R. After some legal disputes, Mr. Reynolds began visitation in 2013.

Throughout 2013, Mr. Reynolds exercised most of his visitation rights. Not long after visitation commenced, H.A.R.'s mother abandoned her. This left H.A.R. in the exclusive care of her grandparents. Mr. Reynolds was not made aware of this development.

During this same timeframe, the Suchlands grew concerned that H.A.R. had been physically abused. Child Protective Services became involved and the Suchlands filed a dependency petition in January 2014, based on the mother's abandonment and Mr.

Reynolds's alleged abuse. Mr. Reynolds denied any abuse and the dependency action was ultimately dismissed.

Not having found relief through the dependency, in August 2014 the Suchlands filed a nonparental custody petition for H.A.R., later amending it to allege de facto parentage. The court found adequate cause to proceed to trial on the nonparental custody petition but not on the de facto parentage claim. At trial, the court heard from several witnesses. The testimony regarding whether H.A.R. had been physically abused was mixed. The Suchlands presented testimony suggesting H.A.R. had been abused. Mr. Reynolds testified and denied any abuse. He also called witnesses to support his claims.

At the end of trial, the court determined the Suchlands had not proved by a preponderance of the evidence that Mr. Reynolds was an unfit parent or that he had abused H.A.R. The court found several of the Suchlands' witnesses not credible. In addition, the court did not consider photographs of H.A.R.'s bruising indicative of abuse. Although the court found H.A.R. was happy with her grandparents and thrived in their home, the court explained that the "best interest of the child" standard did not apply to a nonparental custody proceeding. Clerk's Papers at 541, 543. The court then dismissed the nonparental custody petition. The Suchlands appeal.

ANALYSIS

Adequate cause for de facto parentage

The Suchlands contend the trial court should not have dismissed their de facto parentage action because they presented evidence Mr. Reynolds fostered the Suchlands' parent-like relationship with H.A.R. The Suchlands point to: (1) Mr. Reynolds's delay in obtaining visitation, and (2) his nonpayment of child support. This court reviews a ruling concerning the placement of a child for abuse of discretion. *In re Parentage of J.A.B.*, 146 Wn. App. 417, 422, 191 P.3d 71 (2008).

"[A] *de facto* parent stands in legal parity with an otherwise legal parent." *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005). A person petitioning for de facto parentage must show the following:

> "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature."

J.A.B., 146 Wn. App. at 427 (quoting *L.B.*, 155 Wn.2d at 708).

The trial court properly held that the Suchlands failed to establish the first element of de facto parentage. While Mr. Reynolds could have done more to be with H.A.R. and

provide financial support,[1] he never abandoned his daughter. Nor is there any evidence Mr. Reynolds consented to the Suchlands taking over the role of H.A.R.'s parents. To the contrary, it was the efforts of Mr. Reynolds to exercise his rights as H.A.R.'s father that placed him in conflict with the Suchlands. The evidence presented by the Suchlands did not meet the rigorous standards required for establishing de facto parentage. *Cf. In re Parentage of J.B.R.*, 184 Wn. App. 203, 205-07, 214, 336 P.3d 648 (2014) (father's failure to seek relationship with daughter for more than 10 years evidenced consent to de facto parentage).

Nonparental custody petition

Chapter 26.10 RCW permits a third party nonparent to petition a court for custody of a child. Because such a request necessarily implicates the parent's fundamental right to raise his or her children without state interference, this court affords a parent considerable deference when balancing the parent's rights against both the interests of third parties and children's rights. *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Custody of J.E.*, 189 Wn. App. 175, 183-84, 356 P.3d 233 (2015). A court

[1] While Mr. Reynolds failed to pay child support, he did provide insurance coverage for H.A.R. The fact that the Suchlands did not want to use Mr. Reynolds's insurance cannot be said to be his fault.

will only grant the third party's petition when the nonparent establishes by clear and convincing evidence that "either the parent is unfit or custody with the parent would result in 'actual detriment to the child's growth and development.'" *J.E.*, 189 Wn. App. at 184 (internal quotation marks omitted) (quoting *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013)); *In re Custody of C.C.M.*, 149 Wn. App. 184, 205-06, 202 P.3d 971 (2009).

The Suchlands correctly point out that the trial court used the wrong standard of proof in assessing their nonparental custody petition. Instead of employing a preponderance standard, the court should have utilized the more stringent clear and convincing standard. But this error does not benefit the Suchlands. By finding the Suchlands failed to prove by a preponderance of the evidence that Mr. Reynolds was an unfit parent or dangerous to H.A.R., the trial court necessarily also found the Suchlands had failed to satisfy their burden of proof by clear and convincing evidence. Although the Suchlands did present some evidence of abuse and parental unfitness at trial, the evidence was not so overwhelming to compel a decision in their favor. The trial court's findings in favor of Mr. Reynolds have evidentiary support and therefore withstand scrutiny on appeal.

CONCLUSION

The trial court's orders dismissing the de facto parentage action and nonparental custody petition are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

November 14, 2017 - 8:28 AM

Filing Petition for Review

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