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No. 50665-3-II

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

In re the Custody of
P.M.S.

PAMELA SCHIMMEL and IRWIN SCHIMMEL
Respondents

and

MIA STANFILL (fka SCHIMMEL)
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

Washington law accepts as axiomatic that no one cares more about serving a child's best interests than the child's parents. This principle is enshrined in our constitutions and our statutes, yet it is repeatedly violated in this case, which concerns the custody of a child, P.M.S., born to Mia and Larry Stanfill.¹ The child is now eight. Larry is incarcerated. Mia has relied on her family for help with P.M.S. as she struggled with issues of her own, but prominent among those issues is her family's larger and extraordinary dysfunction. Her parents, Irwin and Pamela (the Schimmels), are the petitioners in this case. Irwin is an alcoholic and Mia is an adult child of an alcoholic. Irwin also now has Alzheimer's disease, placing even greater caretaking demands on Pamela. Partly to limit exposure to Irwin's drinking, P.M.S. spends considerable time in the home of Mia's sister and her husband (Theresa and Brian).

Mia appeals the court's order awarding custody of her daughter to the Schimmels. Despite her past troubles, Mia is presently a fit parent and returning P.M.S. to her custody will not cause the child any detriment. The court arrived at the contrary conclusion based on erroneous understandings and applications of the constitutionally and statutorily mandated legal standards.

¹ Because multiple parties share last names, their first names will be used to avoid confusion.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the petition for custody and limiting visitation. CP 57 (§ 3.4), CP 59 (§§ 3.2 and 3.3), CP 106 (§ 4), CP 111-112) (§§ 4-9).
2. The trial court erred by entering a restraining order against Mia. CP 59 (§ 3.5), CP 106 (§ 9), CP 103 (§ 14).
3. The trial court erred by denying an award of interim fees to Mia and denying her fees at the conclusion of trial. CP 60 (§ 3.6); CP 103 (§ 15); Supp. CP _ (sub 188).
4. The trial court erred by denying Mia a continuance and appointed counsel as an accommodation for her disability, including by violating the GR 33 standards for consideration of her request.
5. The trial court erred by denying Mia's motion to vacate. CP 78-81.
6. The trial court erred when it purported to enforce a CR 2A, despite clear evidence there was no agreement. CP 107 (§ 10).
7. The trial court erred by entering the residential schedule. CP 110-116.
8. The court erred by entering the following order (incorporating findings of fact and conclusions of law from 2015):

In the trial on the fitness/detriment phase, the stipulated Decree of Custody and Findings of Fact and Conclusion of

Law may be admitted to establish the existence of certain relevant facts.

CP 81; see, also, CP 78.

That Decree and those Findings included the following

It is in the best interest of the child to be placed in the custody of the petitioners, and at this time:

At the beginning of the case, both parents were unfit. Mr. Stanfill continues to be an unfit parent. Both parents agree that it is in the best interest of the child to be placed in the primary custody of the petitioners. (CP 54, ¶ 2.7)

The following reasons exist for limiting visitation of:

Respondent Mia Schimmel:

Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions.

A long term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions.

Significant mental health problems which affect the ability to perform parenting functions.

Any and all visitation between Mia Schimmel and the child shall be according to the Amended Temporary Custody [Order], signed 3/6/15, until further order of the court.

CP 55-56 § 2.9).

A continuing restraining order against Mia [Stanfill] is necessary because Mia [Stanfill] has a pending criminal case (Clark County Superior Court Cause #14-1-02076-7) in which there is a No Contact Order with Pamela Schimmel. If that No Contact Order is modified, rescinded, or expired, a continuing restraining order is necessary in this current matter in so far as that Mia Schimmel is

excluded from the Petitioner's home, work place, or the child's school.

CP 56 (§ 2.11).

It is in the best interest of the child to reside with Irwin Schimmel and Pamela Schimmel.

CP 57 (¶ 3.2).

9. The court erred by entering the following findings of fact and conclusions of law:

At the time this case was filed: The child was not living with Mia Schimmel. The child had been living with Irwin Schimmel and Pamela Schimmel since December 30, 2012 at the time of filing. Mia Schimmel was not a suitable custodian.²

...

Mia [Stanfill] is currently unfit, or, even if she may be fit, the child will suffer actual detriment (harm) to her growth and development if she lived with Mia [Stanfill].

...

Mia Schimmel failed to submit to random urinalysis testing on a color-line at Lifeline Connections as ordered by the court, signed March 6, 2014, and incorporated in the initial Findings of Fact and Conclusions of Law and the Decree of Non-parental Custody, both dated August 7, 2015; she failed to exercise visitation through Innovative Services NW from the end of September 2016 through her date of trial; she had inconsistent visitation in 2016, which led to termination of supervised visitation by Innovative Services NW in September 2016, which as not resumed; the parties were able to arrange a visit in December 2016, which was

² This finding is erroneous and at odds with the court's prior finding that the child had not been in Mia's custody since 2014, not 2012. CP 54. The court's "suitable custodian" finding is challenged because the time reference is unclear.

not supervised by ISNW; she was inconsistent in initiating telephone calls with the child as allowed by prior court order; she has a history of unstable housing; her recent criminal history resulted in bench warrants, one of which was served on her during a day scheduled for trial in this action; she failed to demonstrate that she is able to provide for the child's basic financial needs; she also failed to work toward reunification; failed to parent; failed to be involved in child's education; and also allowed telephone visits by Mr. Stanfill while he was in prison, in contravention of court order.

The Findings and Conclusions entered by this Court on 8/7/15 are hereby incorporated by reference and supplemented hereby.

CP 101 (¶ 8)

It is in the child's best interests to live with the Petitioners because:

Petitioners had physical custody of the child at the time this case was filed, due to the unfitness of both parents, and subsequently have had physical custody of the child since October 2014. They each have a strong emotional bond with the child and have provided for the child throughout this case.

CP 101 (¶ 9).

The visitation ordered is reasonable. Findings about any reasons for limiting a parent's visitation are summarized [in] the *Residential Schedule* and/or the *Non-Parent Custody Order*. These findings are supported by the following facts:

Respondent Mia Schimmel:

She left the child in the care of Petitioners prior to the filing of the Petition. After the court returned the child to her care, the court removed the child from her care in October 2014. She had inconsistent visitation with the child, including periods with no visitation with the child.

Visitation for Respondent Mia Schimmel shall be as follows:

Two supervised visitations per week, for two hours each. Any and all visitation between Mia Schimmel and the child shall be supervised by an appropriate and protective supervisor selected by Petitioners (currently Innovative Services NW) and/or a supervisor chosen by the Petitioners. Petitioners may increase the duration or frequency at their discretion. If Petitioners choose to provide more than the visitation outlined herein, this does not create a right to Mia Schimmel for enforcement of such increase beyond the minimum frequency and duration set forth herein.

Mia Schimmel may initiate a call to Petitioners between 7:00 p.m. and 7:30 p.m. to speak to the child every Tuesday and Thursday for up to ten (10) minutes per call. Petitioners shall ensure the child is available for such calls. If such call is missed, the Petitioners shall return the call if Mia Schimmel indicates by message or voice mail that she would like a return call.³

Mia Schimmel may send correspondence and appropriate gifts (e.g., holidays and birthday presents) to the child.

CP 102 (¶ 10).

A continuing restraining order against Mia Schimmel is necessary because Mia Schimmel has previously had issues with following previous restraints against contact and such contact has been a disruption to the petitioner(s) and/or the child.”

CP 104 (¶ 14).

The court finds that Mia Schimmel lacks credibility and is inconsistent in her testimony. Further, Mia Schimmel

³ The residential schedule provides Mia “may contact the child by phone during reasonable hours (which excludes calling between 8:00 p.m. and 7:00 a.m.) no more than once per day. If the call is missed, [Mia] shall leave a message indicating that she called, the phone number to call her back (if necessary); and then the Petitioners shall ensure the child calls her back, within the same day, if reasonably possible.” CP 115 (¶ 11).

provided inaccurate and/or incomplete information to Dr. Poppleton. Mia Schimmel's actions and lack of actions throughout this matter show a continuing abandonment of the child.

Mia Schimmel was prohibited from attending the child's school after having arriving unannounced at an extra-curricular activity involving the child and attempting to take the child on a visit, which was outside the visits ordered by the Court. The ensuing disruption was harmful to the child.

CP 103 (¶ 16).

[Mia Stanfill] has one or more of these problems as follows:

Abandonment – She intentionally abandoned a child listed in 2 for an extended time.

Neglect – She substantially refused to perform her parenting duties for a child listed in 2.

CP 111

Issues Pertaining to Assignments of Error

1. Did the court erroneously apply a “best interests of the child standard,” equating it to the “detriment” and “unfitness” standards?
2. Did the court improperly rely on evidence and findings taken and made during a 2015 trial the mother did not attend, since it was a trial related to the father, she having stipulated to temporary custody and only that?
3. Did the court deny the mother her right to a trial at which her fitness is presumed?

4. Did the court erroneously place the burden on the mother to establish her present fitness?

5. Did the court erroneously find the mother had abandoned the child when the court had previously restrained the mother's ability to contact the child and the child's custodians and despite the mother's ongoing efforts to regain custody of her child?

6. Did the court erroneously find the mother unfit based on historical actions rather than present unfitness?

7. Did the court erroneously find detriment based on evidence inadequate under the law of our state?

8. Did the court improperly deny the mother's request for interim attorney fees?

9. Did the court erroneously deny the mother her requested accommodation, i.e., continuance and appointment of counsel?

10. Should the mother receive her fees on appeal?

III. STATEMENT OF THE CASE

The facts of this case, procedural and substantive, are complex. This statement of the case provides an overview, with elaboration (and additional record citation) included in the argument section.

Mia Stanfill is one of four children born to Irwin and Pamela Schimmel. Irwin, an extraordinarily successful Clark County

entrepreneur, is also an alcoholic. When Mia was about six years old, Pamela nearly left Irwin because of his drinking. After this, Irwin stopped drinking “pretty much.” RP 490. What “pretty much” means is unclear, since he and Pamela testified unreliably on this question and no independent inquiry was made. However, Irwin admitted drinking while he was parenting Mia. RP 1044. Irwin has also been drinking while acting as custodian for P.M.S. In fact, shortly before the court’s final orders in 2017, Irwin had been convicted of a DUI and charged with having an open container in the car (bottle of vodka); consequently, he has to use an Intoxalock device on his vehicle. RP 1045, 1048; Ex. 25, 51. He also has Alzheimer’s, for which he is being medicated. By his report, before his DUI, he had been drinking around three mixed drinks at home most nights while watching TV. RP 1048-1049.

Mia, now 35, and an adult child of an alcoholic, has faced many challenges. Mia alleged that her father sexually abused her as a young girl; though Irwin has denied doing so; these allegations have not been investigated or adjudicated. RP 488-489. As early as age 14, Mia became defiant, experimented with drugs, and suffered medical illnesses, prominently gastrointestinal; she has now been diagnosed with pulmonary hypertension, a condition she will eventually die from. Her relationship with her parents became largely a contest for control. For example, an

accomplished horsewoman, Mia was prohibited by Irwin from further competition because she refused to “behave.” RP 1054. However, he continued to take the other children to horse shows.

Irwin and Pamela and Mia also fought over school and the company Mia kept. They sent her to various therapeutic boarding schools, though, as the only medical expert to testify noted, the success of such programs depends on addressing the whole family context, which never happened. RP 507. Rather, the relationship between Mia and her parents was and is contentious, with her parents, for example, disapproving her choices, including her choice to marry Larry Stanfill. RP 832-834; 1088-1090. Their child, P.M.S., was born in 2010.

Larry’s trouble with the law, involving drugs and violence, ended him in prison in 2012. At this point, Mia was divorcing Larry and struggling with her health. She relied on her family for help with P.M.S., including leaving the child with her parents or a neighbor. In 2013, her parents sought custody. In 2014, after several hearings and changes in residential placement, temporary custody was given to the Schimmels, with Mia having supervised visitation. CP 10-19. The court also imposed on Mia various drug testing and evaluation requirements. CP 18.

In 2015, a trial was convened. On the first day of trial, Mia and the Schimmels came to the “broad strokes” of an agreement regarding custody

of P.M.S., but only custody, not fitness or other conditions about which they were openly in dispute. RP 8, 18-20. The court did not resolve those disputes; the parties indicated they would continue their negotiations until arriving at a CR 2A stipulation. RP 28-31. Mia and her counsel were dismissed from the trial, which continued as to Larry, against whom the petition was granted (prohibiting contact with his daughter pending his release and satisfaction of various requirements.) CP 58-61.

Mia and her parents were never able to reach a CR 2A agreement (as described in §IV.C, with all record citations). The orders entered following Larry's trial in August 2015 granted custody to the Schimmels, as to both Mia and Larry, but as to Mia based only on her stipulation as to standing (i.e., no suitable custodian). Visitation was subject to the temporary order entered March 2015. They also set the matter for trial on the petition as it pertained to Mia, then Mia's counsel withdrew. Supp. CP _ (sub 136, 138).

On May 9, 2016, now represented by new counsel, Mia filed a Motion and Declaration for Order Vacating Decree & Amended Findings. CP 63.⁴ The court agreed the August 2015 order did not satisfy the

⁴ Mia did not have consistent representation, as set forth below. See § IV.E. Over the five years of these proceedings, Mia was often pro se and sometimes represented by different attorneys, often appearing at the last minute. Mia unsuccessfully sought funds to retain counsel or for appointment of counsel as an accommodation. RP 589, CP 91; CP 82, RP 583-585; Supp. CP _ (Sub 212).

requirements for nonparental custody, but denied Mia's motion to vacate. CP 80-81. Over the next year, over multiple hearings, including three separate evidentiary proceedings, the court went back and forth about whether it needed a trial on the Schimmels' petition. See §IV.C. For much of the evidentiary proceedings, the court operated on the premise it was deciding only what visitation to allow Mia (not her present fitness or detriment to the child), having changed its mind (several times) about the effect of the August 2015 order. See §IV.C.

Indeed, during the 2016-2017 trial phases, much of the evidence consisted of the Schimmels and Mia fighting over who was responsible for missed visits and phone calls. Mia sometimes missed scheduled visits, but the Schimmels admitted they gave priority to P.M.S.'s activities, including travel, over visitation and phone calls with Mia. RP 1035-1040; 1061-1062; 1079-1080. The GAL agreed "both sides" contributed. RP 817.

Despite this inconsistent contact, no one disputed the strong bond between Mia and P.M.S. RP 199-200; RP 768; RP 424-427. The only expert to testify, court-appointed evaluator Dr. Poppleton further testified to Mia's fitness, after an assessment that included psychological testing. RP 389-436; Ex. 29. Despite a history of drug use, Mia has completed treatment and submitted drug-testing results. She did have a UA that tested positive in the summer of 2015, but Mia submitted evidence it was

likely the weight loss drug she was using (for her pulmonary hypertension). Ex. 17. In any case, no evidence was presented of any current substance abuse by Mia. Her NA sponsor testified to her ongoing commitment to sobriety, though the court simply chose not to believe that testimony. RP 912-918. Mia's parents speculated regarding Mia's current drug use, but they lacked personal knowledge since their contact with Mia was extremely limited. See, e.g., RP 834 (Pamela testified that she is not in her daughter's life anymore); RP 1055 (Irwin cannot talk to Mia). The GAL had no contact with Mia since her 2015 report. RP 188.

Dr. Poppleton testified to the family's complex and dysfunctional dynamics, including issues of power and control. RP 507- 508. While he saw no reason to deprive Mia of custody, because of the family pathology, he proposed a case manager to mediate between the parties while transitioning P.M.S. back to her mother's care. RP 435-436.

The court wholly disregarded Dr. Poppleton and focused entirely on what it identified (often incorrectly) as inconsistencies in Mia's testimony. It ignored the Schimmels' inconsistencies and the admitted alcoholism and Alzheimer's. It relied on the August 2015 findings from the trial Mia did not attend and, despite Mia's persistent efforts to regain custody, found abandonment. Despite no evidence of current substance abuse, the court found unfitness. The court found further that if Mia was

not unfit, P.M.S. would suffer actual detriment, with no specificity. The only evidence about detriment came from the Schimmels, who worried Mia would cut off contact between them and P.M.S. and not take her to her activities. See §IV.C (for elaboration). No one testified that P.M.S. needed special care her mother could not provide. Nevertheless, the court awarded custody of P.M.S. to the Schimmels. Mia appeals. CP 117.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

Custody orders are reviewed for an abuse of discretion. *In re Custody of C.D.*, 188 Wn. App. 817, 826, 356 P.3d 211 (2015). However, questions of law are reviewed *de novo*. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343, 227 P.3d 1284 (2010); *see, also, In re Dependency of M.S.R.*, 174 Wn.2d 1, 13, 271 P.3d 234, 241 (2012) (constitutionality a question of law). Findings are reviewed for substantial evidence, and challenged here for lack thereof. *C.D., supra*. Failure to apply the law correctly is an abuse of discretion.

B. THE STANDARD FOR NONPARENTAL CUSTODY.

As background and starting point, it must be noted that nonparental custody is an extraordinary remedy, since it abridges a parent's constitutional right. *In re Custody of B.M.H.*, 179 Wn.2d 224, 236-239, 315 P.3d 470 (2013) (available only in extraordinary circumstances); *see,*

Troxel v. Granville, 530 U.S. 57, 77, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (the United States Supreme Court has “long recognized” 14th Amendment protects “a parent's interests in the nurture, upbringing, companionship, care, and custody of children”); *In re Luscier*, 84 Wn.2d 135, 137 and 139, 524 P.2d 906 (1974) (declaring under Const. art. 1 § 3 that Washington “no less zealous” in protecting families).

Washington law permits nonparental custody because the statute, as interpreted, protects the parent’s right by imposing on petitioners a heavy substantive burden, which must be satisfied by clear and convincing evidence. *B.M.H.*, 179 Wn.2d at 236 (petitioner must prove unfitness or detriment to the child’s growth or development); *In re Custody of C.C.M.*, 149 Wn. App. 184, 205, 202 P.3d 971, 981 (2009) (proof by clear and convincing evidence). In short, nonparental custody petitions may be granted only in “unique and extreme circumstances.” *In re Custody of L.M.S.*, 187 Wn.2d 578, 387 P.3d 707 (2017); *Id.*, at 579 (“extreme and unusual”). In such proceedings, a parent is entitled to a presumption that placement of a child with the parent serves the child’s best interests. *In re Custody of Shields*, 157 Wn.2d 126, 146, 136 P.3d 117, 127 (2006).

Thus, nonparental custody operates in the same plane as other state actions infringing upon a parent’s constitutional right to the care and custody of a child, such as dependency and termination proceedings.

However, unlike with those proceedings, no mechanisms exist in nonparental custody proceedings to promote family reunification. *See, e.g.*, RCW 13.34.025 (coordination of services); RCW 13.34.090 (rights to counsel, to be heard, etc.); RCW 13.34.092 (right to counsel); RCW 13.34.180 (regarding provision of services). RCW 13.34.020 expressly declares reunification as our policy:

The legislature declares that the family unit is a fundamental resource of American life, which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized.

There is no reason to value less a family involved in a nonparental custody action. Rather, “[m]aintaining the family unit should be the first consideration in all cases of state intervention into childrens' lives.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522, 527 (2011) (internal citations omitted). This policy, as expressed in our statutes and cases, is also constitutionally mandated. *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 313, 376 P.3d 350, 360 (2016) (termination case), citing Wash. Const. art. I, § 12; see, also, Const., amend. 14.

Here, the trial court awarded custody of Mia’s child to her parents on two bases: unfitness and detriment. CP 101. Neither of these was proved, let alone by clear, cogent and convincing evidence. Indeed, Mia never truly received a trial at which she was presumed fit, as our law

requires. Altogether, Mia was denied in these proceedings the statutory and constitutional protections to which she was entitled. Instead, the trial court exercised its own preferences for the grandparents as custodians, essentially applying a “best interests” analysis, though Mia disputes even that standard would justify an award of custody to her parents, a legal error amplified by the procedural irregularities pervading these proceedings. In sum, here, as in *L.M.S.*, Mia “has a positive relationship” with her daughter and “is able and willing to raise her.” 187 Wn.2d at 571. The decree awarding custody to the Schimmels should be vacated and P.M.S. returned to the custody of her mother.

C. THE EVIDENCE DOES NOT AS A MATTER OF LAW ESTABLISH THE MOTHER TO BE UNFIT OR ANY FACTS JUSTIFYING NONPARENTAL CUSTODY.

1) Introduction

Mia has been without custody of her child for three years and counting. Despite having to run a blockade of impediments imposed by her parents and sister and brother-in-law, she has managed to maintain and strengthen her parent-child bond. RP 434. She concedes she has struggled in the past with substance abuse, gotten into legal problems, and will forever have to work hard to protect her health. However, as supported by Dr. Poppleton, the only neutral witness in the case with current information, Mia has the present ability to provide basic nurture,

health, and safety to her child. RP 433-434. Dr. Poppleton made this assessment based on psychological testing and other objective criteria, not solely on Mia's self-reporting. RP 391-436. Even after the Schimmels suggested Mia did not give him a full history of her mental health and drug abuse, Dr. Poppleton noted it would not change his assessment of her current fitness. RP 434-444; RP 503-504. Nor is there evidence of detriment, the other basis upon which nonparental custody may be granted, as elaborated upon below. The fundamental inadequacy of the court's findings is part and parcel with the multiple legal errors, procedural irregularities, and fundamental unfairness of the trial level proceedings.

2) Procedural History and Posture.

More than two years elapsed between the Schimmels' 2013 custody petition and trial convened in the summer of 2015. Mia, present with counsel (Gross), and the Schimmels agreed in "principle" to the "broad strokes" of an agreement about custody, though Mia on the record expressly disavowed any agreement to a finding of unfitness. RP 8; RP 19. For their part, the Schimmels wanted to insert conditions, broadly described as Mia abiding by "the rules." RP 19. The GAL suggested conditions and requirements to be imposed on Mia, to which Mia

objected, including on the basis that she lacked the financial ability to comply with that much monitoring and supervision. RP 20-24; RP 25-26.

The court declined to rule on these disputed matters and instructed the parties to address the GAL's concerns in the final order "by way of looking at the best interest of the child." RP 26-28. The parties indicated they would later provide a CR 2A for the court to incorporate into final orders. RP 28-31. Mia and her attorney left the courtroom and the court proceeded to try the nonparental custody action against Larry Stanfill, concluding with an order awarding custody to the Schimmels based on the child's best interest and on Larry's present unfitness. CP 54 (¶ 54).

With respect to Mia, the 2015 order was based solely on an agreed finding as to standing. CP 54 (¶ 2.6: "neither parent was a suitable custodian at the beginning of the case"). The order expressly noted that while both parents were unfit at the beginning of the case, only Larry continued to be. CP 54 (¶ 2.7).

Despite Mia's absence from trial, the court made additional findings as reasons to limit the visitation of Larry and Mia. CP 55-56. With respect to Mia, the court found "willful abandonment ... long-term impairment from ... substance abuse ... [and] mental health problems." CP 55-56 (¶ 2.9). The court entered a conclusion that "[i]t is in the best interest of the child" to reside with the Schimmels and granted custody to

them. CP 57. The order restrained Mia from contact with her mother, Pamela, and excluded Mia from the Schimmels' "home, work place, or the child's school." CP 56. The order made Mia's visitation subject to a temporary order entered March 6, 2015, which included conditions and constraints on Mia. CP 56 (§ 2.9); see CP 37-42.

These conditions appear to be the subject of the ongoing dispute between Mia and her parents, which they had left court to resolve by CR 2A stipulation. The parties never reached an agreement. Supp. CP _ (sub 123). Nevertheless, on August 14, 2015, the Schimmels moved for permission to present "the CR 2A Agreement and Stipulation ... in order to memorialize the oral stipulations placed on the record on July 29, 2015." CP 62. This motion was stricken expressly because the parties could not agree beyond the "broad stroke" of the agreement made on the record, i.e., that the Schimmels have custody of P.M.S. while Mia made efforts to address her issues. RP 17; Supp. CP _ (sub 134). *See, In re Custody of A.L.D.*, 191 Wn. App. 474, 506, 363 P.3d 604 (2015) (nonparental custody often involves parent's temporary reliance on family members during difficult times). Mia's counsel indicated the case should be set for trial because no agreement was reached. RP 161; CP 64. The matter was set for trial. Supp. CP _ (sub 136, 137). However, Mia's

counsel then withdrew; two months later, new counsel (Spencer) appeared. Supp. CP _ (sub 138, 139).

Shortly thereafter, in May 2016, Mia moved to vacate on the basis that the 2015 order adjudicated only the custody issue as to Larry Stanfill. CP 63-67. The court conceded Mia had stipulated only to standing, a stipulation “insufficient to allow the court to limit or control [her] constitutionally protected interest to raise her child without state interference.” CP 80. The court expressly found, “there was no agreement as to unfitness or actual detriment.” CP 81.⁵ Or, as ruled in virtually identical circumstances, Mia was entitled at this point to a trial at which she is presumed fit. *In re Custody of Z.C.*, 191 Wn. App. 674, 704, 366 P.3d 439, 453 (2015), *as amended* (Dec. 17, 2015).

Later that month, reversing itself, the court declared the trial would proceed only on the visitation issue. See RP 171 (5/20/16). When trial commenced on June 20, the court declared the 2015 order was based on what it characterized as a CR 2A (though obviously not the CR 2A discussed in court in 2015) and “that the parties had resolved the issue of custody and, within that, the underlying fitness for [sic] actual detriment.” RP 183. Accordingly, the court declared, the trial would concern itself

⁵ The court goes on in this order to declare it “will make a ruling as to residential schedule,” but first must find unfitness and detriment, as if those critical inquiries were a foregone conclusion. CP 81; see, also RP 575.

only with “the issue of particularized details around visitation.” RP 183.

In other words, Mia would not get a trial at which she was presumed to be a fit parent.

After two days of testimony and closing arguments in June 2016 on the visitation issue, the court questioned whether it could enter a visitation schedule without having had a trial on unfitness and detriment. RP 569-570 (7/12/16). The court and counsel (Sundstrom for Mia, substituting for Spencer) debated the procedural posture of the case and whether the court could modify the temporary custody order or what. RP 568-577. The court decided to set the matter for another trial, which convened on August 26, by which point, Mia was without counsel. RP 579. Again the court addressed the procedural posture of the case, acknowledging it had been wrong to proceed to entry of a residential schedule before trying the issue of unfitness. RP 579. The court noted it had not heard that issue “[b]ecause of the settlement that occurred.” *Id.* The court declared it would hear testimony about unfitness because it “is an important point.” RP 580. However, the court said it already had “heard testimony which assumed that you were unfit,” but now that issue needed to “be thoroughly fleshed out” because the documents so far had

not “closed that loop for me.” RP 580.⁶ The court then addressed and denied Mia’s motion for attorney fees, discussed in the section below.

Trial reconvened on November 29, with Mia still representing herself. RP 587. After a full day of testimony, trial recessed and reconvened in April 2017, with counsel (Slate) now appearing for Mia and the court declaring it would like to finish the case that day. RP 787.

At the conclusion of the trial, the court granted custody to the Schimmels and entered orders varying little from the 2015 orders. RP 1149-1151 (“all other portions of that [3/6/15] order remain intact and will be incorporated into this new order with the additional findings regarding unfitness. That was the only thing that was lacking”). RP 1151. The court found RCW 26.09.187 and RCW 26.09.004 (RP 681-682; RP 864) controlling and incorporated the orders entered on August 7, 2015. CP 101 (“The Findings and Conclusions entered by this Court on 8/7/15 are hereby incorporated by reference and supplemented hereby”).⁷

⁶ It is not clear in whether the testimony to which the court refers occurred in a proceeding Mia attended (i.e., the 2015 trial).

⁷ The court earlier, in its ruling on the motion to vacate, also alluded to the earlier proceeding, declaring that in the upcoming trial, the August 2015 orders “will be relevant to narrow the issues and establish relevant facts.” CP 78. At the end of trial, the court also referred to a previous showing of unfitness. RP 892.

3) The court's orders are improper procedurally and substantively.

First, for multiple reasons, the court cannot rely on findings entered in the 2015 proceeding. By law, Mia is entitled to a “blank slate” trial on nonparental custody. *Custody of Z.C., supra*. Moreover, she expressly repudiated any findings of unfitness, and those findings entered as justifying limits on her visitation cannot be used to waive her substantial rights. *Z.C.*, 191 Wn. App. at 702-703; *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980) (attorney "has no authority to waive any substantial right of his client" absent specific authorization). Nor were the findings part of a CR 2A stipulation, since the record makes clear the parties failed to reach agreement. *In re Marriage of Ferree*, 71 Wn. App. 35, 40, 856 P.2d 706 (1993); *see, also, Condon v. Condon*, 177 Wn.2d 150, 157, 298 P.3d 86, 89 (2013) (“The purpose of CR 2A is to give certainty and finality to settlements.”). If there was one thing on which the parties agreed in open court it was that they did not have an agreement.

Finally, the court could not rely, in making the findings, on evidence adduced in the trial involving Larry, from which Mia and her counsel absented themselves. RP 31. Petitioner's counsel observed the problematic nature of admitting evidence about Mia when she and her

counsel were absent, but the court declared her interests “resolved” and, therefore, “she doesn’t have input as to what we admit at trial.” RP 44.

For all these reasons, the court could not, two years later, reach back and rely on those proceedings to support factual findings to deprive Mia of custody. *See, e.g., In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737, 740 (2014) (due process right to be present at trial); *Vandercook v. Reece*, 120 Wn. App. 647, 651–52, 86 P.3d 206, 209 (2004) (court could not rely on testimony in different proceeding).

The court’s incorporation of the 2015 orders is further problematized by the court’s mistaken understanding of the proper standard and procedural posture, meaning the court’s narrowing the trial to an evaluation of visitation only (again, as if the necessary factual bases for custody itself were a foregone conclusion). Most of the trial proceedings occurred with the court and all participants laboring under this erroneous framework, fundamentally tainting everything. The court effectively bypassed the actual task and placed the burden on Mia to justify visitation rather than presuming her fit for custody, as our law requires. This burden-shifting is evident in the court’s oral ruling, where, essentially, the court found Mia unfit because the court found her lacking in credibility, whether because of intent, absentmindedness or misunderstanding. RP

1144. Close examination of the court's ruling and the evidence reveals just how completely the law was misapplied here.

In particular, the court did not ever actually address the substantive requirements for nonparental custody. It diverted mainly to an attack upon Mia's credibility, failing to recognize how little that answered the legal issues in play. For example, the court spent a lot of time talking about Mia and drug-testing, noting it did not know why Mia missed some UAs and could not track her testimony on why she stopped the UAs. RP 1142-1143.⁸ However, the material fact is there is no evidence of drug use by Mia after 2015. Quite the contrary. In the June 2016 trial, Mia provided extensive testimony and exhibits related to her treatment, UAs and hair follicle tests from Lifeline and KLEAN. RP 303-316. Her sponsor testified that Mia had been working the program for over a year and the sponsor had no reason to suspect relapse after 2015. RP 917. Whether or not the court believed Mia's sponsor or Mia herself, it could not find current drug use based on nothing more than disbelieving her denial. In other words, the court had no actual evidence of current substance abuse.

⁸ Mia supplied a hair follicle tests and UA results to the court. Ex. 13 and 15 (6/2016 trial). She completed the intensive outpatient treatment recommended by her assessment at Lifeline. Ex. 40, Ex. 41. The order did not require her to get treatment at Lifeline, only an assessment, with which she complied. After starting rehab, she had nine clean UAs and did have one "dirty" UA that was determined to be consistent with a weight loss drug she was taking. Ex. 17 (6/2016 trial). The next UA taken on 8/5/2015 was negative. Ex. 17 (6/2016 trial).

Historical substance abuse is not sufficient. *See L.M.S.*, 187 Wn.2d at 573 (disregarding father's historical domestic violence).

The court also found Mia had misrepresented to Dr. Poppleton whether she had been diagnosed with a mental illness and was inconsistent in past representations on the subject. RP 1142-43. The court recognized this evidence did not establish Mia had a mental illness. RP 485. On the pertinent question of whether Mia has any illness affecting her ability to care for her child, Dr. Poppleton did not diagnose Mia with a mental illness and found no concerns about her ability to parent her child. RP 400-401; see, also, RP 486 (Pamela confirming earlier testing revealed no mental illness). (As discussed below, the court ignores the mental health of the Schimmels and their unreliable reporting of same.)

The court's misapprehension of the material facts and issues continues, as for example in its expressed concern about medical releases. RP 1143-44.⁹ The court also noted Mia was inconsistent about allowing her daughter to speak with Larry and about naming the 12 steps. RP 1145.¹⁰ Because of these inconsistencies, the court says it does not believe Mia regarding missed visits and phone calls with her daughter. RP 1145.

⁹ Mia submitted all of the signed releases required by court order. Ex. 19; RP 304-316.

¹⁰ The dispute about the father-daughter contact concerned mainly whether it occurred during Mia's supervised visits. See, e.g., RP 219-221.

Here, again, the court has both the question and the answer wrong. Irwin conceded he cancelled visits and did not require the child to be available for phone calls. He claimed the child's activities (dance, soccer, horses, and homework) made her unavailable for visitations and phone calls. RP 1035-1040; 1061-1062; 1079-1080. (Irwin also admitted P.M.S. likes to talk to her mom. RP 1074.) Pamela confirmed "both sides" missed phone calls and that they do not make the phone calls or visitation with Mia a priority. RP 817. In fact, Pamela testified she made the decision to limit Mia's visits to one time per week because of the child's activities. RP 844. Additionally, Mia is required to call around (number to number) to find her daughter at the designated time for phone calls. RP 273-275; RP 817; RP 1040. The GAL endorsed that missed calls and visits resulted from "problems from both sides," though most problems attributable to Mia were historical. RP 213.

In other words, the court simply ignored the evidence in its rush to indict Mia, concluding from the "inconsistencies" in her testimony that there is "ongoing abandonment." RP 1145. The court acknowledges it is relying on historical information, but declares Mia has "taken no action since then to form a relationship with this child where, again, she hasn't really parented this child ever." RP 1146; see also RP 1146-49.

Certainly, veracity is a desirable quality in any parent, but no more so than in a custodian, yet the court remains unperturbed by the Schimmels' unreliable testimony, as, for example, about Irwin's alcoholism. First, he denied he was an alcoholic (RP 1040), then, faced with his recent DUI (and his deposition), he changed his testimony, though minimized by claiming he was only an alcoholic "this last time." RP 1041-1049. After continuing to deny relapse, he then admits that he had a few drinks at home and then got in the car. RP 1043; Ex. 25, 33.

When asked about Irwin's drinking in the first trial Mia attended (June 2016), Pamela testified she had left him temporarily because of his heavy drinking, when Mia was six or seven (leaving the children overnight in his care). RP 489-490. She returned when he "pretty much" stopped drinking. RP 489-490. Pamela also testified that she started leaving P.M.S. with Theresa (Mia's sister) because she did not want to expose the child to Irwin's drinking. RP 819; see, also, Ex. 11 and RP 234-235 (P.M.S. talking about Irwin's drinking). Additionally, Pamela testified that Irwin did not tell her about the DUI, but instead she found the citation in his vehicle. RP 811-812.

Yet the court seemed determined to minimize inconvenient truths about the Schimmels, the custodians who could not get their stories

straight about Irwin's alcoholism or about much else.¹¹ The judge seems to put a lot of weight on the GAL, who dismissed Mia's report of her father's drinking as exaggerated. RP 232. Only when Irwin is actually arrested for driving drunk and with an open container are the Schimmels forced to admit his longstanding and ongoing problem, with implications not only for their current fitness but as corroborative of Dr. Poppleton's testimony about the family dynamics and his insight into Mia's struggles as a child of an alcoholic. Irwin clearly drank heavily during Mia's childhood. During this time, Mia accused Irwin of sexually abusing her, the same time Pamela left Irwin. RP 488-89. Not only does Irwin transport Mia's daughter, he decides what is more important: a dance class or time with Mia, a horse show or visit with Mia, a soccer game or a phone call from Mia. Additionally, her father decides when and for what Mia will receive money out of the partnership. RP 655, 1108-1109, 1112. The Schimmels admit an ongoing violation of court order requiring P.M.S. to live with them (not with her aunt). RP 1030, 1076.

¹¹ Pamela continuously testified that she did not know what was happening with the child, phone calls, and visitation because Irwin took care of it or the child was at Theresa's house. RP 818, 822-827. Irwin testified inconsistently about his diversion program. RP 1082. Pamela testified she had no concerns about her husband's health that would be relevant to taking care of P.M.S., but then, with her memory refreshed with her deposition, admits he was diagnosed with Pre-Alzheimers. RP 276; 279. She also testified she leaves P.M.S. with Theresa to limit her exposure to Irwin's drinking. RP 819.

Yet only Mia was tasked for not playing by the rules. Much was made of the fact that Mia brought P.M.S. gifts and requested off-site visits, but the Schimmels were okay with this until they weren't. The court also dinged Mia for lying about having a felony conviction, having later to concede she was telling the truth. RP 1141, 1166. Basically, the court excoriates Mia for lacking credibility, then leaps from that to conclude she has abandoned her child, is an unfit parent, and custody restored to her will be an actual detriment to P.M.S. These dots simply do not connect, even when translated by the Schimmels' attorney into orders with language tracking the law's requirements. However, even these written findings are inadequate to the task because the evidence does not support them, i.e., the Schimmels failed to produce clear, convincing, cogent evidence that Mia is unfit or that custody would be detrimental to P.M.S.

Mia is not unfit. "A parent is unfit if he or she cannot meet a child's basic needs." *B.M.H.*, 179 Wn.2d at 236; *see, also*, RCW 26.44.010 (the state may intervene into the parent-child relationship in "instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents ... and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety"). As Dr. Poppleton reported, this is not the case with Mia. He did not have any concerns about Mia's ability to provide for her daughter's basic needs.

RP 433-434; Ex. 29. Nor does the evidence offered by the Schimmels overcome the presumption of Mia’s fitness or prove any specific detriment to P.M.S. Pamela acknowledged Mia had not had an opportunity really to parent P.M.S. for years. RP 757. There was no evidence of a current drug problem or an inability to provide P.M.S. with the basic necessities. What the Schimmels offered to support their claims was either out-of-date or speculative. See, e.g., RP 1089-90 (Irwin referring to historical drug problems, consorting with people who do not work, and moving away from Clark County). However, the “test for fitness of custody is the present condition of the mother and not any future or past conduct.” *In re Custody of A.L.D.*, 191 Wn. App. 474, 506, 363 P.3d 604 (2015).

Additional reasons the court cited for Mia’s unfitness include her financial inability to support a child, though Pamela testified she knew of no unpaid bills of Mia’s. RP 832-833. Moreover, this finding of the court’s flies right in the face of its finding in support of denying Mia fees (RP 584: she gets \$30,000 “just for being”) and that she can pay the costs of supervised visitation and drug-testing and evaluation (RP 682).¹²

¹²The attorney fees issue is addressed in detail below. Briefly, like her siblings, Mia relies on distributions from a family partnership that is controlled entirely by her father via her brother-in-law. RP 1051, 1112. Irwin decides what the partnership money can be used for and he decided the partnership money will not go to pay an attorney for these proceedings. RP 1085, 1086. In other words, the adverse party controls Mia’s finances.

In censuring Mia, particularly for her perceived lack of credibility, the court ignores the actual task before it: presuming Mia fit. The court finds abandonment, despite the undisputed evidence that Mia has relentlessly sought to regain custody of her child, to parent her child, that she loves her child and her child loves her. The court only had to look at its docket to see Mia engaged in the opposite of abandonment. In any case, past abandonment does not justify a finding of unfitness. *L.M.S.*, at 583-584. Nor does any of the other evidence, as discussed above. The court may have known as much, since it also entered a backup finding of detriment, though it, too, lacks evidentiary support.¹³ The court does not even name the specific detriment, as our law requires. *L.M.S.*, at 571. And we know by “detriment” the court means something very different from “best interests,” with examples of a family where a hearing impaired child is placed with a nonparent custodian who facilitates communication, or a where a child suffers ongoing trauma creating needs the parent cannot address. *See B.M.H.*, 179 Wn.2d at 236 (cases cited therein); *In re Mahaney*, 146 Wn.2d 878, 898, 51 P.3d 776, 787 (2002) (children not

¹³ The court seemed to hedge its bets in its written findings:

Mia [Stanfill] is currently unfit, or, even if she may be fit, the child will suffer actual detriment (harm) to her growth and development if she lived with Mia [Stanfill].

CP 101.

recovered from trauma experienced in parent's custody). Here, the Schimmels testified detriment was them losing contact with P.M.S. and P.M.S. going without the many benefits they provide her (school, horses, tutoring). RP 871-873, 1074, 1089-1090. These arguments might matter if this was a "best interests" contest, but it is not. Whether the Schimmels can, in their view, provide for P.M.S. better than Mia does not matter. Mia is the child's parent. "A nonparent's capacity to provide a superior home environment to that which a parent can offer is not enough to establish actual detriment." *In re Custody of J.E.*, 189 Wn. App. 175, 185, 356 P.3d 233 (2015) (internal citations omitted).

The complex procedural unfolding of this case (made worse by Mia's ability to afford consistent counsel) and the court's narrowing of its inquiry to visitation and its subsequent focus on Mia's credibility may have obscured the dispositive issues. Something certainly did, because the orders the court entered are erroneous as a matter of law.

D. THE TRIAL COURT SHOULD HAVE VACATED THE 2015 DECREE.

The failure of the evidence to substantiate the court's order is dispositive. Still, it is worth noting the numerous other reasons the court's orders are fatally flawed, including the court's erroneous denial of the motion to vacate. As noted, in 2015, Mia agreed only to the "broad strokes" of temporary custody. *See In re Parentage of J.A.B.*, 146 Wn.

App. 416, 426, 191 P.3d 71 (2008) (“nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time”). She did not attend the trial where Larry’s rights were adjudicated, yet, at its conclusion, the order included reasons for limiting her visitation and subjecting her to conditions to which she did not agree. As to her, this order should have been vacated. *Id.* (when the parent becomes fit, “the nonparent has no right to continue a relationship with the child”).

The facts and much of the law are the same for this argument as discussed directly above, when describing how the court failed to understand the necessity for a trial on unfitness and detriment. See § IV.C(3). The record is clear on this point, no matter the trial court’s effort to raise a CR 2A agreement from the ashes of the parties’ failed negotiations. Simply, there was no deal.

Moreover, the court could not rely on the signature of Mia’s attorney to extend the agreement beyond his authority, which he understood as limited to the “broad stroke” of temporary custody. RP 166-173; CP 64-65 (attorney states will note for trial if no agreement); Supp. CP _ (sub 136: note for trial). An attorney "has no authority to waive any substantial right of his client" absent specific authorization. *Graves v. P.J. Taggares Co.*, 94 Wn.2d at 303. Conduct violating this principle justifies vacating judgment. *Morgan v. Burks*, 17 Wn. App. 193,

199-200, 563 P.2d 1260 (1977) (“Absent express authority or an informed consent or ratification, attorneys may not waive, compromise or bargain away a client's substantive rights”).

Here, two substantial rights are at stake: Mia’s constitutional parental right and her right to a trial grounded on the presumption necessary to protect her parental right. *Graves*, 94 Wn.2d at 304; Const. art. IV, § 23; RCW 2.24.010 et seq. At trial, Mia asserted her fitness and objected to constraints proposed by the GAL and the Schimmels. Her attorney did not have authority to settle these issues and they were not settled, as made clear by the failure of the parties to complete a CR 2A stipulation. *Graves*, 94 Wn.2d at 301-305. The 2015 order, as it pertained to Mia, should have been vacated. Because of this error, the trial court made the further error of proceeding to trial on the narrow issue of Mia’s visitation rights, rather than granting her a trial at which she was presumed fit, an error the court’s back and forth did not cure.

E. THE COURT SHOULD HAVE GRANTED ATTORNEY FEES TO MIA OR APPOINTED COUNSEL FOR HER ON THE BASIS OF THE STATUTE AND GR 33. ITS FAILURE TO DO SO VIOLATES MIA’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

Washington has two separate mechanisms by which a child may be removed from a parent’s custody. One mechanism involves the state and is replete with protections for the parent’s constitutional right but also with

tools for advancing the state’s policy of preserving families. So, for example, in dependencies and terminations, a parent without means receives counsel at public expense. RCW 13.34.090(1), (2); *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 97, 401 P.3d 442, 448–49 (2017), *review granted sub nom. In re Dependency of S.K-P.*, 189 Wn.2d 1030, 408 P.3d 1094 (2017) (“Washington has long recognized parents’ fundamental liberty interests in the right to parent their children, which compels a constitutional due process right to court-appointed counsel for all parents in dependency and termination proceedings”).

Here, Mia’s ability to regain custody of her child was severely hindered by the lack of consistent legal representation in these proceedings arising from her inability to afford counsel. Mia had four attorneys, most appearing at the last minute, often as if through a revolving door (i.e., attorneys making multiple appearances). During long stretches, Mia was unrepresented, including during a critical hearing (July 2016) and a critical day of trial (November 2016, when Dr. Poppleton, Brian Spencer, and Pamela testified, among others).¹⁴ In other words, she litigated by the seat

¹⁴ Mia pro se (Supp. CP_ sub 14, 170); Morse appears (sub 21); Morse withdraws after trial date set (sub 59); Spencer appears (sub 60); Spencer withdraws a month before trial date (sub 99); Gross appears less than two weeks before trial date (sub 108); Gross withdraws after custody orders entered (sub 138); Spencer re-appears for first part of trial (sub 139); Spencer withdraws after first part of trial (sub 170); Sundstrom appears on behalf of Spencer (sub 171); Sundstrom (sub 173); Mia pro se 8/16 through 1/17 (subs 187, 204, 212); Slate appears for conclusion of trial (sub 219).

of her pants against the Schimmels, her wealthy parents, who were continuously represented by one attorney. This inequality is particularly consequential here where the only fair description of the procedure is “tortured,” with trial occurring at multiple stages over three years during which the court basically kept moving the goal posts (i.e., changed its mind about the central issues being litigated). In 2015 and, again, as a trial date approached in 2016, Mia sought to equalize the contest by requesting “suit money” under the pertinent statute and, then, by seeking an accommodation under the ADA, a request governed by GR 33. CP 35, CP _ (sub 178). The court denied her requests. CP _ (sub 188); CP _ (sub 212).

The nonparental custody statute authorizes an award of fees based on the relative financial abilities of the parties (i.e., need versus ability to pay). RCW 26.10.080. The statute is not limited to awards at the end of a case, but expressly allows them “from time to time.” *Id.* The statute codifies longstanding Washington law allowing interim awards in family law cases. *Bennett v. Bennett*, 63 Wn.2d 404, 387 P.2d 517 (1963). As between spouses, where one lacks the necessary funds, and a corresponding ability to pay exists, it has been held the court abuses its discretion by denying funds. *Koon v. Koon*, 50 Wn.2d 577, 581-82, 313 P.2d 369 (1957), *citing Krieger v. Krieger*, 133 Wash. 183, 185, 233 P.

306, 307 (1925) (“it is the duty of the court to allow such provision in order that her case may be fairly heard”).

As this authority recognizes, counsel performs a crucial role in protecting the fairness of the proceeding, a concern heightened here by Mia’s constitutional rights and the child’s welfare and interest in her relationship with her mother. If it were the State instead of the Schimmels seeking to infringe upon these interests, Mia would be entitled to an attorney. *See* RCW 13.34.090. As an aspect of due process, she would enjoy the right to be represented by counsel. *In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737, 740 (2014). There is no rational basis to treat her differently, meaning not only did the court abuse its discretion, it ran afoul of constitutional guarantees of equal treatment. U.S. Const., amend. 14 (equal protection clause); Wa. Const. art. 1, § 12 (privileges and immunities).

Moreover, here, the court denied her statute-based request based on an erroneous understanding of the applicable law. The court said the nonparental custody fees statute contained “much different language” than in RCW 26.09.140. RP 580. In fact, the statutes are identical and focus the inquiry on the financial resources of the party. Here, instead, the court did not find it “equitable” to have the Schimmels pay for fees because they were paying some of Mia’s medical and living expenses. RP 585. In fact,

it is not fair to deny Mia the means by which to defend her parental rights. “The purpose of the statutory authority is to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage.” Weber, 20 Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). Even post-trial, fee requests under the statute are evaluated irrespective of who prevailed on the merits of the case. *In re Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003) (provision must be read in light of statute tying consideration of financial circumstances); *see, also, In re Marriage of Wilson*, 117 Wn. App. 40, 51, 68 P.3d 1121, 1127 (2003) (“[t]he prevailing party standard does not apply in such proceedings.”). Here, the court applied the incorrect legal standard, thereby abusing its discretion. *In re Welfare of BRSH*, 141 Wn. App. 39, 46, 169 P.3d 40, 43 (2007).

In doing so, the court also rendered these proceedings fundamentally unfair. It is axiomatic, that, disparate resources can place a party in a family law proceeding “at a distinct and unfair disadvantage...” in proceedings to determine the primary residential placement of the child.” *In re Marriage of King*, 162 Wn.2d 378, 416, 174 P.3d 659 (2007), (Madsen, J., dissenting). That is precisely what happened here, where the financial resources of the parties are of David and Goliath proportions. The Schimmels never submitted financial declarations, but there was no

dispute regarding their considerable wealth. See, e.g., Supp. CP _ (Sub 89). *See, also, Custody of Z.C.*, 191 Wn. App. at 707 (failure to file financial affidavit treated as concession of ability to pay).

The same was not true of Mia. Rather, she remained dependent on her family for financial support, which helped her to meet her basic needs and helped with her high medical expenses, but left her with little to no discretionary funding. Supp. CP _ (sub 176, 182). Though on paper, by virtue of a family business partnership, she appears to have a high net worth, in fact all distributions to her are controlled by either her father, Irwin, or her sister Theresa's husband, Brian. RP 975-976, 1112. Brian conceded distributions are made arbitrarily, in the sole discretion of the general partner. RP 655. These distributions are Mia's sole source of income, given the constraints her medical condition places on her ability to dependably work. RP 936-938.

While the parties engaged in some disputes over who paid what, the court accepted that Mia's income was about \$30,000 annually. The court also offered that it saw no reasons she could not afford counsel with that income, in light of other expenses paid for her. RP 585. Not long after, the court deprived Mia of custody finding she "failed to demonstrate" the financial means to support her child. CP 101. On both counts, the court was wrong.

Three months later, Mia renewed a request for appointment of counsel under the ADA (and for a continuance to allow for counsel to appear). RP 589. The court described the county's procedure, which involves submission first to an administrator and then appeal to the court. Id. The court agreed with the administrator and denied Mia's request as "untimely" (request must be made "in advance, not the court date prior to trial") and as lacking a factual basis (i.e., finding "pulmonary arterial hypertension with high blood pressure and the medical fallout of that" as not being "a basis for an attorney to accommodate that illness").

Mia disputed the court's ruling, pointing out the importance of the interest at stake and her lack of control over the partnership distributions, with the partnership paying some of her expenses directly to vendors and disbursing to her \$600 weekly. RP 581; see, also, CP 82-88. The court responded that it had "never seen a party to a lawsuit who receives \$30,000 just for being and has their home and medical paid for just by virtue of them being who they are." RP 584. The court had "never seen a litigant in these proceedings who has that benefit." Id. The court acknowledges the "parents' holdings financially are much more significant than \$30,000 a year," but did not think that put Mia "in a situation like many of the litigants in my courtroom which is out of work, sometimes in a marriage relationship where they're not the breadwinner, and they have

had all access to finances cut off to them,” situations where the court grants fees. RP 584. The court also opined that Mia had the ability to work, that she was not 100 percent disabled. RP 585. That she could do baby-sitting for hire, and her other volunteer work with the PHA. RP 585. The court declared her \$600/week payments were sufficient to meet her living expenses (food, utilities, transportation) and “plenty to cover all that with and pay attorney’s fees.” RP 585. The court did not “see a reason why you can’t afford an attorney,” but also declared that was not an issue before it, since “[t]here’s no right to counsel in these proceedings.” RP 591. The court also dismissed Mia’s request as “usual attempts to delay the proceedings.” RP 590, an attribution that is simply unfair. See, e.g., RP 171.

Similarly, the Court’s ADA analysis completely ignores the controlling rule, GR 33, which requires the court to grant the accommodation unless specific conditions are met. GR 33(c)(2)(a request for accommodation may be denied only on certain bases, as set forth in the appendix). None of these conditions appear applicable here, nor does it appear the court addressed them, though the rule requires it to do so on the record. GR 33(d)(e). Mia’s disability was undisputed (RP 976), yet the court, without citing to any basis, declared Mia’s condition (“pulmonary arterial hypertension with high blood pressure and the medical fallout of

that”) as not being “a basis for an attorney to accommodate that illness.”
RP 589.

Certainly, too, the court’s denial of the accommodation because it was untimely misconstrues the rule, which expresses a preference for timely requests; it does not elevate timing over the needs of the disabled applicant. GR 33(b)(2)(“Requests should be made in advance whenever possible, to better enable the Court to address the needs of the individual”). Here, the trial court simply read out of the rule its primary focus: the needs of the disabled individual.¹⁵ And that person, Mia, was most prejudiced by delay but more so by being forced to trial without counsel.

To be sure, Mia’s financial circumstances are highly unusual – wealthy on paper, but utterly dependent on financial distributions from the members of her family she is fighting against to regain custody of her child. Moreover, she must undertake this struggle while laboring to protect her health. The court’s assessment that she could supplement her income through employment finds no support in the record. Effectively, as to her ability to retain counsel, Mia was indigent.

The court’s handling of Mia’s request for fees and accommodation reinforces the overall unfairness of these proceedings, including the way

¹⁵ Nor did the court engage in an analysis under rules pertinent to motions to continue trial. *See* CR 40(d).

in which the court held Mia to one standard and everyone else (her parents and her siblings) to another standard. While this kind of favoritism might be merely unfortunate in some settings, here it imperils Mia's constitutionally protected interests and her child's reciprocal interest in being raised by her parent. Whether or not the court liked Mia, she deserved to be treated fairly, including by having the laws applied to her in the way they were intended. Here, she was entitled to have the court "balance the needs of the party requesting fees against the other parties' ability to pay." *Matter of Custody of M.W.*, 185 Wn.2d 803, 822–23, 374 P.3d 1169, 1179 (2016), as amended (Sept. 1, 2016), reconsideration denied (Sept. 7, 2016). She was also entitled to the procedures and relief guaranteed by GR 33.

This matters here because Mia was unable, lacking funds for counsel, to mount a consistent challenge to the Schimmels' petition, including to manage this case so it proceeded expeditiously. The discussion above about the procedural irregularities of this case underscores the importance of consistent representation.

Finally, the court declares no right to counsel exists in nonparental custody proceedings. RP 591. It bears noting, again, the interests at stake here – the mother's and the child's -- heighten concerns for full and fair litigation. The court seems to take shelter in the belief the constitution

does not compel it to do what makes sense to do: to improve the quality of the proceedings by ordering Mia's wealthy parents to advance fees for Mia to retain counsel. (It also bears noting the family could have made this advance from Mia's own share of the partnership.) Yet the court seemed determined to avoid this sensible and fair solution.

In any case, this case challenges the assertion that counsel is not also constitutionally mandated. Granted, there is no right to counsel as between two parents. *Marriage of King*, 162 Wn.2d at 386. But here, unlike in *King*, Mia squares off against nonparents. As the Supreme Court recently noted, "[t]he nonparental custody statutes are designed to address situations wholly different from a divorce." *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644, 646 (2014). Here, Mia is situated more like a parent in dependency proceedings, where right to counsel is guaranteed. RCW 13.34.090. Here, because the dependency statute does not apply expressly, Mia asserts her right to appointed counsel under the due process clauses of the state and federal constitutions. *See* U.S. Const. amend XIV, § 1; Wash. Const. art. I, § 3. She argues further that disparate treatment of her, as compared to parents in dependency proceedings, violates the Equal Protection Clause and Const., art. 1, § 12. This Court may address this issue pursuant to RAP 2.5(a)(3). While it is not the State directly challenging her right to the custody of her child, it is state law

permitting the Schimmels to do so. Under these facts, they, like the State, have vastly superior resources. See *In re Myricks*, 85 Wn.2d 252, 533 P.3d 841 (1975).¹⁶ Here, as in dependencies, a parent's rights can be severely or completely curtailed, including loss of contact (RCW 26.10.160) and decision-making (RCW 26.10.170). More onerous than a dependency, the modification standard in nonparental custody virtually makes permanent the decree while failing to provide a parent with means to ameliorate any parental deficiencies. *Custody of Z.C.*, at 704-707. Here, as in dependencies, Mia should have been afforded counsel. The lack of counsel prejudiced her in the ways described throughout this brief, with the gross and pervasive procedural irregularities, the long-term deprivation of custody, the overall unfairness of the proceeding, and the fatally flawed final orders.

F. THE COURT ERRED BY LEAVING THE CHILD IN THE CARE OF THE SCHIMMELS.

Unlike Mia, the Schimmels are not entitled to a presumption of fitness. Again, by analogy to state interventions, the state cannot remove a child from a struggling parent and place the child in the custody of struggling custodians. Sympathies for this entire family notwithstanding, the court, as an instrument of the state, has a duty to the child. *In re*

¹⁶ The federal constitutional component of *Myricks* has been overruled, but the state constitutional grounds remain. *S.K.-P.*, at 97.

Marriage of Coy, 160 Wn. App. 797, 805, 248 P.3d 1101, 1105 (2011).

Here, by ignoring the considerable evidence of the Schimmels' own problems, the court was derelict in its duty to the child. The State would never get away with something like this. *See, e.g., In re Custody of A.F.J.*, 179 Wn.2d 179, 183, 314 P.3d 373, 375 (2013) (DSHS requiring de facto parent to obtain foster care license to maintain placement of child with her pending legal parent's dependency proceeding).

Irwin is an alcoholic with a relapse in the months before the court entered its order. He has been doing a large share of transporting P.M.S. He has Alzheimer's, which generally impairs function of the sufferer but also places substantial caregiving demands on other family members.

Pamela and Mia remain embroiled in a bitter conflict. Mia has raised the possibility of having been sexually abused by Irwin. P.M.S. sleeps in bed with the Schimmels. RP 237. No one investigated. RP 236. It was undisputed P.M.S. spends many nights, if not most, in the home of Mia's sister, Theresa, over whom the court has no authority. The court ordered she must spend the majority of residential time with the Schimmels. CP 106 ("The child shall reside with Petitioners a majority of the time, rather than with other family members."). On this record, it is hard to know whether to be reassured by that order or worried. In any case, because the

court entered a restraining order, Mia is unable to monitor compliance with that order, which is consequently rendered entirely ineffectual.

Dr. Poppleton sagely urged upon the court the necessity to view this family in its entirety and to consider the Schimmels' parenting environment as problematic. RP 508-509 (noting family pathology, consistent with Mia's reporting to him). The court at least should have viewed the Schimmels against the same high standard to which it held Mia. Instead of focusing so much on its disapproval of Mia, the court should have focused on the child and the law that requires reuniting that child with her mother.

G. THE MOTHER SHOULD RECEIVE HER FEES ON APPEAL.

On the authority of RAP 18.1 and RCW 26.10.080, Mia seeks attorney fees based on her need relative to the Schimmels' ability to pay and incorporating the arguments and authorities set forth above. *Matter of Custody of M.W.*, 185 Wn.2d 803, 822–23 (this Court should “balance the needs of the party requesting fees against the other parties' ability to pay”). As compared to most family law proceedings, here the fees provision should be viewed in light of the constitutional rights at stake, as discussed above.

IV. CONCLUSION

For the foregoing reasons, Mia Stanfill respectfully asks this Court to vacate the decree awarding custody to her parents, the Schimmels, to reverse the court's order denying her fees, and to remand for dismissal of the petition after consideration of the trial level fees request according to the correct legal standard. In the alternative, Mia should receive a new trial, with interim fees granted for counsel, and presided over by a different judge, in the interest of fairness and the appearance of fairness. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779, 785 (2005); *In re Marriage of Black*, 188 Wn.2d 114, 137, 392 P.3d 1041, 1053 (2017). Ms. Stanfill also asks this Court to order the Schimmels to pay her attorney fees on appeal.

Respectfully submitted this 30th day of April 2018.

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Custody of P.M.S.

No. 50665-3-II

Appendix: Statutes and Rules

RCW 26.10.080

Payment of costs, attorney's fees, etc.

The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.09.140

Payment of costs, attorneys' fees, etc.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

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RCW 13.34.090

Rights under chapter proceedings. (*Effective until July 1, 2018.*)

(1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder.

(2) At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and

if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

(3) If a party to an action under this chapter is represented by counsel, no order shall be provided to that party for his or her signature without prior notice and provision of the order to counsel.

(4) Copies of department of social and health services or supervising agency records to which parents have legal access pursuant to chapter [13.50](#) RCW shall be given to the child's parent, guardian, legal custodian, or his or her legal counsel, prior to any shelter care hearing and within fifteen days after the department or supervising agency receives a written request for such records from the parent, guardian, legal custodian, or his or her legal counsel. These records shall be provided to the child's parents, guardian, legal custodian, or legal counsel a reasonable period of time prior to the shelter care hearing in order to allow an opportunity to review the records prior to the hearing. These records shall be legible and shall be provided at no expense to the parents, guardian, legal custodian, or his or her counsel. When the records are served on legal counsel, legal counsel shall have the opportunity to review the records with the parents and shall review the records with the parents prior to the shelter care hearing.

RULE 2A STIPULATIONS

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

GR 33

REQUESTS FOR ACCOMMODATION BY PERSONS WITH DISABILITIES

(a) Definitions. The following definitions shall apply under this rule: (1)

"Accommodation" means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability, and may include but is not limited to: (A) making reasonable modifications in policies, practices, and procedures; (B) furnishing, at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, or readers; and (C) as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability. (2) "Person with a disability" means a person with a sensory, mental, or physical disability as defined by the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101-12213) The Washington State Law Against Discrimination (ch. 49.60 RCW), or other similar local, state or federal laws.

(b) Process for Requesting Accommodation. (1) Requests. Requests for aids, modifications, and services will be addressed promptly and in accordance with the

Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101-12213) and the Washington State Law Against Discrimination (ch. 49.60 RCW), with the objective of ensuring equal access to courts, court programs, and court proceedings. (2) Timing. Requests should be made in advance whenever possible, to better enable the court to address the needs of the individual. (3) Local Procedures Allowed. Local procedures not inconsistent with this rule are encouraged. Informal practices are appropriate when an accommodation is clearly needed and can be easily provided. (4) Procedure. An application requesting accommodation should be made on a form approved by the Administrative Office of the Courts and may be presented ex parte in writing, or orally and reduced to writing, to the presiding judge or officer of the court or his or her designee. (5) Content. The request shall include a description of the accommodation sought, along with a statement of the disability necessitating the accommodation. The court may require the person requesting accommodation to provide additional information about the qualifying disability to help assess the appropriate accommodation. Medical and other health information shall be submitted under a cover sheet created by the Administrative Office of the Courts for use by applicants designated "SEALED MEDICAL AND HEALTH INFORMATION" and such information shall be accessible only to the court and the person requesting accommodation unless otherwise expressly ordered.

(c) Consideration and Decision. (1) Considerations. In determining whether to grant an accommodation and what accommodation to grant, the court shall: (A) consider, but not be limited by, the provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101-12231), chapter 49.60 RCW, and other similar local, state, and federal laws; (B) give primary consideration to the accommodation requested by the applicant; and (C) make its decision on an individual- and case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation. (2) Determination. A request for accommodation may be denied only if: (A) the person requesting application has failed to satisfy the substantive requirements of this rule; or (B) the court is unable to provide the requested accommodation on the date of the proceeding and the proceeding cannot be continued without significant prejudice to a party; or (C) permitting the applicant to participate in the proceedings with the requested accommodation would create a direct threat to the health or well being of the applicant or others. (D) the requested accommodation would create an undue financial or administrative burden for the court; or would fundamentally alter the nature of the court service, program, or activity under (i) or (ii): (i) An accommodation may be denied based on a fundamental alteration or undue burden only after considering all resources available for the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. (ii) If a fundamental alteration or undue burden would result from fulfilling the request, the Court shall nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the court.

(d) Decision. The court shall, in writing or on the record, inform the person requesting an accommodation that the request for accommodation has been granted or denied, in whole or in part, and the nature and scope of the accommodation to be provided, if any. A written decision shall be entered in the proceedings file, if any, in which case the court shall determine whether or not the decision should be sealed. If there are no proceedings

filed the decision shall be entered in the court's administrative files, with the same determination about filing under seal.

(e) Denial. If a requested accommodation is denied, the court shall specify the reasons for the denial (including the reasons the proceeding cannot be continued without prejudice to a party). The court shall also ensure the person requesting the accommodation is informed of his or her right to file a complaint under the Americans with Disabilities Act of 1990 with the United States Department of Justice Civil Rights Division.

Comments [1] Access to justice for all persons is a fundamental right. It is the policy of the courts of this state to assure that persons with disabilities have equal and meaningful access to the judicial system. Nothing in this rule shall be construed to limit or invalidate the remedies, rights, and procedures accorded to any person with a disability under local, state, or federal law. [2] Supplemental informal procedures for handling accommodation requests may be less onerous for both applicants and court administration. Courts are strongly encouraged to adopt an informal grievance process for public applicants whose requested accommodation is denied.

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