

FILED
Court of Appeals
Division II
State of Washington
7/20/2018 3:07 PM

No. 50665-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Custody of:

P.M.S., Child

PAMELA SCHIMMEL and IRWIN SCHIMMEL,

Respondents,

and

MIA SCHIMMEL (aka MIA STANFILL) and
LARRY STANFILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE BERNARD VELJACIC

CORRECTED BRIEF OF RESPONDENTS

MANCUSO LAW OFFICE PLLC

By: Laura L. Mancuso
WSBA No. 27128

10000 NE 7th Ave., Ste. 400
Vancouver, WA 98685
(360) 448-2856

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515
Duffy G. Romnor
WSBA No. 52822

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondents

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I. INTRODUCTION

After more than four years of litigation and seven days of trial over three phases, the trial court awarded nonparental custody of the child to respondents, the child's maternal grandparents, and limited residential time to appellant, her mother. The trial court properly entered its nonparental custody order after finding the mother unfit, and that returning the child to her would cause the child actual detriment.

The mother failed to correct parental deficiencies or make substantive efforts to reunify with the child, whom she had left with the grandparents. For instance, although the nonparental custody action was filed because, among other reasons, the mother refused to perform parenting functions by leaving the child for extended periods of time with the grandparents, the mother repeatedly missed court-ordered visits with the child and failed to accept makeup time offered to her. Further, despite a history of drug abuse, the mother admitted to relapsing and abusing methamphetamine in 2014 – less than two years after the nonparental custody petition was filed – twice tested positive for methamphetamine use in 2015, and refused to participate in court-ordered urinalysis testing during the eighteen

months leading up to final phase of trial, which concluded in April 2017.

The trial court did not abuse its discretion in entering its nonparental custody order, and properly denied the mother's request for attorney fees or appointment of counsel when she failed to prove a ground for an ADA accommodation, and the court found she had financial resources to pay her own attorney fees.

This Court should affirm the trial court's orders in its entirety, and deny the mother's request for attorney fees on appeal.

II. RESTATEMENT OF FACTS

A. Mia is the mother of P.M.S., and daughter of the Schimmels, who were awarded nonparental custody of P.M.S. after four years of litigation.

Appellant Mia Schimmel ("Mia"), age 38, is the daughter of respondents Pamela and Irwin Schimmel (collectively, "the Schimmels") (CP 1-2, 299), and mother of P.M.S., age 8 (DOB 6/8/2010). (RP 77; CP 105-10) P.M.S. has lived on and off with her grandparents, the Schimmels, since she was born, and has lived with them consistently since August 2014. (RP 77; CP 105-10)

It is undisputed that Mia has a history of criminal activity and drug addiction. (*See* App. Br. 9, 17) Mia, who began abusing drugs at the age of 14, was in and out of reform school, as a youth, and in

and out of substance abuse treatment programs as an adult. (RP 490-96, 499, 755, 999; III Exs. 7, 8, 11, 13, 14)¹ More recently, Mia was criminally charged with possession of methamphetamine, identity theft, property theft, and trafficking of stolen property. (II Ex. 4 at 1-2; III Exs. 7, 8, 9, 11, 13, 14; CP 28-29) Mia admitted to using methamphetamine in 2014 (CP 131, 332), and tested positive for methamphetamine twice in 2015. (II Ex. 5 at 2-3; II Ex. 9 at 1) Mia's drug use after 2016 is unknown because she stopped submitting proof of her participation with court-ordered urinalysis ("UA") testing, and her longest known period of sobriety is under one year. (RP 189, 755, 858, 996-97; CP 293-94)

When P.M.S. was 2 ½ years old, Mia left P.M.S. with the Schimmels indefinitely. (CP 326) As a result, the Schimmels filed for nonparental custody in January 2013. (CP 1) After more than four years of litigation, and a three-phase trial held over seven days between June 2015 and April 2017, the trial court awarded nonparental custody of P.M.S. to the Schimmels. (CP 105)

¹ This matter was tried in three phases, all of which used numerical exhibits. For clarity, any exhibits from the first phase will be cited as ("I Ex. _"); exhibits from the second phase will be cited as ("II Ex. _"); and exhibits from the third phase will be cited as ("III Ex. _").

The trial court found that Mia made no effort to “remedy[] [] those situations” that had caused the Schimmels to commence the nonparental custody action, but instead engaged in “a continuation of this pattern.” (RP 1146) The trial court noted that over the four-year litigation, the court made efforts to reunify Mia and P.M.S. through court orders addressing drug treatment for Mia and visitation between Mia and P.M.S., but Mia “failed to work on reunification” and “refused to parent” P.M.S.:

[The] passage of time [between the three trials] also was an opportunity while she’s under the eye of the Court to make efforts, to reestablish this relationship with the child. That’s the purpose of these orders, to set up visitations, to set up opportunity to get the drug treatment and UAs done to show the Court that that’s no longer a problem. . . . [But] [d]uring the pendency of the case, [] she failed to work on reunification, [and she] refused to parent.

(RP 1147-48; *see also* RP 768) The trial court found that Mia has a pattern of refusing to parent P.M.S., which made her unfit or, even if fit, P.M.S. would suffer actual detriment if returned to Mia. (Finding of Fact (“FF”) 8, CP 101; RP 1141, 1146-49)

Despite Mia’s attempts throughout her brief to disparage the Schimmels, in whose care she left her then 2 ½ year old daughter, and whom she briefly agreed should be awarded nonparental custody, it is her actions — or lack of action — that caused the trial

court to enter its nonparental custody order. While the Schimmels dispute Mia's allegations, which the trial court had in any event rejected, it is Mia's fitness as a parent that is the primary issue in this appeal. The following statement of facts focuses on her and on the substantial evidence on which the trial court relied in making its findings and entering its nonparental custody order.

B. Mia has relied heavily on the Schimmels to provide for P.M.S.'s daily needs since P.M.S. was born in 2010.

P.M.S., who was born on June 8, 2010, was conceived during her parents' less than one month marriage. (RP 77; CP 310; I Ex. 12 at 2) P.M.S.'s father, Larry Stanfill, has been imprisoned since before P.M.S.'s birth, and has "a fairly extensive and violent criminal history" including drive-by shooting, first degree robbery, possession of methamphetamine, assault, extortion, domestic violence, and unlawful possession of a firearm. (RP 77, 131, 149; CP 310) Under the terms of the orders dissolving Mia and Larry's marriage, Mia was designated primary residential parent with sole decision-making. (I Exs. 13, 14; CP 299) The court restrained Larry from contacting Mia or P.M.S. due to his history of domestic violence, substance abuse, and other criminal activity. (I Ex. 13 at 6; CP 55-56)

Mia moved in with her parents, the Schimmels, when she was five months pregnant with P.M.S. and remained at their home until

August 2012, when P.M.S. was two years old. (RP 739; II Ex. 18 at 8)
Even after moving out, Mia regularly left P.M.S. with the Schimmels “[s]everal times a week,” with her absences lasting for hours, days, or even a week at a time. (RP 739; *see also* CP 4)

Because Mia failed to do so, the Schimmels consistently took responsibility for P.M.S.’ basic needs. For instance, Mia refused to cooperate in getting P.M.S. medical insurance, as “she was afraid that if she went somewhere to fax information and signatures, she would be arrested” because of an outstanding criminal warrant. (CP 25)
Eventually, the Schimmels obtained health insurance for P.M.S. on their own. (CP 25)

C. Mia left P.M.S. with the Schimmels, when she was 2 ½ years old. The Schimmels petitioned for nonparental custody in January 2013.

In December 2012, Mia asked her parents to watch P.M.S., who was then 2 ½ years old, “for a few hours.” (CP 302, 326) After Mia failed to return, the Schimmels petitioned for nonparental custody on January 11, 2013. (CP 1) The Schimmels asserted that Mia had essentially abandoned P.M.S. at their home, and expressed their concern that Mia was once again abusing drugs. (CP 4-5)

1. The trial court found adequate cause for the Schimmels' petition, but granted Mia primary care of P.M.S. in May 2013.

After the Schimmels filed their petition, the trial court initially divided P.M.S.'s residential time equally between Mia and the Schimmels. (CP 10) On May 24, 2013, the trial court found adequate cause for the Schimmels' petition, but granted Mia "primary residential placement" of P.M.S., and alternating weekend overnight residential time with P.M.S. to the Schimmels. (CP 11-12, 129) The trial court also appointed Josephine Townsend as guardian ad litem ("GAL"). (CP 13-15, 130)

After P.M.S., who was then age 3, was returned to Mia's primary care, Mia was chronically late in picking up P.M.S. from preschool. (RP 621-24) A neighbor, whose child attended the same preschool as P.M.S., regularly stayed with P.M.S. at the school "to comfort [her] so that she wasn't left there alone waiting." (RP 620-21, 623) If no one picked up P.M.S., the neighbor took P.M.S. home with her to wait for Mia. (RP 624-25) Due to Mia's failure to communicate with the neighbor, it was never clear how long P.M.S. would stay with the neighbor, but it was typically into the evening, for three to four hours. (RP 625-26 (the agreement had been that P.M.S. would only stay at the neighbor's house "just a few minutes"))

While waiting for her mother, P.M.S. would “repeatedly” ask “[i]s my mom coming? Is my mom coming?” (RP 626) P.M.S.’s teachers also reported that during this time P.M.S. expressed concern over whether she would be picked up, and snuck food home from school. (CP 26) P.M.S. began suffering from severe separation anxiety, which necessitated therapy. (RP 36, 678; *see also* 1147)

- 2. After Mia admitted to abusing methamphetamine in August 2014, the trial court ordered supervised visitation between Mia and P.M.S., and ordered Mia to participate in drug testing and a substance abuse evaluation.**

In the summer of 2014, the Schimmels reasserted their concern that Mia was once again abusing drugs to the GAL. (CP 331-32) The Schimmels also advised the GAL that Mia had recently broken into their home and stole “thousands of dollars’ worth of jewelry,” and had failed to bring P.M.S. to the Schimmels for their court-ordered residential time. (CP 331-32; *see* CP 28-29)

In August 2014, the GAL made an “unannounced visit” to Mia’s home. (CP 25, 331-32; RP 202) Mia’s house was “very filthy” with moldy food on the floor, a refrigerator containing “inedible food,” “dirty dishes,” with garbage and dirty clothes strewn throughout the house. (RP 202-03; CP 332; *see* CP 279-92 (color photos of Mia’s house taken by the GAL during her visit)) The GAL

found “multiple pills” and four “methamphetamine pipes with residue” “left out in the open” with “about six phones that had been taken apart with a screwdriver.” (CP 25, 332-33; RP 203; *see* CP 279-92) Mia “admitted [to the GAL] that she [had] relapsed on meth and needed help.” (CP 332; *see also* CP 131)

Because of the “unsafe” condition of Mia’s house, the drug paraphernalia, her recent criminal activity, and fearing P.M.S. would suffer “immediate and irreparable injury,” the GAL filed a motion for a temporary order, placing P.M.S. primarily with the Schimmels. (CP 329-34) The trial court entered an *ex parte* restraining order on August 18, 2014, ordering all visitation between Mia and P.M.S. be professionally supervised. (CP 335-38)

After a full hearing, the trial court entered an order on October 2, 2014, providing up to three weekly 2-hour supervised visits between P.M.S. and Mia through Innovative Services Northwest, and allowed Mia phone calls with P.M.S. (CP 16-17) The trial court prohibited either party from speaking to P.M.S. about the custody proceeding. (CP 18)

The trial court also ordered Mia to undergo a hair or nail drug test at ADS in Hazel Dell, and random urinalysis through Lifeline Connections, the results of which were to be provided to the GAL, the

Schimmels, and the court. (CP 18) The trial court also ordered Mia to participate in a substance abuse evaluation and comply with any recommendations. (CP 18)

Trial on the Schimmels' petition for nonparental custody was set for February 11, 2015. (CP 356)

- 3. By March 2015, Mia had failed to comply with the court's orders for drug testing and a substance abuse evaluation. Mia also regularly missed her scheduled visits with P.M.S.**

Approximately two months before the scheduled February 11, 2015 trial date, the GAL issued her report. (CP 23) The GAL reported that Mia violated the October 2, 2014 order by not completing the random UAs, failing to provide the GAL with a hair/nail drug test, and failing to participate in a substance abuse evaluation. (CP 24)

The GAL also reported that Mia violated the order by discussing the custody proceeding with P.M.S. and telling her that the Schimmels "were keeping [P.M.S.] from [Mia]," which was "upsetting" to P.M.S. (CP 24) The GAL reported that Mia failed to participate in scheduled phone calls with P.M.S. and was "verbally abusive" when asked to follow the schedule. (CP 24) Mia also cancelled scheduled supervised visits with P.M.S. (CP 25)

The GAL reported that, at the time of the report, Mia was currently "out on bail for criminal charges consisting of Identity

Theft, Trafficking Stolen Property First Degree and Possession of Stolen Property First Degree for allegedly” stealing and pawning her mother’s jewelry. (CP 25; *see* CP 28-29; III Exs. 7, 8, 9 (Mia was still under court supervision regarding her possession of a controlled substance (i.e., methamphetamine) from 2007)) Mia was also the respondent in a civil anti-harassment proceeding, filed by a former roommate, who alleged that Mia posted nude photographs of her on the internet, and made statements to the roommate’s family to “harass and intimidate her.” (CP 26)

Until Mia complied with the October 2, 2014 order, the GAL recommended all visitation and phone privileges “be suspended” and that Mia should have no contact with Pamela Schimmel while the jewelry theft case is pending. (CP 26; *see also* CP 28-29) As a result of the GAL’s report, the trial court temporarily suspended Mia’s phone contact with P.M.S., but maintained the supervised visitation. (CP 343-45; *see* CP 339-42, 347) After a hearing on January 22, 2015, the trial court reinstated Mia’s phone contact, allowing her to call P.M.S. twice per week at specified times. (CP 348-49)

Because Mia had failed to comply with the drug testing requirements from the October 2, 2014 order, the trial court ordered Mia to submit to “random UA’s beginning on Monday, 1/26/15, to

continue through to trial.” (CP 348) The trial court also ordered Mia to complete a substance abuse evaluation within two weeks. (CP 349) The trial court struck the trial date of February 11, 2015, and set a new trial date of June 29, 2015. (CP 357)

Mia did not complete a substance abuse evaluation within two weeks of the trial court’s ruling on January 22, 2015. (See III Ex. 40 (Mia’s substance abuse evaluation completed on March 10, 2015)) Mia also continued to miss her scheduled visits and phone calls with P.M.S. (See, e.g., II Ex. 11 at 130, 166, 183)

On March 6, 2015, the trial court entered another order, restating the schedule for supervised visitation and phone contact between Mia and P.M.S. from its earlier ruling, and again ordered Mia to submit to “random UAs through Lifeline Connections,” “to continue through to trial or pending further court order,” “provide signed releases” for the UAs, submit to a substance abuse evaluation through Lifeline Connections by March 16, 2015, and provide a copy of the evaluation to the court, the Schimmels, and the GAL within two weeks. (CP 37-40)

D. At the start of trial in June 2015, Mia stipulated to the Schimmels having nonparental custody of P.M.S. The only issue tried was the father's fitness to parent.

On June 29, 2015, the parties appeared for trial on the Schimmels' nonparental custody petition. (CP 50-52) Mia, who was represented by counsel, conceded that she was not in compliance with the March 6, 2015 order requiring drug testing at Lifeline Connections and for her to produce copies of the substance abuse evaluation. (RP 16-17) Mia had one UA done at Lifeline Connections that tested positive for methamphetamine on March 9, 2015 and on June 12, 2015 she provided a UA sample that was rejected because it "did not register to body temperature." (II Ex. 5)² Mia then chose to have the rest of her random UAs done at a different facility than the one ordered by the court. (RP 16, 189) Mia did not disclose the March 2015 positive test result to the court.

Mia agreed the Schimmels should have nonparental custody of P.M.S., but did not agree that she was unfit. (RP 8) The trial court acknowledged that even if the parties stipulated to custody, a trial was still necessary to resolve the terms of a final order because the court needed to hear evidence about Mia, the Schimmels, "the nature

² The trial court later questioned the below-temperature UA sample, noting it "suggests she was sneaking in urine." (RP 1142)

of their relationship with the child, [and] the judgment exercised with regard to care for that child.” (RP 13) The trial court denied Mia’s request for a continuance of the trial on that issue because the case had already been pending for “a couple of years” (actually three years), and it was important for P.M.S. to “have stability and consistency and a final residential schedule.” (RP 11-12)

After a pause in the proceedings, Mia and the Schimmels reached an agreement. (RP 14) Contrary to Mia’s claims, their agreement was not merely “broad strokes” (App. Br. 18, 20), but a definitive agreement, providing the Schimmels with nonparental custody, and granting Mia twice-weekly supervised visitation and phone calls, similar to the March 6, 2015 temporary order. (RP 15) The parties also agreed that Mia be allowed to attend P.M.S.’s extracurricular activities. (See RP 8, 14-15) Left to be “fine tuned” were requirements for Mia to share the records of her substance abuse treatment and UAs with the Schimmels, the GAL, and the court. (RP 14-17, 156; see RP 20-23) The trial court swore in Mia, Pamela, and Irwin, and each of them stated under oath their agreement to the stipulation. (RP 19-20) It was understood that a final agreed order would be entered later. (RP 31)

After a two-day trial solely addressing the issue of the fitness of the father, who appeared telephonically from jail, the trial court granted the Schimmels' petition for nonparental custody of P.M.S. (CP 51, 167; RP 6, 147-48, 153)

On August 7, 2015, the parties' attorneys and the GAL appeared for presentation and entry of a final decree and findings. The findings were "based on [the CR 2A] agreement between [the Schimmels] and Mia Schimmel; and by the trial between [the Schimmels] and Larry Stanfill." (CP 53) The trial court found that "[a]t the beginning of the case, both parents were unfit. Mr. Stanfill continues to be an unfit parent. Both parents agree that it is in P.M.S.'s best interest to be placed in the primary custody of [the Schimmels]." (CP 54) The trial court ordered that there be no residential time between the father and P.M.S. until further order of the court (CP 55), which the father does not challenge.

The trial court ordered that Mia's residential time with P.M.S. be limited due to "substantial refusal to perform parenting functions," "long term impairment" from "substance abuse," and "significant mental health problems." (CP 56) Mia was not present, but her counsel signed the findings "[a]pproved by; [n]otice of presentation waived." (CP 57) As Mia and the Schimmels had not

yet agreed on the “fine tuned” final terms of their stipulation, the trial court maintained the March 6, 2015 temporary order, pending further order of the court. (CP 59)

E. A second phase of trial was scheduled when Mia and the Schimmels could not agree on final terms. Meanwhile, Mia continued to miss scheduled visits with P.M.S. and stopped participating in the court-ordered drug tests.

In July 2015, Mia again tested positive for methamphetamine use, which she asserted was due to a weight loss drug she was using. (II Ex. 9 at 1; II Ex. 17; RP 316) Although the March 6, 2015 order required her to participate in random UAs “through to trial or pending further court order” (CP 40), she stopped UA testing after September 2015. (II Ex. 9 at 1)

On August 14, 2015, the Schimmels’ attorney moved to enforce the parties’ CR 2A stipulation, which had been read into the record at the start of trial. (CP 62) On October 2, 2015, it was determined that the parties were unable to reach an agreement — largely due to certain requirements on Mia that the Schimmels and the GAL believed were necessary to ensure that Mia remained healthy and off drugs. (CP 166; see RP 20-24) A new trial date of June 20, 2016 was set to address the final terms of an agreed nonparental custody order. (CP 166, 309)

Meanwhile, Mia missed three visits with P.M.S. in August 2015 and missed all visits with P.M.S. from the beginning of September to the end of October 2015. (II Ex. 11 at 248-49, 262; RP 327) When asked the reason for the missed visits at trial, Mia testified, “I can’t tell you why.” (RP 327) Mia’s pattern of missing visits persisted into 2016. (*See, e.g.*, II Ex. 11 at 297, 302-03, 308)

Mia’s trouble with the law also continued — on July 16, 2015, a warrant was issued for Mia’s arrest due to her failure to appear at a hearing regarding criminal charges for theft and trafficking stolen property. (III Exs. 10, 11)

F. Phase two of the trial was held a year later, in June 2016, to determine the terms of a stipulated nonparental custody order. Meanwhile, a dispute arose over whether Mia had consented to her unfitness by agreeing to nonparental custody.

A month before the second phase of trial to address the final terms for the Schimmels’ nonparental custody was to begin, Mia obtained new counsel, who filed a CR 60 motion to vacate the decree and findings, entered on August 7, 2015. (CP 63) Mia challenged the trial court’s entered findings to the extent that it found she was unfit. (CP 66) The trial court denied the motion, reasoning that by agreeing (under oath) to the Schimmels having nonparental custody of P.M.S., and by signing the August 7, 2015 findings, Mia had conceded she

was unfit. (RP 168-69, 171) The trial court ruled that the only issue to be resolved at the pending trial was the terms of the nonparental custody order, not Mia's fitness as a parent. (RP 171; *see also* CP 167)

Phase two of the trial commenced on June 20, 2016. (CP 71-77) The GAL testified that Mia was still not in compliance with the court's March 6, 2015 order, and continued to miss visits and phone calls with P.M.S. (RP 214-15) Mia failed to provide signed releases regarding her treatment, had stopped getting UAs at Lifeline, had positive drug tests for methamphetamine on March 9, 2015 and July 24, 2015, had discussed the custody dispute with P.M.S., and allowed phone calls between P.M.S. and P.M.S.'s father, which had been prohibited by the court. (II Ex. 5 at 2; II Ex. 9 at 1; RP 189, 198, 210-11, 214-15, 223; *see also* RP 201-02, 300)

Dr. Landon Poppleton, whom Mia had only recently retained to do a parent risk assessment, issued a report and also testified. Based on Mia's self-reporting, Dr. Poppleton concluded that Mia was capable of caring for P.M.S. (*See* RP 407, 411) However, he also testified that he was not necessarily recommending that Mia have custody because he did not do a "full family evaluation" and does not know the "level of resiliency of the child." (RP 459) Further, on cross-examination, Dr. Poppleton acknowledged that Mia had not

been forthcoming regarding her drug use, criminal history, and mental health issues. (RP 446-48) As a result, Dr. Poppleton acknowledged that “the validity” of his “conclusions could possibly be attenuated.” (II Ex. 18) Finally, Dr. Poppleton recognized that “Mia certainly has a ‘history’ of risk factors for parenting, including medical, substance abuse and environmental risk factors” and these are “data points of Mia’s living environment being unfit.” (II Ex. 18 at 13-14)

G. At the conclusion of phase two of the trial, the trial court granted Mia’s request for an evidentiary hearing on her parental fitness, and a third phase of the trial was scheduled.

Phase two of the trial concluded after 2 days, on June 21, 2016. (RP 567) The trial court *sua sponte* reconsidered its earlier decision, denying Mia’s request for a trial on her parental fitness. (CP 78) The trial court found that there had been no agreement regarding Mia’s fitness, therefore, “further proceedings on the issue of unfitness and actual detriment” was necessary before it could rule on the terms of a nonparental custody order. (CP 78, 80-81; *see also* RP 568-70) The trial court reasoned that the stipulation in the previously entered decree that “[n]either parent was a suitable custodian at the beginning of the case” was “insufficient to allow the court to limit or

control [Mia]’s constitutionally protected interest to raise her child without state interference.” (CP 80)

In her brief, Mia erroneously claims that the trial court made this ruling *before* the trial on June 20, 2016 and then “revers[ed] itself” by declaring “the trial proceed only on the visitation issue.” (App. Br. 21) However, the trial court made this ruling *after* the June 20, 2016 trial, and stated that “additional trial proceedings will be required on the issue of unfitness or actual detriment.” (CP 81) As a result, a *third* phase of the trial was scheduled for October 3, 2016. (RP 577) However, Mia was taken into custody due to an active warrant on the first day of phase three of the trial. (CP 234-35) Phase three was then continued to November 29, 2016. (CP 235)

H. By fall 2016, while waiting for phase three of the trial to start, Mia completely stopped visiting P.M.S.

After September 2015, Mia had already stopped participating in the court-ordered random UAs, under the March 6, 2015 order. (See II Ex. 9 at 1) The following year, in fall 2016, Mia also stopped participating in court-ordered visits with P.M.S., under the same order, after Innovative Services cancelled their contract due to Mia’s excessive cancellations and her outstanding fees — Mia had missed 12 visits between January and September 2016. (RP 633-34; III Ex. 49; *see also* RP 642-43, 646-48) Before cancelling the contract,

Innovative Services made numerous attempts to “schedule make-up visits, [but] it was difficult to get ahold of [Mia].” (RP 638) For example, until Mia shared her email address, Innovative Services’ “only means of communication” with Mia was by phone, and Mia did not return their many voicemails. (RP 648-49) Innovative Services began emailing Mia after she told them that communication via email “would be helpful for her to remember” but, again, Mia failed to respond. (RP 632, 634-36)

In the fall and winter of 2016, the only visit Mia had with P.M.S. took place on December 23, 2016 — the visit was arranged by Pamela because P.M.S. wanted to give Mia a Christmas gift. (RP 813-14) Mia showed up over an hour late to that visit. (RP 814)

I. Phase three of the trial addressing Mia’s fitness to parent lasted three days, starting in November 2016 and concluding in April 2017.

Phase three of the trial addressing Mia’s unfitness, occurred on November 29, 2016 and on April 17-18, 2017. (RP 592; CP 244, 249, 252) By then, Mia was still in violation of the March 6, 2015 order, and her counsel had withdrawn. (CP 185) Mia appeared *pro se* on the first day, but was represented by counsel for the last two days. (CP 99, 248; RP 587, 784, 1152)

Dr. Landon Poppleton again testified to address Mia's fitness to parent. Despite that it had been five months since the last phase of trial, Dr. Poppleton stated there were limitations to his recommendations because of the short time he was given. (RP 717) Dr. Poppleton again testified that he did not "get the impression" that Mia "was fully forthcoming with all of her information about her history and background," particularly because there was inconsistency between what Mia told him and the record. (RP 694-95) For instance, Mia told Dr. Poppleton that she had never had any mental health treatment (II Ex. 18 at 6; RP 447-48), when there was evidence that her statement was untrue. (See CP 165 (KLEAN Chemical Dependency Compliance Report noting that Mia is working with the "in house therapist . . . where mental health concerns are addressed"), II Ex. 4 at 1 (Mia reported "[m]ental health issues" in the 2015 chemical dependency assessment at Lifeline); III Ex. 42 at 96-97 (Mia testified at a 2008 forfeiture proceeding that she goes to "counseling" and a "Dr. Richardson" proscribed her Abilify for bipolar disorder "with schizophrenic tendencies"))

Finally, Dr. Poppleton acknowledged that Mia's inconsistencies with visitation was a concern because "a child generally . . . is going to need a parent who is reliably there, and . . .

if you have a parent who just kind of isn't doing it then that, I think, speaks volumes." (RP 712)

Mia's Narcotics Anonymous sponsor also testified. (See RP 912-13) Although Mia had previously testified in phase two of the trial that she had not used any drugs whatsoever since 2008 (RP 297-98), the sponsor revealed that Mia had "relapsed" and used drugs on July 4, 2015. (RP 923) The sponsor was unaware of Mia's March 2015 positive UA for methamphetamine, and expressed concern that Mia was denying the validity of the test because "part of recovery [is] taking responsibility that . . . you've used an illegal substance in the past." (RP 923-24)

Pamela testified about Mia's cancelled visits, Mia's tardiness to visits that she did attend, and explained that Mia is so inconsistent with making her scheduled weekly phone calls that Pamela has stopped reminding P.M.S. about the calls because she does not want P.M.S. to be disappointed. (RP 747-51, 817) As a result, when phone calls actually do occur, P.M.S. does not have much interest in talking to Mia, and "is just eager to get off the phone, to go on with what she as doing." (RP 817) Pamela stated her belief that Mia would be unable to parent P.M.S. because, other than for a few months in 2013, there has not been a time that Mia provided for P.M.S.'s daily

needs. (RP 754, 765-67, 871) Pamela expressed her disappointment that despite opportunities Mia failed to take the necessary steps to develop her relationship with P.M.S. (RP 768; *see, e.g.*, RP 768-72, 846, 866-67, 874-75)

J. In June 2017, the trial court awarded nonparental custody of P.M.S. to the Schimmels. The trial court found Mia unfit because she failed to remedy her parenting deficiencies over the 4-year litigation, and failed to comply with court orders intended to reunify her with P.M.S.

The trial court entered final orders on June 28, 2017, awarding the Schimmels nonparental custody. (RP 1152; CP 95, 99, 105) The trial court incorporated its 2015 decree and findings as to the father, but amended the decree and findings “as to the mother/respondent, Mia Schimmel only.” (CP 99, 105)

The trial court awarded custody of P.M.S. to the Schimmels due to Mia’s “continued ongoing abandonment” and her refusal to “perform her parenting duties.” (RP 1149; CP 110-11) After considering the “significant volume of material” in this case (RP 1141), the trial court determined that Mia “is **currently** unfit, or, even if she may be fit, [P.M.S.] will suffer actual detriment . . . if she lived with Mia.” (FF 8, CP 101) (emphasis in original)

The trial court found that Mia “failed to work toward reunification[,] failed to parent,” did not make an effort to visit her

child, and has “taken no action . . . to form a relationship with this child,” which is “a continuation of this pattern” of abandonment and refusal to parent. (FF 8, CP 101; RP 1146) The trial court found that Mia’s “actions and lack of actions throughout this matter show a continuing abandonment of the child.” (FF 16, CP 103)

In reaching its decision, the trial court found that Mia “lacks credibility” due to her inconsistent and contradictory testimony. (FF 16, CP 103; RP 1142-44, 1147-49) For instance, Mia testified that P.M.S. was never exposed to drug use in her home, but it was undisputed that the GAL found methamphetamine pipes and residue in Mia’s home in 2014. (RP 298, *contra* CP 25, 279, 92, 331-33)

The trial court found Mia missed visits and phone calls with P.M.S. despite the efforts of the supervisor and the Schimmels to support her contact. (FF 8, CP 101; RP 1148; *see also* RP 1145 (trial court believed the Schimmels over Mia regarding Mia’s inconsistent visits and phone calls)) The trial court also noted that despite Mia’s undisputed history of drug abuse, Mia “failed to submit to random urinalysis testing . . . at Lifeline Connections as ordered by the court.” (FF 8, CP 101) Mia had two positive UAs, and has “showed consistently that she’s not following through with” the prescribed steps regarding her “drug issues.” (RP 1145, 1147)

The trial court issued a restraining order preventing Mia from having unauthorized contact with her parents or P.M.S (CP 95-98), and granted Mia twice weekly supervised visitation (CP 111), and twice weekly phone calls. (FF 10, CP 102)

After considering Mia's financial resources, including her 25% interest in a partnership set up for her by the Schimmels, which provides her with \$32,000 in cash annually, the trial court denied Mia's requests for attorney fees. (CP 233, 259, 274) The trial court also denied Mia's request for an appointed attorney (at public expense) under GR 33 because it was "untimely" and she did not "provide a sufficient basis for providing an attorney as an accommodation under the ADA." (RP 589-91; CP 91)

III. ARGUMENT

A. Before entering its final nonparental custody order, the trial court provided Mia with all of the process that is constitutionally required. (Response to App. Br. 16-17, 19-26, 34-36)

Appellant spends much of her brief complaining about "procedural irregularities." (*See* App. Br. 17) But any "irregularities" were a direct result of Mia's attempt to avoid a trial on her parental fitness in June 2015, shortly after testing positive for methamphetamine. The need for a three-phase trial was due solely to Mia's litigation strategy, by first (under oath) stipulating to the

Schimmels having nonparental custody of P.M.S., then revoking her agreement on the terms of the Schimmels' custody, before finally revoking her agreement entirely.

Mia is wrong when she claims that the trial court sought "to raise a CR 2A agreement from the ashes of the parties' failed negotiations" and "failed to understand the necessity for a trial on unfitness and detriment" (App. Br. 35), and therefore she "never truly received a trial at which she was presumed fit." (App. Br. 16, 21, 36) The trial court had in fact agreed with Mia, finding "only one possible conclusion: there was no agreement as to unfitness or actual detriment." (CP 81) Accordingly, the trial court acknowledged it could not enter a final order on P.M.S.'s custody "unless the issue of [Mia]'s unfitness or actual detriment is established," and granted her a trial to resolve "the issue of unfitness or actual detriment." (CP 81)

The trial court was not required to vacate the 2015 decree and findings in its entirety. (App. Br. 34-35) The trial court did not "rely on findings entered in the 2015 proceeding" in entering the 2017 nonparental custody order. (App. Br. 24) Instead, as the trial court plainly stated, its incorporation of the 2015 orders was related solely to the father, who has not challenged the orders. (CP 99 (the "findings and conclusions as to Larry Stanfill which remain

unaffected by the subsequent proceedings in this matter involving Mia Schimmel”); CP 105 (“Incorporated into this Amended Final Non-Parental Custody Order are the orders as to Larry Stanfill.”)) The trial court also made clear that it was amending its 2015 orders “as to the mother/respondent, Mia Schimmel, only.” (CP 99)³

The trial court did not “reach back and rely” on evidence from the first phase of trial in 2015 to “support factual findings to deprive Mia of custody.” (App. Br. 25) Mia points to no evidence from the first phase of trial that the trial court purportedly relied on in entering its amended findings in 2017, because there is none.⁴ Further, the trial court specifically stated that its amended findings and conclusions were based only on evidence from the last two phases of “[t]rial between [the Schimmels] and Mia Schimmel on June 21, 2016; November 29, 2016.” (CP 99)

Even if the trial court erred in refusing to vacate the August 7, 2015 findings and decree, the error was harmless because Mia suffered no prejudice — the orders only remained in force as to the

³ Ignoring the court’s written orders, Mia complains about oral statements made by the trial court before it entered the amended order and findings. (App. Br. 23) However, written orders control over oral statements. *Marriage of Raskob*, 183 Wn. App. 503, 519-20, ¶ 31, 334 P.3d 30 (2014).

⁴ For instance, the exhibit list from the first phase of trial show no exhibits regarding Mia were admitted. (See CP 154-60)

father — and new orders were entered based on evidence presented during the portion of the trial, in which she participated. “[E]rror without prejudice is not grounds for reversal.” *Saleemi v. Doctor’s Associates, Inc.*, 176 Wn.2d 368, 380, ¶ 21, 292 P.3d 108 (2013).

Because Mia was granted a hearing on her fitness, she was granted all the procedural due process to which she was entitled before the trial court entered its nonparental custody order.

B. The trial court did not abuse its discretion in awarding nonparental custody of P.M.S. to the Schimmels.

- 1. A trial court’s nonparental custody decision is reviewed for manifest abuse of discretion, and its findings should be given deference.**
(Response to App. Br. 17-18, 25-26, 33-34)

Appellate courts are “generally reluctant to disturb a child custody disposition because of the trial court’s unique opportunity to personally observe the parties.” *Custody of C.D.*, 188 Wn. App. 817, 826, ¶ 22, 356 P.3d 211 (2015). A trial court’s decision regarding a nonparental custody petition is thus reviewed “for a manifest abuse of discretion,” and its “findings of fact will be upheld if supported by substantial evidence.” *Custody of C.D.*, 188 Wn. App. at 826, ¶ 22.

Because nonparental custody proceedings, like parental termination proceedings, are “highly fact-specific,” deference to the trial court is “particularly important.” *See Matter of K.M.M.*, 186

Wn.2d 466, 477, ¶ 20, 379 P.3d 75 (2016) (citation omitted). Accordingly, this Court should “defer to the trial court’s determinations of witness credibility and the persuasiveness of the evidence, and its findings will not be disturbed unless clear, cogent, and convincing evidence does not exist in the record.” *K.M.M.*, 186 Wn.2d at 477, ¶ 20 (internal quotation marks omitted).

Despite this deference, Mia complains that the trial court should have given greater weight to her expert witness, Dr. Poppleton, as the only “neutral witness.” (App. Br. 17) But the trial court properly accorded little weight to Dr. Poppleton’s testimony when he was only given nine days to make his conclusions (RP 438), and “most of the information [he] relied upon” was Mia’s self-reporting (II Ex. 18 at 15), and she had not been “fully forthcoming” (RP 694), by lying about her drug use, mental health, and criminal history. (*See, e.g.*, RP 447-48, 694-97, 699-700)

Similar to her challenge regarding the weight accorded to Dr. Poppleton’s testimony, Mia asks this Court to disregard the trial court’s adverse credibility findings against her. Mia claims the court improperly found her “unfit because the court found her lacking in credibility.” (App. Br. 25) But the trial court stated that Mia’s “lack of credibility does not result in her being unfit,” rather, it helped the

court make its “decision as far as who [it] believe[s].” (RP 1149) Whether Mia was unfit or whether placing P.M.S. with Mia would cause actual detriment to P.M.S. is a factual issue, and the trial court was required to make credibility determinations, to which this Court should defer. *K.M.M.*, 186 Wn.2d at 477, ¶ 20.

That the trial court found that Mia lacked credibility does not make its decision wrong when it clearly had in mind the “substantive requirements for nonparental custody.” (*See* App. Br. 26) The trial court properly acknowledged that it could not make any final ruling on P.M.S.’s custody “unless the issue of unfitness or actual detriment is established.” (CP 81) As set forth in II. Restatement of Facts, *supra*, and discussed more fully below, Mia’s unfitness and the detriment to P.M.S. if returned to Mia was established.

2. Mia’s refusal to adequately and consistently parent P.M.S. and comply with court-ordered reunification efforts supports the nonparental custody order. (Response to App. Br. 27, 31-34)

A parent’s constitutionally protected right to parent her child is not absolute — the deference normally given to parents is outweighed by (1) “parental unfitness,” or (2) where “the child’s growth and development would be detrimentally affected by placement with an otherwise fit parent.” *Custody of C.D.*, 188 Wn. App. at 826, ¶ 23 (*citing Marriage of Allen*, 28 Wn. App. 637, 647,

626 P.2d 16 (1981)). Actual detriment and parental unfitness “must be determined on a case-by-case basis.” *Custody of C.D.*, 188 Wn. App. at 826, ¶ 23. Whether a parent is unfit “extends beyond the existence of parental deficiencies [and] consider[s] the specific parent-child relationship at issue” as well as any “other conditions” that “prevent the parent from providing for the child’s basic health, welfare, and safety.” *K.M.M.*, 186 Wn.2d at 493, ¶¶ 57-58 (discussing “unfitness” with reliance on nonparental custody cases).

Mia claims that the evidence presented by the Schimmels was “either out-of-date or speculative.” (App. Br. 32) While the parent’s current fitness is the issue, the “long-standing position” of our courts is “that past history is a factor that a court may consider in weighing a parent’s current fitness.” *Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996) (affirming finding of unfitness in termination proceedings). Thus, a parent’s “historic struggles” and the “issues that she continued to face” at the time of trial are relevant considerations. *Welfare of E.D.*, 195 Wn. App. 673, 689, ¶ 33, 381 P.3d 1230 (2016) (addressing parent’s current unfitness in a termination proceeding), *rev. denied*, 187 Wn.2d 1018 (2017). Also relevant is “the parent’s history of parenting and compliance with services” in addition to the parent’s criminal history, and inability to

provide “adequate [and safe] housing.” *Welfare of E.D.*, 195 Wn. App. at 689-91, ¶¶ 35-40; *see also Dependency of A.S.*, 101 Wn. App. 60, 73-74, 6 P.3d 11 (refusal to partake in court-ordered services and refusal to visit their child were relevant factors pertaining to the parents’ unfitness in a termination proceeding), *rev. denied*, 141 Wn.2d 1030 (2000); RCW 13.34.132(4)(h) (in deciding whether to terminate parental rights, court should consider whether the parent failed to engage with rehabilitative services and has not made a “significant change in the interim”).

Therefore, in entering its nonparental custody order, the trial court properly considered Mia’s parenting history, her refusal to participate in court-ordered services, such as visitation and contact with P.M.S., her questionable ability to provide stable housing for herself and P.M.S., and her ongoing criminal activity. The trial court’s findings on each of these matters are supported by substantial evidence, and supports its conclusion that Mia was unfit, and that returning P.M.S. to Mia’s care would cause actual detriment.

The trial court found Mia failed to parent P.M.S., by failing to maintain consistent court-ordered contact with P.M.S. and failing to cooperate with offered make-up visits. (RP 214-16, 263, 327, 632-36, 638, 644-49, 747-51, 768, 813-14, 817, 1145-49; CP 24-25; II Ex.

11 at 130, 166, 183, 248-49, 262, 297, 302-03, 308; III Ex. 49) Mia claims that the trial court “ignored” testimony about the Schimmels’ role in Mia missing visits with P.M.S., and characterizes the Schimmels’ testimony as “unreliable.” (App. Br. 28-29) But the trial court found that the Schimmels’ testimony was credible and Mia’s was not. (RP 1145, 1149) In weighing the parties’ conflicting testimony, the trial court believed the Schimmels over Mia, and this Court should defer to that determination. *K.M.M.*, 186 Wn.2d at 477, ¶ 20.

The trial court properly considered Mia’s inconsistency in parenting in finding that returning P.M.S. to Mia would cause actual detriment. (FF 8. CP 101) For example, when P.M.S. had previously been returned to Mia’s care early in the proceeding, Mia’s failure to consistently and timely pick P.M.S. up from school caused P.M.S. severe separation anxiety that required therapy to treat. (RP 36, 678, 1147; CP 294, 306) Due to Mia’s later similar conduct, such as failing to appear for visits and failing to call P.M.S., the trial court properly concluded that Mia’s behavior would continue if P.M.S. were returned to her, and cause P.M.S. actual detriment.

In light of the evidence, the trial court’s conclusion that Mia would not parent P.M.S. was not “speculative.” It is Mia, not the Schimmels, who is asking the trial court to speculate. After years of

failing to consistently and adequately parent P.M.S., Mia claims that the trial court should have believed that Mia all of a sudden would start parenting if the Schimmels' petition is dismissed.

In *Custody of Stell*, 56 Wn. App. 356, 368, 783 P.2d 615 (1989), Division One reversed an order dismissing a nonparental custody petition because the trial court had engaged in the same type of speculation that Mia asks the court to do here. After years of the aunt caring for the child, the trial court dismissed her nonparental custody petition and returned the child to his father. In reversing, Division One held that the trial court's conclusion that the father "was somehow able to physically and psychologically care for [the son] although he had never been able to before" was "insupportable" and "speculative." *Stell*, 56 Wn. App. at 368.

The trial court also properly considered Mia's unstable housing situation and her refusal to provide a current address in entering its nonparental custody order. (FF 8, CP 101; RP 594, 662-63, 831, 859). The trial court's concern was not solely whether Mia could provide a home for P.M.S., but that Mia created an unstable housing situation while seeking the return of P.M.S., leaving herself and P.M.S. without "appropriate housing" if P.M.S. was returned to her. *Stell*, 56 Wn. App. at 368 (whether father had "appropriate

housing for himself” and son was a relevant consideration that the trial court failed to adequately consider).

At the commencement of the action, Mia owned a home, which was paid off by the partnership that had been set up by the Schimmels. (RP 600, 837, 859, 958, 1050) Mia unilaterally sold the home in November 2016 while the action was pending. (RP 600, 837) Despite having the proceeds available to her to acquire a new home, Mia’s housing situation remained “in limbo” for several months. (RP 600, 921) Mia lived in a hotel, moved in with her boyfriend’s parents (RP 966-67), tried to buy a house in Castle Rock which “fell through” (RP 589, 600), lived at a rented condominium for a short period (RP 967), then moved into an apartment without a lease agreement. (RP 967-68) Throughout her moves, Mia repeatedly ignored requests from her parents, opposing counsel, the GAL, and the trial court to provide an updated address. (RP 594, 600, 831, 859, 969) The trial court properly found that Mia’s “history of unstable housing,” and the lack of evidence that Mia had appropriate housing for herself and P.M.S., would cause actual detriment to P.M.S. if she were returned to Mia. (CP 101)

The trial court also properly considered the fact that Mia engaged in a variety of criminal activity prior to and during the

pendency of these proceedings, some of which resulted in active arrest warrants. (RP 887, 1001, 1017, 1118, 1148-49; CP 25, 28-29, 331-32; III Exs. 7, 8, 9, 11, 13, 14) Although the threat of incarceration alone does not necessarily warrant a determination that a parent is unfit, the trial court properly considered it in concluding that returning P.M.S. to Mia would cause actual detriment, as it leaves P.M.S. at risk of having both parents incarcerated.

3. Mia's history of drug use and failure to comply with court-ordered drug testing supports the nonparental custody order. (Response to App. Br. 26-27, 32)

In addition to considering Mia's history of parenting, the trial court properly considered Mia's history of drug use in entering its nonparental custody order. It is undisputed that Mia abused methamphetamines before and during the nonparental custody proceeding. Despite the trial court's efforts to ensure that Mia did not relapse into drug use, Mia failed to demonstrate a sustained period of successful sobriety because she refused to follow court orders requiring her to submit to random UAs, and refused to acknowledge both her past drug use and positive drug tests. (CP 24, 26, 145, 189, 293-94, 314, 359-60, 368; RP 16, 300, 341, 996-97, 1088; III Ex. 40 at 1; II Ex. 5 at 3; III Ex. 41 at 1; *compare* RP 297-

98, 370-71, and II Ex. 18 at 7, with III Ex. 40 at 2, and CP 131, 332, and RP 916) Mia also refused to provide records of her drug treatment and refused to sign releases to the GAL and her parents, despite being repeatedly ordered to do so by the court. (CP 18, 24, 40; RP 189-90, 343-45)

Mia claims there was “no evidence of a current drug problem,” (App. Br. 26, 32), and the 2015 positive UAs fall short of the “current” requirement. (App. Br. 27) But this goes exactly to the trial court’s point — despite twice admitting to relapses (CP 131, 332; III Ex. 40 at 2), and evidence of others (III Ex. 41; II Ex. 5; RP 923), Mia failed to demonstrate successful sobriety by refusing to comply with court-ordered drug testing.

Even though it is the Schimmels’ burden to prove a basis for the nonparental custody order (App. Br. 25), it is Mia’s burden to prove that she was addressing her drug abuse. *See Welfare of T.B.*, 150 Wn. App. 599, 610, ¶¶ 24-25, 209 P.3d 497 (2009) (addressing burden of proof in termination proceedings). Only Mia had the ability to demonstrate that she was successful in her efforts to remain sober. As the party with the sole control over that information, Mia cannot fail to produce it and then claim the benefit of its absence. *See Northwick v. Long*, 192 Wn. App. 256, 264, ¶ 18, 364 P.3d 1067

(2015) (“When a party fails to produce relevant evidence within its control without satisfactory explanation, the trial court is permitted to draw the inference that the evidence would be unfavorable to the nonproducing party.”).

Mia only provided UA results from 2015 even though she was ordered to submit to random UAs “through trial or pending further court order.” (CP 40) The trial court was not persuaded by Mia’s explanation that all the UAs positive for methamphetamine were caused by weight-loss medication. (II Ex. 17; RP 998, 1142, 1147) In light of her undisputed history of drug use, including during a period of court supervision when she knew she was placing her custody of P.M.S. at risk, and her refusal to participate in court-ordered services intended to ensure her sobriety and reunify her with P.M.S., the trial court properly concluded that Mia was unfit, and returning P.M.S. to her care would cause actual detriment.

4. After finding a basis for a nonparental custody order, the trial court did not abuse its discretion in placing P.M.S. with the Schimmels. (Response to App. Br. 47-49)

Despite Mia’s attempts to disparage the Schimmels (App. Br. 47-49), the trial court did not find Mia’s accusations credible, and credibility determinations are the province of the trial court. *K.M.M.*, 186 Wn.2d at 477, ¶ 20. Railing primarily against her father, Mia

accuses him of being “an alcoholic,” chides him for having “pre-Alzheimer’s,” and “raise[s] the *possibility*” that she was “sexually abused by” her father. (App. Br. 30, n.11, 48) (emphasis added) The trial court had good reason to not believe Mia’s accusations — both CPS and the GAL investigated Mia’s complaints about Irwin’s drinking and determined it was a non-issue, (RP 200); there was credible testimony that Irwin’s pre-Alzheimer’s is being successfully treated by medication and that the symptoms have abated, (RP 279, 1029, 1064); and there was no reason to give credence to Mia’s claims of “possibl[e]” sexual abuse by Irwin (RP 236, 488-89), as Mia apparently had no qualms with leaving P.M.S. in her parents’ care for long periods from the time P.M.S. was born until this action commenced, and at one point agreed that the Schimmels be granted custody. Mia’s arguments are a mere attempt to distract this Court from the dispositive issue (i.e., Mia’s fitness).

C. Mia was not entitled to appointment of counsel, nor was she entitled to have her attorney fees paid by the Schimmels.

The trial court properly denied Mia’s requests for appointed counsel (at public expense) when she is not constitutionally entitled to counsel. The trial court also did not abuse its discretion by denying Mia attorney fees under RCW 26.10.080, after determining

that Mia has the financial resources to pay her own attorney fees. Finally, the trial court properly denied Mia's request for an accommodation under GR 33 when she failed to meet the rule's substantive requirements.

1. There is no right to appointed counsel in nonparental custody proceedings. (Response to App. Br. 45-47)

A parent is not entitled to court-appointed counsel in a nonparental custody proceeding. *See* RCW 26.10.010-.912 (no right under nonparental custody statutes to appointed counsel for parents); *Dependency of E.H.*, 158 Wn. App. 757, 768, ¶ 18, 243 P.3d 160 (2010) (in cases concerning nonparental custody, indigent parents are only entitled to appointed counsel where “the nonparental custody action is *inextricably linked* with the *dependency issue*” under RCW Chapter 13.34 (emphasis added)).

In asserting a “right” to appointed counsel in nonparental custody proceedings (*see* App. Br. 46), Mia relies entirely on cases involving parents whose rights to the custody and care of their children are at risk in termination and dependency proceedings. While our courts have acknowledged the similarities between termination/dependency proceedings and nonparental custody actions, they are not identical, and do not require the same statutory

safeguards. For instance, in a termination/dependency proceeding, a parent has a statutory “right to be represented by an attorney in all proceedings under this chapter.” RCW 13.34.090(1). There is no statutory right to appointed counsel in a nonparental custody proceeding. Instead, the court has *discretion* to order one party to pay attorney fees to another party (not necessarily the parent), “after considering the financial resources of all parties.” RCW 26.10.080. The court also has discretion to appoint counsel “to represent the interests of a minor or dependent child” under RCW 26.10.070, but no similar statute exists for parents.

The different treatment is because the “fundamental liberty interest” at stake in termination/dependency proceedings is far greater than in nonparental custody proceedings. As our Supreme Court described, termination of parental rights “entirely and permanently” “ends the parent/child relationship” and the parent loses any standing in legal proceedings concerning the child:

An order terminating parental rights ends the parent/child relationship entirely and permanently. [A]ll rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support are severed and terminated and the parent thereafter has no standing in legal proceedings concerning the child. RCW 13.34.200. A termination order leaves the parent without the right to talk or meet the child, or to participate in or be informed about the child’s development. The parent is

allowed no opportunity to make decisions regarding the child's upbringing.

King v. King, 162 Wn.2d 378, 394, ¶ 35, 174 P.3d 659 (2007) (internal quotations omitted, alteration in original). A nonparental custody order, however, does not permanently end the parent/child relationship. Instead, “[a] nonparental custody order confers only a temporary and uncertain right to custody of the child for the present time, because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.” *Custody of A.F.J.*, 179 Wn.2d 179, 186, ¶ 9, 314 P.3d 373 (2013) (quoting another source).

A nonparental custody order is more like a custody order in a dissolution action, where our Supreme Court held that there is no right to appointed counsel, because the parent's rights to the child “are not terminated but rather allocated” and the parent retains “standing in legal proceedings concerning the children”:

A decree of dissolution between parents does not sever either parent's rights and responsibilities over the children. The rights and responsibilities of the parents are not terminated but rather allocated. Furthermore, the parents retain the right to seek modification of the parenting plan. RCW 26.09.260. They also retain standing in legal proceedings concerning the children. The interest at stake here is not commensurate with the fundamental parental liberty interest at stake in a termination or dependency proceeding.

King, 162 Wn.2d at 394-95, ¶ 36.

Here, Mia continues to have a relationship with P.M.S. and maintains legal standing in any legal proceedings related to her. Mia's parental rights were not at risk of being permanently terminated, as is the case in termination and dependency proceedings. Therefore, Mia was not entitled to appointed counsel.

2. The trial court did not abuse its discretion in denying Mia's request for attorney fees under RCW 26.10.080. (Response to App. Br. 38-41)

Under RCW 26.10.080 a trial court "may," in its discretion, order one party to pay the other party's "reasonable attorney's fees" if the requesting party shows she has "need" and the other party has the "ability to pay." RCW 26.10.080; *Custody of Smith*, 137 Wn.2d 1, 22, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). A trial court's decision on attorney fees is viewed for an abuse of discretion. *Custody of Smith*, 137 Wn.2d at 22. The trial court here did not abuse its discretion when the Schimmels had already voluntarily paid some attorney fees for Mia (RP 1085-86), and there was substantial evidence that Mia had the ability to pay her own attorney fees.

Whether the Schimmels have the ability to pay Mia's attorney fees is not the test under RCW 26.10.080. (App. Br. 37, 40) Instead

it is whether they have the ability *and* whether Mia has the need for her attorney fees to be paid. RCW 26.10.080 (court must consider “financial resources of all parties”). Mia claims that she has the need for attorney fees because she cannot work because she has Pulmonary Hypertension. (CP 191; RP 289, 979, 981) But as the trial court acknowledged, if Mia believes she needs more money, Mia has “the ability to do some kind of work to supplement” her income, considering that Mia is not “100 percent disabled” and currently does volunteer work and babysitting (without compensation). (RP 585; *see* RP 289, 373, 979; *see also* RP 981, 1070 (Mia has other opportunities for employment))

Further, despite claiming a “need” for her attorney fees to be paid, Mia has proven she has the ability to pay private defense counsel to represent her in a criminal theft case (RP 1017), a proceeding where she is, unlike here, entitled to appointed counsel. Mia in fact enjoys a stable income stream, receiving weekly distributions from a partnership set up by her parents, which provides her with an annual “cash” income of approximately \$32,000. (RP 301, 655-56, 937) This “cash” is entirely at Mia’s disposal, as her bills and living expenses are paid for by the partnership. For instance, the partnership pays Mia’s income taxes

and most of Mia's living expenses including the down payment, mortgage, HOA dues, and property taxes for Mia's house (which she subsequently sold after the house was paid off), car payments, auto insurance, new tires, health insurance, medical expenses not covered by insurance, and travel expenses for medical care.⁵ (RP 656, 659, 660-62, 666-67, 670, 1050, 1069-70; III Ex. 5) The record contains only one instance of the partnership refusing to pay an expense for Mia — in 2017, she requested \$60,000 to buy a horse. (RP 983, 1070-71)

Based on the evidence before it, it was well within the trial court's discretion to deny Mia attorney fees when Mia has the ability to pay her own attorney fees.

3. The trial court did not abuse its discretion in denying Mia's request to have an attorney provided for her under GR 33 as an ADA accommodation. (Response to App. Br. 42-45)

The trial court correctly denied Mia's GR 33 motion for an appointed attorney as an ADA accommodation because the motion was untimely and did not meet the substantive requirements of GR 33. (RP 589) An unrepresented disabled person may be appointed

⁵ Between 2014 and 2016, the Partnership made the following payments to and for Mia: \$66,872.08 in 2014; \$92,129.14 in 2015; and \$84,155.04 from January to August 2016. (RP 658-59; III Ex. 5 at 1-3; III Ex. 52 at 1)

counsel as an accommodation under GR 33 if “necessary” to make the courts “readily accessible” where there would otherwise be a disability-related barrier. GR 33(a); 2 Tegland, Washington Practice Series: Rules Practice GR 33 (8th ed. August 2017 Update). Accommodation requests under GR 33 are decided “on an individual-and case-specific basis” and may be denied if, among other reasons, the “requesting application has failed to satisfy the substantive requirements” of the rule. GR 33(c)(1)(C), (c)(2)(A). Appointing an attorney as a “reasonable accommodation” under GR 33 has been done, for example, where a party has a “disability [that] prevents comprehension of process/proceedings.” *Marriage of Lane*, 188 Wn. App. 597, 599, ¶ 5, 354 P.3d 27 (2015).

Mia provides no support for her argument that the trial court erred in denying her GR 33 request. She simply claims that because she has “pulmonary arterial hypertension with severe blood pressure,” she is entitled to an attorney under the rule and the trial court “completely ignore[d]” the requirements of GR 33. (App. Br. 43) But GR 33(c)(2)(A) explicitly authorizes the court to deny an accommodation request if it does not “satisfy the substantive requirements of [the] rule,” which include a “statement of the

disability *necessitating* the accommodation.” GR 33(b)(5) (emphasis added).

The trial court properly denied Mia’s request, after concluding that she did not “provide a sufficient basis for providing an attorney as an accommodation under the ADA.” (RP 589) Illness alone does not satisfy the requirements of GR 33. As the trial court acknowledged, Mia’s illness did not prevent her from being able to afford an attorney (III. Argument C.2, *supra*), nor did it create a barrier to her access to the court. (*See* RP 589-91) Unlike the party in *Marriage of Lane*, Mia has provided no evidence that her illness interferes with her “comprehension of [the] process/proceedings” so that she could not appear *pro se*.⁶ 188 Wn. App. at 599, ¶ 5.

The trial court also properly denied Mia’s request for a GR 33 accommodation because it was “untimely.” (RP 589) “Whenever possible,” the accommodation request “should be made in advance.” GR 33(b)(2). Here, Mia made her request only two court days before the start of phase three of the trial. (RP 589) Mia gave no explanation as to why it was not “possible” for her to submit a timely accommodation request, considering that she had been diagnosed

⁶ Mia incorrectly states that her “disability was undisputed.” (App. Br. 43) Only Mia’s *diagnosis* is undisputed; whether her illness renders her disabled was not agreed to.

with her illness in 2013. (RP 931) The trial court believed that Mia's "11th hour" request was "the usual attempt[] to delay the proceedings." (RP 590)

D. This Court should deny Mia's request for attorney fees on appeal. (Response to App. Br. 49)

This Court should not award Mia attorney fees on appeal for the same reason this Court should affirm the trial court's denial of attorney fees below — Mia has the ability to pay her own attorney fees. RCW 26.10.080. The party requesting attorney fees under RCW 26.10.080 must show "financial need" to justify a fee award on appeal. *Smith*, 137 Wn.2d at 21-22. As explained above, Mia does not have the need for her attorney fees to be paid.

Further, this Court should deny attorney fees on appeal when most of Mia's complaints on appeal are based on "procedural irregularities" she created, which caused the litigation to be time consuming and costly for both parties. The underlying matter could have been resolved at trial in 2015. Instead, it went on for another two years because Mia twice retreated from agreements she made while represented by counsel. This appeal is merely an extension of those actions. This Court should therefore deny her fees on appeal.

IV. CONCLUSION

This Court should affirm the trial court's decision in its entirety and deny the mother's request for an award of attorney fees on appeal.

Dated this 20th day of July, 2018.

SMITH GOODFRIEND, P.S.

By:  _____
Valerie A. Villacin
WSBA No. 34515
Duffy G. Romnor
WSBA No. 52822

Attorneys for Respondents

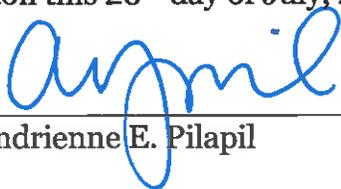
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 20, 2018, I arranged for service of the foregoing Corrected Brief of Respondents, to the court and to the parties to this action as follows:

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Glenn Slate Heritage Family Law 11105 NE 14th S., Ste. A Vancouver, WA 98684 gleen@heritagefamilylaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Patricia S. Novotny Zaragoza Novotny, PLLC 3418 NE 65th Street, Suite A Seattle, WA 98115-7397 patricia@novotnyappeals.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 20th day of July, 2018.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

July 20, 2018 - 3:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50665-3
Appellate Court Case Title: In Re the Custody of P.M.S.
Superior Court Case Number: 13-3-00086-2

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Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

Filing on Behalf of: Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

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