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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

RELY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES IN REPLY 1

II. ARGUMENT IN REPLY 2

 A. INTRODUCTION AND FACTUAL CLARIFICATIONS..... 2

 1) Drug Use..... 3

 2) The Schimmels’ Fitness..... 5

 3) Missed visits 6

 4) Dr. Poppleton..... 8

 5) Procedural Irregularities..... 10

 B. THE STANDARD FOR NONPARENTAL CUSTODY IS NOT
 BEST INTERESTS, WHICH IS WHAT THE COURT APPLIED
 HERE, NOR DOES THE EVIDENCE HERE ESTABLISH BASES
 FOR NONPARENTAL CUSTODY. 11

 1) The Legal Standards. 11

 2) The Evidence. 13

 C. THE FINANCIAL ISSUES 23

III. CONCLUSION..... 25

TABLE OF AUTHORITIES

Washington Cases

<i>Fernando v. Nieswandt</i> , 87 Wn. App. 103, 940 P.2d 1380 (1987).....	6
<i>In re Custody of A.L.D.</i> , 191 Wn. App. 474, 363 P.3d 604 (2015).....	2
<i>In re Custody of B.M.H.</i> , 179 Wn.2d 224, 315 P.3d 470 (2013)	11
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009)	13
<i>In re Custody of J.E.</i> , 189 Wn. App. 175, 356 P.3d 233 (2015).....	12
<i>In re Custody of L.M.S.</i> , 187 Wn.2d 579, 387 P.3d 707 (2017). ..	11, 12, 22
<i>In re Custody of Z.C.</i> , 191 Wn. App. 674, 366 P.3d 439 (2015) ..	13, 15, 21
<i>In re Dyer</i> , 157 Wn.2d 358, 139 P.3d 320 (2006);	17
<i>In re Mahaney</i> , 146 Wn.2d 878, 51 P.3d 776 (2002)	20
<i>In re Marriage of McNaught</i> , 189 Wn. App. 545, 359 P.3d 811 (2015) ..	17
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).	25
<i>In re Marriage of Schweitzer</i> , 132 Wn.2d 318, 937 P.2d 1062 (1997)	13
<i>In re Marriage of Swanson</i> , 88 Wn. App. 128, 944 P.2d 6 (1997).....	6
<i>In re Marriage of Woffinden</i> , 33 Wn. App. 326, 654 P.2d 1219 (1982). ...	9
<i>In re Stell</i> , 56 Wn. App. 356, 783 P.2d 615 (1989).	8
<i>In re Welfare of C.B.</i> , 134 Wn. App. 942, 143 P.3d 846 (2006)	14, 16
<i>In re Welfare of T.B.</i> , 150 Wn. App. 599, 209 P.3d 497 (2009).....	14, 16
<i>King v. King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	23
<i>Northwick v. Long</i> , 192 Wn. App. 256, 364 P.3d 1067 (2015).	16

Reynolds v. N. Pac. Ry. Co., 22 Wash. 165, 60 P. 120 (1900) 17

Statutes

RCW 26.09.140. 25

Other Authorities

Tegland 13B *Wash. Prac., Criminal Law* § 2414 (2017-2018 ed.) 19

Tegland, 14A *Wash. Prac., Civil Procedure* § 24:1 (2d ed.) 17

Kenneth W. Weber, *Wash. Prac., Family and Community Property Law* §
40.2 (1997) 25

I. STATEMENT OF ISSUES IN REPLY

1. The Schimmels consistently misrepresent important facts and consistently rely on Mia's past instead of her present.

2. The court never finds and the Schimmels never prove the "actual detriment" our law requires be proved to justify an infringement upon a parent's fundamental right to the custody of her child.

3. Likewise, the Schimmels' unfitness argument ignores Mia's recovery and current circumstances and relies on abandonment, contrary to our law and to the facts – facts that include this mother's ongoing struggle to regain custody of her child.

4. If Mia had any burden in the trial, it was a burden of production, which she satisfied by proving her completion of treatment, her participation in aftercare, and her ongoing sobriety. The Schimmels continue to bear the burden of proof by clear and convincing evidence.

5. If anyone was proved unfit, it was Irwin, a fact the court cannot ignore and fulfill its duty is to serve the best interests of the child.

6. The trial court cannot merely ignore uncontroverted facts.

7. As applied here, nonparental custody unconstitutionally infringes upon Mia's relationship with her daughter in the absence of any services or safeguards to protect that relationship, including appointment of counsel, at trial and on appeal.

II. ARGUMENT IN REPLY

A. INTRODUCTION AND FACTUAL CLARIFICATIONS.

Mia does not and did not, in her opening brief, dispute she has a history of drug abuse and other troubles. “Nonparental custody cases often involve a young parent who struggles with an addiction or financial independence and gives one or more children to grandparents or other relatives to temporarily raise.” *In re Custody of A.L.D.*, 191 Wn. App. 474, 495, 363 P.3d 604 (2015). However, here, Mia’s history is part of the larger Schimmel family dysfunction.

Nonetheless, the Schimmels want to focus only on Mia and only on her past. However, the law requires the court to focus on the present. The “test for fitness of custody is the present condition of the mother and not any future or past conduct.” *A.L.D.*, 191 Wn. App. at 506. Further, the law places on the Schimmels the burden to prove the bases for nonparental custody by clear, cogent, and convincing evidence. Mia does not have to prove she is fit or prove the absence of detriment. Yet the trial court here got all these procedural elements wrong, requiring Mia to overcome a presumption of unfitness and failing to identify any actual detriment, not to mention ignoring undisputed evidence and otherwise suggesting its bias against Mia, making its final orders a foregone conclusion. Those legal

errors are discussed below. However, preliminarily, Mia offers some prominent examples of the Schimmels' misleading factual statements.

1) Drug Use.

The court entered its orders in June 2017. Mia last and briefly relapsed in March 2015, three years earlier.¹ Later in 2015, over a roughly three-month period, Mia tested negative. (A false-positive urinalysis in July resulted from medical use of a drug for her hypertension, as the testing entity confirmed. Exhibits 9, 17 (6/20/16)). The treatment center concluded Mia was not abusing drugs. No one contradicted this evidence. Rather, the treatment provider, KLEAN, corroborated Mia had completed rehabilitation and her Narcotics Anonymous sponsor (part of Mia's post-rehab plan) testified in the 2017 trial to her belief that Mia has been drug-free since 2015. RP 912-918.² Mia also drug-tested just before trial (June 2016), at Dr. Poppleton's request, and the results were negative. Exhibit 18 (6/21/16), at 13. The Schimmels ignore this evidence of Mia's current sobriety and focus instead on her history. See, e.g., Br. Respondents, at 8-9 (re GAL observation of house in 2014).

¹ Even this "positive" test result seems problematic, as the cover letter describes it as being both a "positive" and a "negative" result. Exhibit 5 (6/20-21/16) (Letter from Lifeline dated 6/23/15).

² KLEAN is a provider of rehabilitative treatment for various forms of substance abuse with locations up and down the Pacific Coast, including Portland, and a program for treating the affected family. See <https://kleantreatmentcenters.com/> (last visited 09/19/18).

The Schimmels also distort the record when they claim Mia refused to participate in court-ordered testing during the 18 months before the final trial phase or that “her longest known period of sobriety is under one year.” Br. Respondents, at 1-2, 3. In fact, of course, Mia did participate in drug-testing and treatment. She moved to a different provider (from Lifeline to KLEAN) because she liked the smaller support groups and the counselor (RP 308-310), but the order did not require her to get an evaluation or treatment at Lifeline. In short, she complied with the order, completing the recommended treatment to the provider’s satisfaction, as stated in the June 16, 2016 letter. Exhibit 17 (6/20/16). She also tested negative with Dr. Poppleton right before trial.

In short, Mia’s present sobriety was established by drug tests over the course of her treatment and pretrial evaluation, testimony of her sponsor, and confirmation of successful treatment. RP 912-918; Exhibits, 9, 17 (6/21/16). Dr. Poppleton did not think she needed any more drug testing; rather, he indicated her prognosis for continued sobriety to be good based on these facts and Mia’s self-awareness of her risks. Exhibit 18 (6/20-21/16), at 12, 14. Most pertinently, Dr. Poppleton testified Mia’s historical drug use would not interfere with her parenting. RP 416-417. Simply, the Schimmels fail to prove any drug use since the early 2015 “positive-negative” result and cannot use Mia’s past as a substitute.

2) The Schimmels' Fitness

The Schimmels want to render irrelevant the evidence of the broader family dysfunction and their own specific conditions and conduct pertinent to the child's welfare, arguing it is "Mia's fitness," not theirs, at issue here. Br. Respondents, at 4; see, also, Br. Respondent, at 40 (claiming GAL determined that drinking a "non-issue").³ It is hard to imagine anyone taking the view that placing a child in the custody of a relapsed alcoholic is a "non-issue," let alone where, as here, Irwin's drinking is, as a matter of record and common sense, part of the broader family dynamic directly relevant to P.M.S.'s welfare, as Dr. Poppleton testified. RP 419-420; Exhibit 18 (6/21/16), at 11-14. The Schimmels have long tried to isolate Mia as a "problem," ignoring the long history of Irwin's alcoholism and all that signifies for the family system. If Mia's historical substance abuse is somehow a failure of character, as the Schimmels' brief seems to insinuate, then Irwin's alcoholism is also. In fact, of course, both are medical conditions amenable to treatment, assuming they are confronted openly and honestly. As Dr. Poppleton testified, the path to a healthy future for P.M.S. lies in this direction.

While Irwin's alcoholism and present relapse are proved by the Schimmels' own testimony, the Schimmels focus on the GAL assessment

³ The GAL's investigation consisted of speaking to the Schimmels, which she did prior to Irwin's DUI and Open Container Violation.

from 2015 (Br. Respondent, at 40), when their own testimony and this more recent evidence show how completely the Schimmels misled the GAL.⁴ Tacitly, their unsuitability is further established by the fact that, in direct violation of the court order, P.M.S. spends most her time at her aunt's house, not with Irwin and Pamela. Br. Appellant, at 29; CP 106 (ordering child reside majority of time with the Schimmels); RP 819 (Pamela leaves P.M.S. with Mia's sister to shield her from Irwin). Mia grew up in that household. Her daughter should not.

3) Missed visits

Mia's opening brief addressed the trial court's pervasively inaccurate view of the facts, as well as its misapprehension about the legal standard and does so below. Here, she highlights one aspect of that problem – the interplay between the court's "neglect" finding and the visitation record, wherein the Schimmels and the trial court attribute solely to Mia missed visits with P.M.S.

The Schimmels want to reduce this to a credibility determination, but that requires ignoring the Schimmels' own testimony and the evidence from the supervisors. Contrary to court order, the Schimmels limited the

⁴ The GAL's investigation of the Schimmels can fairly be characterized as cursory. See Br. Appellant, at 48. In general, but in this family particularly, such an approach fails the GAL's duty to act as a neutral advisor, let alone "an expert in the status and dynamics" of this family. *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1987); see also *Marriage of Swanson*, 88 Wn. App. 128, 140, 944 P.2d 6 (1997) (guardian's failure to investigate and assess child's best interests).

visits to once a week for most of 2016 because P.M.S. had conflicts. RP 1033-1035; 1037. The GAL described this as the Schimmels not being able to make it work because of their travel schedule, and speculated Mia was having problems with transportation and juggling medical appointments. RP 214. Additionally, the Schimmels testified they chose to miss visits, elevating in priority horse-riding for P.M.S., for example. RP 1037-1038; 1077-1079 (Mia's objection to these priorities meaningless); see, also, RP 643 (visitation supervisor testified Irwin "regularly" contacted her when P.M.S. was going to be gone because of other activities). A few times the Schimmels just forgot to go or "spaced it." RP 1036-1037. Irwin testified they did not schedule make-up visits if they might last until five, meaning no afternoon or evening visits were possible, in his view. RP 1079-1080.⁵

In light of the evidence, even the GAL agreed both parties were responsible for missed visits. RP 212 (problems on both sides; Irwin and Pam traveling a lot; less inconsistency recently on Mia's side). And the visitation facility's record confirms the same. Exhibit 17; RP 634. Again, the court not only ignores the actual and uncontroverted evidence, the court ignores the broader system in which these visits occur – alcoholism

⁵ This constraint on visitation necessarily constrains Mia's ability to work and makes the Schimmels' and the court's view on this a no-win scenario for her.

and a lifelong struggle between father and daughter, with this iteration involving Irwin's complete control over Mia's access to her daughter.⁶ At the same time, the family bonds prevail, as, for example, when Pamela arranges for visits between Mia and P.M.S. outside of the supervised context. See, e.g., RP 231. In other words, not all visits are recorded, so the Schimmels' claims about visits are not reliable. See, e.g., Br. Respondent, at 17, 21.⁷ Taken together, you have Irwin imposing arbitrary rules and restrictions, making visits as he pleases, and Pamela permitting visits outside that structure. At least Dr. Poppleton recognized how unhealthy a dynamic this is for P.M.S.

4) Dr. Poppleton

This entrenched family dysfunction makes the intervention of neutral professionals crucial to P.M.S.'s welfare. This court does not “condone the [trial] court's refusal to consider repeated and unanimous independent expert opinions.” *In re Stell*, 56 Wn. App. 356, 370, 783 P.2d 615 (1989). Rather, “trial courts should rely on expert opinion to help

⁶ The father-daughter power dynamic is writ large in the visitation struggle from the very start, with, for example, Irwin unilaterally and arbitrarily imposing restrictions. See, e.g., RP 22, 23, 161 (CR 2A was means for Mia to get visitation), 197-198, 221-222, 224 (GAL saw no reason for Irwin's rule against Mia bringing gifts), 226. Then Mia is faulted for not complying with the rules Irwin mandates – all of which merely thwarts P.M.S.'s desire to see her mother. See, e.g., RP 199-200.

⁷ The claims are not even reliable on their face. The Schimmels point to Mia missing 12 visits and ignore the 7 visits they missed. Br. Respondent, at 20.

reach an objective, rather than subjective, evaluation of the issue."

Marriage of Woffinden, 33 Wn. App. 326, 330 n.3, 654 P.2d 1219 (1982).

Here, no expert disputed Dr. Poppleton. The GAL last issued a report in 2015 and had no contact with Mia since and obviously did little investigation of the Schimmels. Only Dr. Poppleton offered a dispassionate and informed view of this family and the needs of P.M.S., though the Schimmels do their best to distort his testimony, which Mia accurately recounted in her brief. As noted, he testified to the importance of the parent-child relationship to P.M.S.'s healthy development. Exhibit 18 (6/21/16), at 13. Based on his observation of the mother-daughter interaction, he concluded Mia "virtually maxed out" on his structured protocol to assess parenting. Exhibit 18 (6/21/16), at 11. Mia's historical drug use posed no impediment to her parenting (RP 416, 434-444). He even mapped a path to reunification, with checkpoints and safeguards along the way, and using Mia's current condition as a baseline. Exhibit 18 (6/21/16), at 13-14.⁸ He recommended a case manager to allow neutral implementation and monitoring, an especially important mechanism given the family dynamics and mutual mistrust. Indeed, he noted how this family's dynamics contributed to the risk to P.M.S. and recommended a

⁸ At the final phase of trial, the Schimmels used the false-positive result from late 2015 in cross-examining Dr. Poppleton, not revealing the testing entity's conclusion it was a false positive. RP 708.

“full family evaluation.” Id. at 11. He worried about the implications of the child not actually being in the care of the custodians, reinforcing the need for a neutral to implement and monitor. Id.

No expert testified in dispute of this sensible and substantiated expert opinion. Even Pamela agreed “absolutely” on the value of a case manager “[t]o monitor both sides,” as recommended by Dr. Poppleton. RP 499. Yet the court simply ignored the evidence and the opportunity it offered to deliver P.M.S. to a healthier and happier future.

5) Procedural Irregularities.

It is not clear why the Schimmels bother to contest the fact of the tortured procedural history of this case, except to continue heaping blame on Mia. Br. Respondents, at 26-28. If anything, the procedural history reflects the overarching problems with this case, including the trial court’s failure to keep front and center the child’s welfare and the mother’s constitutional rights. For example, the Schimmels claim “harmless error” from the court’s reliance on historical evidence, including evidence taken at a trial she did not attend. Br. Respondent, at 28. They claim Mia points to “no evidence” the court used from that trial. In fact, the court directly incorporated findings made in that trial. CP 78, 81. This error cannot be harmless where the court also ignores uncontroverted evidence of Mia’s

present circumstances. Mia stands by her argument and factual recitation regarding the fatal procedural flaws in this action.⁹

B. THE STANDARD FOR NONPARENTAL CUSTODY IS NOT BEST INTERESTS, WHICH IS WHAT THE COURT APPLIED HERE, NOR DOES THE EVIDENCE HERE ESTABLISH BASES FOR NONPARENTAL CUSTODY.

1) The Legal Standards.

There is nothing “extreme and unusual” about this case, such as our law requires to infringe upon a parent’s constitutional rights. *In re Custody of L.M.S.*, 187 Wn.2d 579, 387 P.3d 707 (2017). Particularly pertinent here, we know that even long-term care by and a deeply bonded relationship with a third-party caregiver does not meet the legal standard for an award of nonparental custody. For example, even where a man had fully enacted the parental role since the child’s birth, the potential consequences of severing that relationship did not satisfy the “actual detriment” standard. *In re Custody of B.M.H.*, 179 Wn.2d 224, 236-239, 315 P.3d 470 (2013) (rejecting nonparental custody petition). In other words, a court may not order nonparental custody merely to avoid disrupting the continuity of a caregiving relationship or because the court

⁹ The Schimmels also argue the trial court’s oral statements should be ignored because written orders control. Br. Respondents 28, n.3. That’s true when there is a conflict, but here the court’s oral and written rulings are one consistent mass of inconsistency and error, proof of its result-oriented approach.

views the nonparent as providing a “superior home environment.” *In re Custody of J.E.*, 189 Wn. App. 175, 185, 356 P.3d 233 (2015).

Rather, “actual detriment” must be proved and it means something quite different from the evidence the Schimmels produced in support of their petition. See Br. Appellant, at 33-35.¹⁰ Nor, of course, did the court ever specify what actual detriment justified the extraordinary remedy it ordered. As noted in the opening brief, what the Schimmels argued and their evidence supported was their view that their home was superior to what Mia could provide. Our law presumes the exact contrary. The bottom line is, the Schimmels never proved and the court never found what our law requires to satisfy the actual detriment standard. Here, the actual detriment to P.M.S. is leaving her where she is. Likewise, “unfitness” has a substance not satisfied here, including a temporal requirement. The court cannot rely on Mia’s historical problems, as discussed above and below.

Rather than apply the proper legal standards, the court reached the result it thought best served the child’s interests, a view apparently

¹⁰ The Schimmels argue P.M.S. suffered separation anxiety early in the proceedings (which go back to 2013) and received counseling, but this would seem to be an argument for returning P.M.S. to her mother and for the kind of neutral case manager Dr. Poppleton and Pamela Schimmel wanted. RP 499. The court relies on what it calls “abandonment,” ignoring *L.M.S.* in that regard, but also ignoring the context, including the Schimmels’ limiting Mia’s access and cancelling visits, as described above, not to mention Mia’s persistent and ongoing determination to parent her daughter.

reached early in the proceedings from which the court could not be dislodged when it confronted the evidence of Mia's circumstances now.

2) The Evidence.

The Schimmels must prove the elements by clear and convincing evidence. *In re Custody of C.C.M.*, 149 Wn. App. 184, 205, 202 P.3d 971, 981 (2009). The court's findings as to this proof are reviewed either for substantial evidence, or, as some cases hold, for "highly probable substantial evidence." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)) ("substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence") (internal citations omitted). By either standard, the proof here fails. Nor is the Schimmels' burden altered by the proceedings that occurred in this case before the trial on the merits, since the court nowhere had adjudicated the custody issue. Br. Appellant, at 21, 24, citing *In re Custody of Z.C.*, 191 Wn. App. 674, 704, 366 P.3d 439, 453 (2015).

The Schimmels claim "it is Mia's burden to prove that she was addressing her drug abuse." Br. Respondents, at 38. (As noted above, Mia was addressing her drug abuse.) Notably, the Schimmels cite a dependency case for this proposition, ignoring the context of that case, where the state had offered or provided the parent with all necessary services and where, despite those services, the "parent does not

substantially improve within a year of the dependency order.” *In re Welfare of T.B.*, 150 Wn. App. 599, 608, 209 P.3d 497, 502 (2009) (emphasis added). In those circumstances, this Court said, the state enjoys a rebuttable presumption of having fulfilled the statutory duty RCW 13.34.180(1)(e) imposes, thus shifting the burden of production to the parent. *Id.* Still, it remains the state’s burden to prove it “highly probably that the parent would not improve in the near future.” *Id.*, citing *In re Welfare of C.B.*, 134 Wn. App. 942, 956, 143 P.3d 846 (2006).

Mia would have passed this test. She had substantially improved over time, including even her temporary early 2015 relapse, obtaining the court-ordered services (at her own expense). She was stable, taking care of her health, basically doing her best under the strain of interacting with her family. Nothing rebutted these facts or Dr. Poppleton’s view that Mia loves P.M.S. deeply and is working hard, presenting with “good spirit, and fight to have her daughter in her life.” Exhibit 18, at 11. Regrettably, unlike parents in dependencies, Mia does not receive all necessary services and support to more efficiently pursue restoration of custody (nor, even, an attorney, to aid in defense of Mia’s parental rights). Instead, we have Mia locked in day-to-day combat with her dysfunctional family.

In *C.B.*, on which *T.B.* relies, this Court held “that where a parent produces evidence that she has been improving over a four-month period

after the State files a termination petition,” the State “may not rely solely on past performance” to carry its burden of “highly probable” proof. *Id.* at 953. This measure applies here as well, directly not just by analogy to the dependency/termination context. *See, e.g., Z.C.*, 191 Wn. App. at 694 (despite temporary custody order, parent’s liberty interest “remains undiminished” until proof of unfitness or actual detriment). If Mia had a burden of producing evidence, she satisfied it.

The Schimmels had no current information at all, let alone contradictory information. They had little contact with Mia. They were reduced to hammering on Mia’s history and replaying their narrative of her irresponsibility (which, as noted, includes ignoring their behavior – family dysfunction, drinking and driving, missed visits, etc.). They certainly never engaged with the big picture, as Dr. Poppleton insisted was necessary to P.M.S.’s welfare. At the end of the day, all the Schimmels have is the court’s refusal to credit any of Mia’s evidence, what the Schimmels characterize as Mia’s failure to persuade. *See, e.g., Br. Respondents*, at 39. As argued in Mia’s opening brief, the court went through the motions of a trial on the merits in order to reach a foregone conclusion. This was not a fair trial; it was not even properly conducted, with procedural irregularities almost too numerous to count but all

weighted against Mia. Certainly, the court’s credibility determination is inadequate to the task the Schimmels seek to accomplish.

For example, the Schimmels argue the court “was not persuaded by Mia’s explanation” about the 2015 false-positive UA. Br. Respondent, at 39. Of course, it was not Mia’s explanation; it was the testing facility’s explanation of the test it conducted. Exhibit 17 (6/21/16). The Schimmels made no effort to prove otherwise, and it was their burden to do so. This is where their analysis goes off the rails. The authority they cite to shift the burden to Mia refers to the burden of production, not the burden of persuasion. See Br. Respondent, at 38-39, citing *T.B.* and *Northwick v. Long*, 192 Wn. App. 256, 264, 364 P.3d 1067, 1071 (2015). *Northwick* is a real stretch, having to do with a challenge to the sufficiency of process, from which the Schimmels borrow a holding that cannot be applied in this context.¹¹ On the other hand, *C.B.*, the case on which *T.B.* relies, completely supports Mia’s position. In *C.B.*, the parent produced evidence of drug treatment and several witnesses to testify as to her improvement. At that point, the burden shifted back to the State, as noted above.

¹¹ The strength of precedent requires some similarities between the cited case and the case at bar. In *Northwick*, which the Schimmels cite for a broad proposition about burden-shifting, the plaintiff produced prima facie evidence of proper service and the court held the defendant failed to rebut that evidence by clear and convincing evidence of living elsewhere. If anything, this case illuminates the difference between the burdens of production and persuasion. The party with the initial burden produces evidence to satisfy the burden. The opposing party introduces evidence the court finds inadequate to rebut the proof. Here, the Schimmels offered nothing to rebut the evidence Mia produced.

The Schimmels fail utterly to distinguish between these burdens, though the distinction is critical here. The burden of production is not the same as the burden of persuasion. Tegland, 14A *Wash. Prac., Civil Procedure* § 24:1 (2d ed.). The latter requires a party to persuade the trier of fact that certain facts are “true or not true.” *Id.* Here, this burden is clear, cogent, and convincing evidence and it is the Schimmels’ burden. *See, also, Marriage of McNaught*, 189 Wn. App. 545, 553-554, 359 P.3d 811, 816 (2015) (analyzing burdens in relocation context). By contrast, the burden of production applies to a lesser quantum of evidence, only that necessary to proceed to the fact-finding phase (e.g., a jury trial, by avoiding a peremptory ruling as a matter of law). *See, Tegland, supra.* Here, that means Mia’s evidence of her recovery satisfied any burden she might have had and means the Schimmels cannot rely on the trial court’s simple refusal to credit the evidence Mia presented, especially as the law does not permit the court to simply ignore the evidence without abusing its discretion. *In re Dyer*, 157 Wn.2d 358, 369, 139 P.3d 320, 325 (2006); *accord Reynolds v. N. Pac. Ry. Co.*, 22 Wash. 165, 167, 60 P. 120, 121 (1900) (factfinders “cannot be permitted to ignore undisputed facts”). The court’s discretion “does not extend not extend to completely overlooking factors material to the determination.” *In re Marriage of Landauer*, 95 Wn. App. 579, 975 P.2d 577 (1999).

The Schimmels and the court try to confine Mia to her history by ignoring the objective evidence from neutral experts of her present sobriety and her present ability to parent her daughter. They do not rebut this evidence, they simply ignore it. Yet Dr. Poppleton examined a mountain of evidence, conducted psychological and drug testing of Mia, interviewed her and others, observed her and P.M.S., etc. As he made clear, his assessment and recommendation were the product of all the information he amassed. The truly tragic outcome here is the trial court's failure to credit Dr. Poppleton's unsurprising observation about the risk to P.M.S. from this family system and its broader dysfunction.

Particularly concerning is the trial court's complete refusal to address the unfitness of the Schimmels, in particular, Irwin, a relapsed alcoholic now contending with dementia in whose care the court placed this eight-year-old child. Again, the Schimmels rely entirely on the argument that this is a credibility determination. Br. Respondents, at 39-40. But this deflection requires the court to find the Schimmels not credible, not just Mia, since both Pamela and Irwin conceded the history of severe alcoholism and current relapse and Pamela acknowledged the need to protect P.M.S. from Irwin. See Br. Appellant, at 29-30.¹² And, of

¹² For this reason (and perhaps others), the Schimmels are not caring for P.M.S. wholly or, apparently, mostly, as Pamela testified. RP 819; Exhibit 11. The court plainly knew of this practice, so placing custody with Schimmels suggests the court's complicity in

course, the recent DUI and open container infraction are just facts, not subject to credibility assessment. As with the false-positive UA, the court cannot simply ignore the undisputed facts. Finally, too, Pamela admitted she discovered Irwin's DUI; he did not tell her about it, which says something about Irwin's credibility. RP 811-812.

Second, the Schimmels argue Mia's reliance on the Schimmels for care of self and child undercuts all the evidence of the Schimmels' problems, which is preposterous. The financial issues are addressed below, reinforcing that this family is an interconnected mess. As Pamela conceded, earlier in the marriage when Irwin was actively drinking, she fled the marriage, leaving the children in his care, because she "had had it" with him. RP 489-490. It was during this time the preschool reported to Pamela allegations of sexual abuse of Mia. RP 488-489.¹³ Pamela then describes Mia devolving into a defiant adolescence marked by substance abuse and other behavior typical of children struggling with trauma. RP 490-498. Pamela's testimony, like Mia's, tell a story of interdependence

violating Mia's custodial rights with this unlawful mechanism for working around the custodians' incapacity.

¹³ Pamela describes how, at the time and when confronted by her mother, Mia denied the allegations. That hardly means the abuse did not happen. *See, e.g.,* Tegland 13B *Wash. Prac., Criminal Law* § 2414 (2017-2018 ed.) (discussing common fact that children may delay reporting and that length of delay correlates with relationship between abuser and child). Here is a child who sees her own mother helpless to stop the father from alcohol abuse, who suffers an unexplained and serious burn while with her siblings, etc, RP 487.

and dysfunction. All the family members appear to live off the Schimmels' wealth. See, e.g., RP 942, 1011. Mia is no more dependent than the rest of them. She certainly is not unfit because she receives financial assistance from her family.

Indeed, it is the very fact of these intertwined and mutually destructive lives that raises the alarm on nonparental custody as a remedy here. In this problematic context, nonparental custody is more of a bludgeon available to the better-resourced faction of the family than an intervention to protect a child (while preserving a parent's constitutional rights). Fortunately, facing squarely the facts, including Dr. Poppleton's assessment, the court had other options for helping this family and every reason to pursue them. For example, in a case where a previously impaired parent later remediated her problems but the children's traumatic history supported continuing nonparental custody with the grandmother, our Supreme Court recognized the need for the state to intervene to help reunify the parent and children. *In re Mahaney*, 146 Wn.2d 878, 898, 51 P.3d 776, 787 (2002) (transferring custody case to juvenile court for provision of services and proceedings as though the children were dependent, enabling "all parties, including the children, to have counsel, and ... the opportunity for casework and other services as necessary to assist this family"). Similarly, where a parent, having sought her family's

assistance with her child, became embroiled in conflict with them, the trial court presiding over a nonparental custody petition ordered the matter converted to a dependency, with the state providing services to the mother. *Z.C.*, 191 Wn. App. at 683 (despite the court's order, DSHS did not get involved, the mother receiving neither services nor counsel, delaying for years the reunification of parent and child).

As Mia argued in her opening brief, the disharmony between this two-track system – private actions and state actions – cannot be squared with her constitutional rights. Dr. Poppleton did not have to know whether Mia was abused in the ways she described to know this family is deeply troubled, roiling with mutual antagonism and mistrust. And you do not have to have a doctorate in psychology to know this troubled family system puts P.M.S. at risk, exposing her to the same developmental dangers as Mia experienced as a child.

The Schimmels attempt to counter the constitutional claims, specifically as they relate to Mia's argument about the need for consistent and capable legal representation, an aspect of the broader remedial approach of a dependency proceeding. The Schimmels assert they may exercise the same power as the state to take P.M.S. from Mia without any of the obligations the exercise of that power imposes on the state. For example, they claim the “‘fundamental liberty interest’ at stake in

termination/dependency proceedings is far greater than in nonparental custody proceedings.” Br. Respondent, at 42. But it is not “far greater,” either on paper or in fact, and the differences do not make a difference here. Unquestionably, nonparental custody intrudes upon a parent’s constitutional rights. *L.M.S., supra*. It is not like a marital dissolution (a dispute between legal equals). Contra Br. Respondents, at 43-44. Nor is it exactly like a termination, since, on paper at least, the parent retains her legal relationship with the child. But nonparental custody is virtually indistinguishable from a dependency, which is why the burden of proof is so high and the remedy limited to extreme and unusual circumstances. And, of course, it may also become a de facto termination.

These proceedings, in all the ways described by Mia, violated her constitutional rights. If the Schimmels want to borrow a burden-shifting mechanism from dependencies/terminations, they ought not object to likewise borrowing the requirement that a parent be provided, via a neutral mechanism, with the services and resources needed to remediate any perceived parenting deficits and to contest the party seeking to infringe upon the constitutionally protected relationship. Instead, the Schimmels describe the consequences of Mia’s under-resourced effort to regain her child as a “litigation strategy.” Br. Respondents, at 26-29. Mia’s only

strategy has been to fight tooth and claw against the might of her own family, for her own health and future and that of her daughter.

C. THE FINANCIAL ISSUES

The financial issues have more to do with P.M.S. than with Mia, per se. The disparity between the parties' legal resources directly and adversely affects the court's decision-making. Every person who participates in the legal system knows this is simply true. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting) (parent with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child). Mia has argued there is no cognizable difference between the Schimmels' effort to deprive her of custody and a similar effort if undertaken by the state. For that reason and under the authority of the statute, Mia should be granted fees.

The court and the Schimmels claim she has no need because she "enjoys a stable income stream" and receives cash "entirely at her disposal." Br. Respondent, at 45. Actually, Mia has no control over whether or how much she receives. See RP 1094, 1108-1109, 112 (distributions controlled by either father or brother-in-law); RP 655-656 (distributions made arbitrarily, in the sole discretion of the general partner); RP 1011, 942 (siblings receive more); Br. Respondent at 46, n. 5

(concede amount varies); RP 302 (“doesn’t get approval by Brian, it doesn’t happen”). It did not happen when Mia went to trial pro se.

The Schimmels also note that Mia was able to pay for private defense counsel, though Irwin testified he paid for her attorneys in the past, RP 1086 (can’t remember if he paid for 2014 criminal charge). And though it is undisputed Mia has a debilitating illness affecting her ability to work full time, see RP 930-933; 584, the Schimmels point to the fact that Mia has volunteered and babysat in the past, as if this somehow translates into an ability to secure gainful employment. See RP 981(volunteering consisted of being a “contact,” i.e., returning calls and hosting occasional support group meetings, presumably only when she was well enough to do so); RP 289 (watched a friend’s child a few days a week). With little education, experience, or training and her medical condition, Mia cannot work full time in a job remunerative enough to pay for this kind of litigation. The fact is Mia needs money for fees and the Schimmels easily have the ability to pay her fees, as well as for a case manager and neutral, professional service providers, as Dr. Poppleton recommended. This is not a case where resource scarcity jeopardizes P.M.S.’s welfare and her relationship with her mother.

The court put Mia in a Catch-22: her family supports her (when and if it chooses), so she cannot qualify for assistance or fees. See, e.g.,

RP 974. At the same time, they can deprive her of the means to defend her own constitutional parental rights. This is precisely the kind of unfair fight the statute is meant to safeguard against. The court simply and for no tenable reason chose not to use it, an abuse of discretion.

Finally, the Schimmels argue Mia should not receive fees because she “twice retreated from agreements she made while represented by counsel.” Br. Respondent, at 49. As discussed in her brief, the parties could not come to terms. This was not Mia’s retreat, but a completely unsurprising breakdown in negotiations between the members of this troubled family. These were not agreements she made, which is why they were never finalized. In any case, the statute ties the award of fees to a consideration of financial circumstances,” not merit or conduct. *Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). Like its counterpart, RCW 26.09.140, this statute has as its purpose “to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage.” 20 Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). Here, Mia has a need for fees and an award of fees protects her rights and better protects the welfare of P.M.S.

III. CONCLUSION

Mia Stanfill asks the trial court’s orders be vacated and the petition for nonparental custody dismissed and that she be awarded her fees.

Respectfully submitted this 24th day of September 2018.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

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