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No. 52255-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Welfare of:

**M.W.**

A Minor Child

**A.W. (mother),**

Appellant.

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Pierce County Superior Court Cause No. 16-7-02013-9

The Honorable Judge James R. Orlando

**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ISSUES AND ASSIGNMENTS OF ERROR..... 1**

**INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2**

**ARGUMENT..... 5**

**The trial court should have placed M.W. with family instead of  
requiring her to remain in foster care..... 5**

A. The Court of Appeals should review this case *de novo*  
because the trial court heard no testimony and because this  
case presents a pure question of law. .... 6

B. Absent evidence of a threat to a dependent child’s  
welfare, the law requires placement with relatives who are  
qualified to assume custody. .... 8

**CONCLUSION ..... 11**

**TABLE OF AUTHORITIES**

**WASHINGTON STATE CASES**

*Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 300 P.3d 799 (2013)..... 7

*Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966)..... 7

*In re Maurer's Welfare*, 12 Wn. App. 637, 530 P.2d 1338 (1975)..... 8

*Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994)..... 8

*Smith v. Skagit Cy.*, 75 Wn.2d 715, 453 P.2d 832 (1969)..... 7

*State v. Ramirez*, No. 95249-3, Slip Op. (Wash. Sept. 20, 2018)..... 6

**WASHINGTON STATE STATUTES**

RCW 13.34.020 ..... 9

RCW 13.34.060 ..... 9

RCW 13.34.065 ..... 9

RCW 13.34.110 ..... 9

RCW 13.34.130 ..... 8, 9, 11

RCW 13.34.138 ..... 9

RCW 13.34.260 ..... 8, 11

**OTHER AUTHORITIES**

Epstein, “Kinship Care is Better for Children and Families,” *Child Law Practice Today* Vol. 36 No. 4, American Bar Association Center on Children and the Law (2017)..... 10

## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial judge erred by denying the parties' joint motion to move M.W. to relative placement.
2. The trial court erred by making a decision without considering information specific to M.W.'s case.
3. The trial judge erred by reaching a decision based on unspecified studies that were not introduced into evidence or discussed by the parties.

**ISSUE 1:** Did the trial judge err as a matter of law by refusing to place M.W. with family, given the parties' agreement that such placement was in her best interest, and the absence of any evidence that she would be harmed by moving her to a relative's home?

**ISSUE 2:** Did the trial judge err as a matter of law by reaching a decision based on unspecified studies that had not been introduced into evidence or discussed by the parties?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

In this dependency proceeding, the department, the CASA, and A.W.'s mother all believe that placement with family is in the child's best interests. A family member (Robin Perez) expressed interest in assuming custody early in the proceedings. She and her husband became licensed foster parents in California and received approval for placement under the Interstate Compact on Placement of Children (ICPC).

At a hearing on the department's motion for change of placement, no one presented evidence that M.W.'s best interests required her to remain in foster care. Despite this, the trial judge refused to allow M.W. to move from foster care to the Perez household.

The trial judge erred as a matter of law by refusing to place M.W. with family. All parties agreed that such placement was in her best interest, and no evidence was presented that she would be harmed by moving from foster care to be with family.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

M.W. is the two-year-old daughter of A.W. CP 2. She is a dependent child who resides in foster care. CP 3, 18, 22.

Following a 2017 Family Team Decision Making Meeting (FTDM), the parties developed a plan to serve M.W.'s interests should

return home prove impossible. CP 18. The mother's cousin, Robin Perez, was identified as a resource. CP 18.

Because Ms. Perez lives in California, the department requested an interstate (ICPC) home study in June of 2017. CP 3, 18-19, 28; RP 4. The home study was approved on March 29, 2018. CP 34.

Ms. Perez, like M.W., is African-American. CP 19, 36, 70. She resides in California with her husband of 19 years. CP 19. In anticipation of M.W.'s arrival, she and her husband became certified as foster parents. CP 24; RP 8-9. Ms. Perez herself is a social worker. CP 19, 25, 70, 74; RP 8-9

The couple lives near members of M.W.'s extended family, including grandparents, aunts, uncles, cousins, and second-cousins.<sup>1</sup> CP 19, 23, 25, 40, 52-60, 70, 74-79. They plan to use M.W.'s grandparents for child care. CP 19, 42. The mother, the CASA and her supervisor, and Ms. Perez all outlined the importance of M.W.'s culture and heritage in her upbringing; all agree that M.W.'s interests would best be served by placement with her African-American family. CP 19, 23, 25, 70-71; RP 13, 14.

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<sup>1</sup> Ms. Perez will also ensure contact between the child and her biological siblings, who have been adopted in Washington. CP 20, 71-72; RP 10-11. Ms. Perez plans to bring the child to Washington for visits with her biological siblings. CP 20, 25; RP 11.

The Perez family began developing a relationship with M.W. through video calls starting in December of 2017. CP 6, 19, 25; RP 5. They prepared a bedroom for M.W. in anticipation of her arrival. CP 19.

Ms. Perez has long been committed to serving as a potential adoptive placement for M.W. CP 18, 24-25, 70. She was concerned about the slow pace of progress and did all she could to move the plan forward. CP 18, 24.

In June of 2018, the department brought a motion to move M.W. to the Perez family home. CP 1; RP 3-4, 9. The request was approved by the department's Regional and Area Administrators. CP 3. A second FTDM was held in June of 2018 to discuss a healthy transition plan so M.W. could move to the Perez family home in California. CP 20.

The social worker, the mother, the CASA, and the CASA's supervisor all supported placement with Ms. Perez, agreeing that M.W. should be moved from foster care to be with family. CP 18; RP 3-6, 13. All agreed that the move was in the child's best interests. CP 18, 20; RP 4, 6.

At the hearing on the department's motion, the court allowed interested parties to speak. RP 6-13. However, the court did not hear any testimony given under oath and subject to cross-examination. RP 6, 9, 13.

No evidence was presented suggesting that moving M.W. from foster care to relative care would harm the child. CP 3, 18, 20, 33; RP 2-17.

The court refused to move the child. CP 84-85; RP 16. In his oral ruling, the trial judge referred to unspecified studies that had not been introduced into evidence or discussed by the parties. RP 15.

Court of Appeals Commissioner Schmidt granted the mother's Motion for Discretionary Review. *See* Ruling, dated September 27, 2018.

### **ARGUMENT**

#### **THE TRIAL COURT SHOULD HAVE PLACED M.W. WITH FAMILY INSTEAD OF REQUIRING HER TO REMAIN IN FOSTER CARE.**

Robin Perez and her husband Marco are perfectly suited to care for M.W. and will adopt her should she become legally free. They are related to the child and are surrounded by extended family. Placement with the Perez family is required by law and is in the child's best interests.

The child is African-American, as are Ms. Perez and her relatives; placement with the Perez family will allow M.W. to grow up with strong connections to her cultural and ethnic heritage. The mother, the CASA, the CASA's supervisor, and the social worker all support placement with the Perez family.

Nothing suggests that the child welfare will be jeopardized by placing her with her relatives.

- A. The Court of Appeals should review this case *de novo* because the trial court heard no testimony and because this case presents a pure question of law.

Ordinarily, a dependency court's decision on placement is a matter of discretion. However, under the circumstances in this case, the Court of Appeals should review the trial court's decision *de novo*.

First, this appeal presents a question of law. Appellate courts review questions of law *de novo*. *State v. Ramirez*, No. 95249-3, Slip Op. pp. 3-4 (Wash. Sept. 20, 2018). In *Ramirez*, for example, the Supreme Court reviewed a trial court's decision to impose discretionary Legal Financial Obligations. *Id.* The court recognized that the question "involve[d] both a factual and a legal component." *Id.*, at 3.

Factual components "can be decided by simply examining the record for supporting evidence." *Id.* However, the adequacy of a trial court's inquiry is a legal issue subject to *de novo* review. *Id.* Furthermore, any exercise of discretion is *per se* unreasonable "when it is premised on a legal error." *Id.*, at 4.

Here, as in *Ramirez*, the trial court premised its exercise of discretion on a legal error. The court denied the motion for change of placement based solely on unspecified studies that had not been introduced into evidence or even mentioned during the hearing. RP 15. It refused to place M.W. with relatives despite the parties' agreement that

placing her with the Perez family was in her best interest and despite the absence of any evidence weighing in favor of continued foster placement. RP 15-16.

The trial court erred as a matter of law by refusing to follow the agreed recommendation of all the parties, where no evidence supported the court's decision and the judge based his ruling on unspecified studies that were neither introduced into evidence nor discussed during the hearing. The Court of Appeals should review this legal issue *de novo*. *Id.*

Second, the trial court heard no testimony and made no credibility determinations. RP 3-16. Although the judge gave interested parties an opportunity to speak, no one was placed under oath and the mother had no opportunity to cross-examine any of the people who addressed the court. RP 6, 9, 13.

Appellate courts review *de novo* a trial court decision that relies exclusively on affidavits, declarations, and other documents. *Ameriquist Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013).<sup>2</sup> Appellate courts reviewing a documentary record stand “in the same position as the trial court.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592

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<sup>2</sup> See also, e.g., *Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Carlson v. City of Bellevue*, 73 Wn.2d 40, 435 P.2d 957 (1968); *Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966).

(1994). Here, the trial court’s decision rested entirely on documentary evidence. Review is *de novo* for this reason as well. *Id.*

B. Absent evidence of a threat to a dependent child’s welfare, the law requires placement with relatives who are qualified to assume custody.

A dependent child “*shall* be placed with” a relative with whom the child has a relationship and is comfortable. RCW 13.34.130(3) (emphasis added). A proposed placement may only be rejected if there is “reasonable cause to believe that the health, safety, or welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered.” RCW 13.34.130 (3). Absent good cause, the department “*shall* follow the wishes of the natural parent regarding the placement of the child with a relative.”<sup>3</sup> RCW 13.34.260(1) (emphasis added).

Ms. Perez is related to M.W.<sup>4</sup> CP 18, 24. The two have developed a relationship, and the child is comfortable with her. CP 6, 19, 25; RP 5. The mother wishes to have M.W. placed with Ms. Perez. CP 22-23. Placement with the Perez family will allow M.W. to maintain ties to her

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<sup>3</sup> See also RCW 13.34.130(4) and (5). Even absent these statutory preferences, a court must consider placement with an available relative. See *In re Maurer's Welfare*, 12 Wn. App. 637, 640, 530 P.2d 1338 (1975).

<sup>4</sup> She is also qualifies as a “suitable person” for placement purposes under RCW 13.34.130(3)(II), because the family “has a preexisting relationship with [her], and [she] has completed all required criminal history background checks and otherwise appears to the department to be suitable and competent to provide care for the child,” RCW 13.34.130(1)(b)(ii).

biological siblings, her extended family, and her cultural heritage. CP 19, 23, 25, 70-71.

The court did not find “reasonable cause to believe” that placement with Ms. Perez would jeopardize M.W.’s health, safety, or welfare, or that it would hinder reunification efforts. CP 84-85; RCW 13.34.130 (3). Absent such a finding, the court was required to place M.W. with the Perez family.

The legislature has expressed a strong preference for maintaining family relationships. RCW 13.34.020. For example, when a child is first taken into custody, the department must make efforts to place the child with relatives.<sup>5</sup> RCW 13.34.060. At the shelter care stage, the court must ordinarily place the child with a relative, even if a background check has yet to be completed. RCW 13.34.065(5)(b) The same is true at a disposition hearing. RCW 13.34.130(5). Prior to the disposition hearing, the department must notify relatives who have had contact with the family twelve months prior to disposition. RCW 13.34.110(4). At each review hearing, the court must establish in writing whether preference has been given to placement with a relative. RCW 13.34.138(2)(c)(viii).

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<sup>5</sup> It is not clear from the record what efforts the department made earlier in the case to place M.W. with her relatives in California.

The trial court erred by requiring M.W. to stay in foster care rather than allowing her to be placed with her family. CP 84-85. The court's written order does not outline any basis for the decision. CP 84-85.

In his oral ruling, the trial judge made vague reference to unspecified studies that had not been introduced into evidence or discussed by the parties. RP 15. According to the trial court, such studies address "the harm that's done when you break relationship [sic]." RP 15.

In fact, research shows that placement with family minimizes trauma, improves well-being, increases permanency, improves behavioral and mental health outcomes, promotes sibling ties, allows older children to attain self-sufficiency and reduces the risk of negative outcomes, and preserves cultural identity and community connection. *See* Epstein, "Kinship Care is Better for Children and Families," *Child Law Practice Today* Vol. 36 No. 4, American Bar Association Center on Children and the Law (2017).

Ms. Perez and her husband are certified foster parents. CP 24; RP 9-10. They have been approved for placement through the ICPC process. CP 34. The social worker, the CASA, and the CASA's supervisor all agree that the child should be placed with the Perez family. CP 18; RP 3-6, 13. Two FTDM meetings have been held, and a transition plan prepared. CP 18, 20.

The trial court erred as a matter of law by maintaining M.W.'s foster placement. No evidence suggested that placement with the Perez family would pose any danger, and all parties agreed that placement with relatives was in her best interests.

The trial court's order denying the motion for change of placement must be reversed and the case remanded with directions to allow M.W. to transition to relative care. RCW 13.34.130(3); RCW 13.34.260(1).

### **CONCLUSION**

For the foregoing reasons, the Court of Appeals should reverse the decision of the trial court and remand the case for placement with the relative.

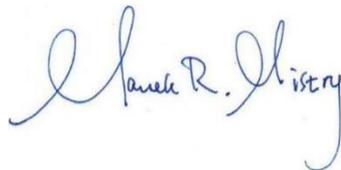
Respectfully submitted on October 16, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I sent a copy of Appellant's Opening Brief to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 16, 2018.



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## Transmittal Information

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