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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Custody of M.S.H and B.M.W.

CATHERINE S. HOM and THOMAS WOT HOM

Respondents

and

ADAM G. HOM

Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COURNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

Removing children from a fit parent is a highly unusual intervention, and under Washington law, is permitted only in extraordinary circumstances. *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013).

M.S.H. and B.M.W, respectively 10 and 8 years old at time of trial, were removed from the custody of their parents Adam Hom and Kristen West on June 4, 2018, at the request of Thomas and Cathy Hom, alleging drug use, abuse and neglect. Thomas is Adam's brother. Adam vigorously contested their petition and sought interim visitation, while Kristen did not. Despite being found a fit parent at trial thirteen months later, the care, custody and control of his daughters was awarded to Thomas and Cathy on the basis that they would suffer actual detriment to their growth and development if returned to Adam's care. He now appeals the court's custody decree. No extraordinary circumstances or special needs beyond the capacity of a fit parent were found at trial showing that placement of M.S.H. and B.M.W. with Adam would constitute actual detriment to them in the future. The court erred in its conclusion that the evidence met the standard of demonstrating detriment to the girls's future growth and development, making it more akin to a decision based on a "best interests" paradigm. The custody decree should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the petition for custody because it found that Adam is a fit parent and no special needs or other extraordinary circumstances supporting actual detriment were found.
2. The trial court erred by entering the finding that “Neither parent has demonstrated the ability to adequately parent or protect the children”.
3. The trial court erred by essentially applying a “best interests” standard since the findings do not support a legal conclusion of actual detriment.

Issues Pertaining to Assignments of Error

1. Did the court erroneously conclude that actual detriment will result based on findings that are legally insufficient under the laws of our state? (Assignment of Error 1)
2. Is a finding of Adam’s parental fitness a demonstration of the ability to adequately parent and protect his children? (Assignment of Error 2)
3. Did the court essentially apply a “best interests of the child” standard in granting custody instead of the “actual detriment” standard, since a conclusion of actual detriment is not supported by the findings of fact? (Assignment of Error 3)

III. STATEMENT OF THE CASE

This is the second nonparental custody petition brought by Thomas and Cathy Hom within eight and a half years for Adam's daughters. Ex 1. The first petition sought custody of M.S.H. as an infant during her dependency proceeding in 2008, which was initiated due to Kristen's substance abuse. Adam participated in, completed, and remained compliant with family reunification services during that process. Ex 8. In September 2010 he was described in a DSHS Dependency ISSP Addendum as "providing a safe and nurturing home for (M.S.H). The house remains clean and clear of clutter and (M.S.H) always appears well cared for. Adam always calls the department if he has any questions or concerns and makes sure the social worker is aware of what is happening in (M.S.H.'s) life." Ex 32. Thomas and Cathy's first petition was dismissed on September 23, 2010 for failure to appear. Ex. 1. The dependency concluded with Adam gaining full custody of M.S.H. Ex 8.

In February of 2011 Adam was informed in writing by Cassie Morley, Family Resources Coordinator for the Parent to Parent Support Program of Thurston County, on behalf of the Olympia School District, that 2½ year old M.S.H. "has made excellent progress, and no longer requires early intervention services". Further, that "there are no concerns for (her) development at this time." Ex 5. M.S.H. went on to receive an

Eagle Excellence award from Horizon's Elementary School in Olympia for the academic year of 2014-15. Ex. 6. Her little sister, B.M.H, born in 2010 (CP 14), received a Superior Attendance award from Horizon's on May 2, 2018 (Ex 7).

On May 25, 2018 Adam left his Wiggins Road residence in Olympia, Ex 25, and moved with his children to Lewis County where he was still living at time of trial. CP 30. The home on Burchett Road is shared with the girl's grandmother, Irene Posada. RP 26. It is spacious and clean, with separate rooms for the girls and their father. Ex 15.

Thomas and Cathy Hom initiated this proceeding on June 4, 2018. CP 1-11. The allegations pleaded against Adam and Kristen in this second petition included "Parents have been evicted 6-25-18, no home to go to." "Both parents are active drug uses (sic) and active drug dealers". "Children are constantly verbally (and) physically abused (and) scared that now homeless." "History of leaving state to avoid court, now homeless, both Kristen (and) Adam will run". CP 2-3. Kristen subsequently left the state and did not participate in pretrial proceedings. RP 16:6-8. She failed to appear at trial and was deemed an unfit parent. CP 69, 71.

On June 5, 2018 M.S.H. and B.M.W. were removed from their father's care based on allegations in Thomas and Cathy's application for an immediate restraining order. Ex 21. A temporary custody order was

entered on August 17, 2018, which also provided for “Visitation as may be arranged by the parties and confirmed in writing (text).” CP 12-18.

On December 12, 2018, Adam filed a motion for contempt against Thomas and Cathy on the basis of their refusal to allow any visitation with his daughters pending trial. CP 19-28. His motion resulted in an order requiring supervised visitation with M.S.H. and B.M.W. CP 34-35. The girls were delighted to see their father again on January 20, 2019, Ex 16; their last time together had been over four months earlier on September 2, 2018. Ex 14.

Official reports of the weekly supervised visitations which thereafter ensued demonstrated that Adam has a “very strong bond” with his girls, a fact also corroborated by witness testimony. Ex 14, 16 & 31. The trial court commended his very strong bond with his daughters:

THE COURT:

There is absolutely no question in my mind, Adam, that you have a very strong bond with your girls. That is clear not only from your testimony, the testimony of witnesses, but from the visitation reports. Honestly, I have rarely seen visitation reports that are that positive that consistently. And so I want to recognize that right off the bat, that that parent bond is there.” RP 6:24-25, 7:1-6.

On January 14, 2019, Adam began to undergo court ordered random urinalysis testing which occurred 16 times until just prior to trial. CP 115-146. The initial test was deemed positive because he failed to appear. Ex 26. However, he remained compliant throughout the remaining six

months of that program. CP 115-146. In addition to that, Adam obtained an alcohol and drug diagnostic evaluation (Ex 11) and began participation in a voluntary drug treatment program at New Directions Counselling which was ongoing at time of trial. Ex 13. His program included additional random drug testing and the results were clean. Ex 12. In February 2019 Adam also completed the “Consider the Children” course presented by Family Education and Support Services. Ex 10.

This case went to trial on July 9, 2019 for a day and a half. Both parties were self-represented, and the testimony provided “wildly different points of view” on whether the children would suffer actual detriment if returned to Adam. RP 6. Medical records for two doctor visits in June 2018 and February 2019 indicated asthma symptoms treatable with an inhaler for M.S.H and B.M.W. Ex 28. One of the most contentious and difficult parts of the trial was the testimony about whether the girls were called names or physically struck. RP 9. Records for one visit to an audiologist by both girls accompanied by Cathy Hom in November 2018 had them reporting being hit in the ear by their grandmother, but there were no injuries or abnormal findings. Ex. 28. While the court found that others had occasionally physically struck the children, it found no such abuse on the part of Adam. CP 71, RP 27:23-25, 28:1-4. No expert, GAL, medical doctor, counselor or psychiatric professional testified. Ex

20. CPS reports were offered but not admitted into evidence. Ex 22. The trial court ultimately found Adam a fit parent, repeating that factor three times in its oral ruling:

THE COURT:

So in considering the testimony, I am not finding that Adam is an unfit parent..." RP 6:1-2.

Moving back, then, to Adam, I'm not making a finding, Adam, that you are an unfit parent." RP 6:14-15

"I'm making the specific finding that, Adam, you may be a fit parent. You are not -- I am not making a finding that you are an unfit parent..." RP 14:10-13.

Nevertheless, the trial court also found that "the girls will suffer actual harm to their development if returned to Adam at this time". RP 14:12-15, CP 72. The court's factual findings focused primarily on Adam and Kristen's living conditions at Wiggins, where the family had not resided for over one year:

Kristen: No contact with the children for an extended period of time. At the time of removal this respondent had demonstrated extreme neglect by not providing adequate living circumstances (filth, rodent infestation, inadequate sanitation, [m]ultiple dirty UA's during the course of this case. Inadequate medical care for the children.) Credible testimony as to verbal and emotional abuse of the children. Failure to protect from emotional and physical abuse by other relatives. Kristen is not a fit parent.

Adam: At the time of removal this respondent had demonstrated neglect by not providing adequate living circumstances (filth, rodent infestation, inadequate sanitation, [i]nadequate medical care for the children.) There was credible testimony as to verbal and emotional abuse of the children. Failure to protect from emotional

and physical abuse by other relatives. Adam may be a fit parent[,] however[,] the girls will suffer actual harm to their development if returned to Adam.”

And the following general factual findings:

1. Parents’ residence on Wiggins (sic) was rat-infested, filthy and unfit for human habitation and the Respondents failed to remediate or change the conditions.
2. Respondents engaged in verbal and emotional abuse of the children calling them bitch, lard-ass, dumb, dumb-ass.
3. Respondents failed to protect the children from similar name-calling and verbal abuse and physical abuse (striking or “popping” the children on the back of the head) by the grandmother.
4. Madison was severely overweight from improper nutrition.
5. Both girls suffered breathing issues which are either attributable to or exacerbated by the living conditions with the parents.
6. The issues in Findings 4 and 5 have significantly improved or resolved with the girls out of the care of the parents. CP 72, no. 8.

Although photographs of Adam and the girl’s home in Lewis County was admitted into evidence (Ex 15), no mention is made of the Burchett residence in the findings.

The Findings and Conclusions culminate at no. 9:

It is in the children’s best interests to live with the Petitioner/s because: Returning the children to either parent will result in actual detriment to the children. Neither parent has demonstrated the

ability to adequately parent or protect the children. Kristen West has demonstrated abandonment of the children. CP 72.

The court denied petitioner's request for a restraining order, explaining:

THE COURT:

I don't believe Adam on his own is a danger to the children. And I don't think that there is any reason to restrain his contact with the kids." RP 16:10-13.

Visitation was provided without any finding of limiting factors:

"For Adam -- so just so folks understand, there are two levels of what they call .191 factors. And those are activities by folks that are a statutory basis to limit contact. There are two types. One is mandatory limitations. And I'm not finding any mandatory limitations for Adam. Those were the limitations that I did find for Kristen.

So for Adam, I am not finding mandatory limitations. I think that the things that have happened have to some degree been remedied. And I don't think there's any reason to have Adam subject to supervised visitation." RP 17:15-25, 18:1.

On July 10, 2019, final orders were entered. The Residential Schedule granted Adam unsupervised overnight visitation every other weekend.

Adam timely appealed, and sought an order of indigency under RAP 15.2(c) to provide a verbatim report of proceedings to this court. CP 99-111. That order was denied by the Supreme Court on October 3, 2019. Case No. 97520-5. A partial verbatim report has therefore been provided in support of his specific assignments of error challenging the trial court's conclusions of law.

IV. ARGUMENT

1. THE STANDARD OF REVIEW

A trial court's custody decision is reviewed for manifest abuse of discretion. *In re Custody of C.D.*, 188 Wn. App. 817, 826, 356 P.3d 211 (2015). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Custody of L.M.S.*, 187 Wn.2d 567, 574, 387 P.3d 707 (2017). A trial court's decision is based on untenable reasons if it is based on an incorrect standard or the facts (as here) do not meet the requirements of the correct standard. *West v. Dep't of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014). A trial court's conclusions of law are reviewed de novo by determining if the findings of fact support the conclusions of law. *In re Adoption of M.J.W.*, 8 Wn. App. 906, 438 P.3d 1244, 1254 (2019). Credibility determinations or evidence is not weighed on appeal. *In re Marriage of Fahey*, 164 Wn. App. 42, 62, 262 P.3d 128 (2011).

If a custody decree follows a contested custody hearing under RCW 26.10.140, one would look to the court's findings of fact and conclusions of law to see whether unfitness or actual detriment were found. See CR 52(a)(1) and (2)(B) (requiring findings and conclusions). Trial courts must make findings on all material issues; where they fail to

do so, appellate courts may direct them to make findings on an issue that is deemed on appeal to be material. In the absence of a specific finding, an appellate court may look to a trial court's memorandum opinion or oral opinion to support a general finding. *In re Custody of Z.C.*, 191 Wn. App. 674, 696, 366 P.3d 439 (2015). An appellate court may consider a trial court's oral decision so long as it is not inconsistent with the trial court's written findings and conclusions. *State v. Kull*, 155 Wn. 2d 80, 88, 118 P.3d 307 (2005). The trial court's oral opinion may be considered to supplement or amplify, but not to contradict, the findings of fact as entered. *Lakeside Pump Equip., Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 843 n. 1, 576 P.2d 392 (1978).

2. THE STANDARD FOR NONPARENTAL CUSTODY

As background and starting point, it must be noted that nonparental custody is an extraordinary remedy, since it abridges a parent's constitutional right. *In re Custody of B.M.H.*, *supra* at 236-239, (available only in extraordinary circumstances); *see Troxel v. Granville*, 530 U.S. 57, 77, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (the United States Supreme Court has "long recognized" that the 14th Amendment protects "a parent's interests in the nurture, upbringing, companionship, care, and custody of children"); *In re Welfare of Luscier*, 84 Wn.2d 135, 137 and 139, 524 P.2d

906 (1974) (declaring under Const. art. 1 § 3 that Washington “no less zealous” in protecting families).

Chapter 26.10 RCW sets forth the procedure for nonparental custody actions.¹ Such an award confers on the nonparental custodian the legal power to ‘determine the child's upbringing’ to the exclusion of the natural parent. *In re Custody of C.C.M.*, 149 Wn. App. 184, 204, 202 P.3d 971 (2009) (quoting RCW 26.10.170).

Washington law permits nonparental custody because the statute, as interpreted, protects the parent’s right by imposing on petitioners a heavy substantive burden, which must be satisfied by clear and convincing evidence. *B.M.H.*, *supra* at 236 (petitioners must prove unfitness or detriment to the child’s growth or development); *In re Custody of C.C.M.* *supra*, 149 Wn. App. at 205 (proof by clear and convincing evidence). In short, nonparental custody petitions may be granted only in “unique and extreme circumstances.” *In re Custody of L.M.S.*, *supra* at 578-579 (“extreme and unusual”). In such proceedings, a parent is entitled to a presumption that placement of a child with the parent serves the child’s

¹ On May 21, 2019, the governor signed SB 5604 into law, repealing chapter 26.10 RCW in its entirety. The law, which takes effect on January 1, 2021, substantially changes the procedure by which a nonparent may assume guardianship of a child.

best interests. *In re Custody of Shields*, 157 Wn.2d 126, 146, 136 P.3d 117, 127 (2006).

Thus, nonparental custody operates in the same plane as other state actions infringing upon a parent’s constitutional right to the care and custody of a child, such as dependency and termination proceedings. However, unlike those proceedings, no mechanisms exist in nonparental custody proceedings to promote family reunification. See, e.g., RCW 13.34.025 (coordination of services); RCW 13.34.090 (rights to counsel, to be heard, etc.); RCW 13.34.092 (right to counsel); RCW 13.34.180 (regarding provision of services). RCW 13.34.020 expressly declares reunification as our policy:

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

There is no reason to value less a family involved in a nonparental custody action. Rather, “[m]aintaining the family unit should be the first consideration in all cases of state intervention into childrens' lives.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522, 527 (2011) (internal citations omitted). This policy, as expressed in our statutes and cases, is also constitutionally mandated. *In re Parental Rights to B.P.*, 186

Wn.2d 292, 313, 376 P.3d 350, 360 (2016) (termination case), citing Wash. Const. art. I, § 12; see, also, Const., amend. 14.

A nonparental custody order must be based on one of two factors, parental unfitness or a showing of actual detriment to the child's future growth and development; they are mutually exclusive alternatives. *In re Custody of S.M.*, 9 Wn. App. 2d 325, 444 P.3d 637, 645 (2019). This is a high standard that will typically be met only in "extraordinary circumstances". *In re Custody of B.M.H.*, *supra* at 236 (quoting *In re Marriage of Allen*, 28 Wn. App. 637, 649, 626 P.2d 16 (1981)).

3. PARENTAL FITNESS

A parent is unfit if he or she cannot meet a child's basic needs. *In re B.M.H.*, *supra* at 236. In order to prove unfitness, the State must show that the parent's deficiencies make him or her incapable of providing "basic nurture, health, or safety." *In re Parental Rights to B.P.*, *supra*, 181 Wn. App. at 61. Examples of unfitness include "instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents" and "where a child is deprived of his or her right to conditions of minimal nurture, health, and safety." *In re Custody of L.M.S.*, *supra* at 576 (quoting RCW 26.44.010). Unfitness can include the parent's fault or omission seriously affecting the welfare of the child, the

child facing physical harm, illness, or death, or the child being deprived of their right to education. *Shields, supra* at 142-43.

A parent's past conduct alone cannot establish current unfitness. *In re Dependency of Brown*, 149 Wn.2d 836, 841, 72 P.3d 757 (2003). This court has noted that the test for fitness of custody is the present condition of the parent and not any future or past conduct. This same principle should apply in a third-party custody case. *In re Custody of A.L.D.*, 191 Wn. App. 474, 505, 363 P.3d 604, 619 (2015). A person's fitness to have custody of children is determined from his present condition and not future expectations. *In re Marriage of Nordby*, 41 Wn. App. 531, 534, 705 P.2d 277 (1985).

a) *Adam's parental fitness is unchallenged on appeal.*

The implications of a finding of parental fitness are critical to a proper determination of actual detriment (*discussed below*). Factors inimical to fitness are ruled out before considering detriment as an “alternative test”. *In re A.L.D., supra*, at 499. The finding that Adam is a fit parent is unchallenged and a verity on appeal. *In re Adoption of M.J.W., ibid.*

b) *Adam's ability to perform parenting functions is emphasized since no limiting factors to visitation were found.*

The trial court's oral ruling expressly stated that it found no limiting factors to visitation with M.S.H. and B.M.W:

THE COURT: For Adam -- so just so folks understand, there are two levels of what they call .191 factors. And those are activities by folks that are a statutory basis to limit contact. There are two types. One is mandatory limitations. And I'm not finding any mandatory limitations for Adam. RP 17:15-25.

RCW 26.09.191 factors are codified in RCW 26.10.160 for nonparental custody proceedings and are identical in relevant part:

Visitation with the child *shall* be limited if it is found that the parent seeking visitation has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or *substantial refusal to perform parenting functions*. RCW 26.10.160(2)(a)(i). (emphasis added).

Our Supreme Court pointed to this very statute in *L.M.S.*, in affirming the denial of a nonparental custody hearing because petitioners failed to allege facts that "if proved" would show actual detriment. *L.M.S.*, 187 Wash. 2d 567 at 583. Here, as to Adam, abandonment or refusal to perform parenting functions is "not found".

RCW 26.09.004 provides the legal definition of "parenting functions":

"Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs

functions necessary for the care and growth of the child. Parenting functions include:

- (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
- (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
- (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
- (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
- (f) Providing for the financial support of the child.

As to Adam, the court implicitly found no “substantial refusal to perform” these parental functions, a mandatory limiting factor for visitation. This factual consideration by the trial court bears heavily on the proper application of the legal standard required in determining actual detriment, a “highly fact-specific inquiry” (see below). *Shields, supra*.

4. ACTUAL DETRIMENT

Parental rights may also be outweighed in custody determinations when actual detriment to the child's growth and development would result

from placement with an otherwise fit parent. *Custody of Shields, supra*, 157 Wn. 2d at 143.

“In *extraordinary circumstances*, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the State's interest in the child's welfare. *There must be a showing of actual detriment to the child.*” *In re Marriage of Allen, supra*, 28 Wn. App. at 649. (*emphasis added*)

References to a substance abuse problem for which a parent needs treatment, without more, cannot fairly be understood to be an ‘extraordinary circumstance’—substance abuse is, regrettably, a common reason for which a parent loses temporary custody of a child.” *In re Custody of Z.C. supra*, 191 Wn. App. at 703-04.

A worthwhile distinction between fitness and actual detriment may focus on the characteristics and capabilities of the child. It may assume the child has some handicaps or special needs *that even a fit parent cannot handle or fulfill*. *In re A.L.D., supra* at 499. (*emphasis added*) Following *B.M.H.*, the *J.E.* court held that “[t]he nonparent must show that the child has significant special needs that would not or could not be met in her parent's custody, or some serious diagnosed emotional instability that will be exacerbated by the placement.” *In re J.E., supra*, at 189.²

² *B.M.H.* did not indeed establish a bright-line rule requiring evidence of a child's special needs. *In re Custody of L.M.S.*, 187 Wash. 2d at 582. At issue are “needs that would not or could not be met” by the parents; *sometimes* these are special needs.

a) A “best interests” standard cloaked as actual detriment is insufficient.

The actual detriment standard is *not met* by showing that nonparental custody is in the child's best interests, and a nonparent's ability to provide a superior home environment compared to the parent's is not enough to establish actual detriment. *In re J.E.*, *supra*, at 185.

Similarly, a nonparent cannot obtain custody of a child merely because the trial court finds the nonparent would be a better parent. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346–47, 227 P.3d 1284 (2010).

In re J.E. this court reversed a decree of custody concluding that while the court's findings and conclusions included recitals of actual detriment, the court had, in substance, applied the too-low standard of the “best interests” of J.E. The trial court record did not demonstrate that “J.E. has significant special *needs that would not or could not be met* if he were in the parents physical custody”. *In re J.E.* at 189. (*emphasis added*)

b) A finding of actual detriment is highly-fact specific and determined on a case by case basis, and must consider the long-term growth and development of the child.

Whether placement with a parent will result in actual detriment to a child's growth and development is a highly fact-specific inquiry, and “[p]recisely what might [constitute actual detriment to] outweigh parental rights must be determined on a case-by-case basis.” *Shields, supra*, at 143

(quoting *In re Marriage of Allen*); *B.M.H.*, 315 P.3d at 476; *L.M.S.*, 187 Wn.2d at 576. The correct standard is “a focused test looking at actual detriment to the child if placed with an otherwise fit parent.” *Shields, supra*, at 150. Under the actual detriment standard set forth in *Allen*, the trial court should focus primarily on effects to *long-term growth and development*, and the burden should be squarely placed on the petitioner. *Custody of Shields*, 157 Wn. 2d at 150. (*emphasis added*)

c) *Actual detriment resulting from placement with a fit parent must be demonstrated (shown) and properly proven.*

Under the heightened standard, a court can only interfere with a fit parent's parenting decision to maintain custody of his or her child if the nonparent *demonstrates* that placement of the child with the fit parent *will result* in actual detriment to the child's growth and development.” *Custody of Shields, supra*, 157 Wn. 2d at 144. There must be a *showing* of actual detriment to the child. *In re Marriage of Allen, supra*, 28 Wn. App. at 649. (*emphasis added*)

Explaining when actual detriment to a child’s future growth and development may be found, the *B.M.H* court cited as examples *Allen, supra*; *In re Custody of Stell*, 56 Wn. App. 356 (1989); and *In re Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001). To these we add *In re*

Custody of C.D., supra. (Wn. App. 2015). In analyzing these cases where actual detriment was found two commonalities emerge:

1. There was a focused test “looking at actual detriment to the future growth and development of the child if placed with a fit parent”;
2. The actual detriment was specifically demonstrated (shown) and based on substantial evidence.

For instance, in *Allen, supra*, the child was deaf and the stepmother and her three children were fluent in sign language but the father was not. 28 Wn App. at 641–42. Further, the court describes in great detail the stepmother's admirable efforts to accommodate the child's disability. *Id.*, at 640–41. The court further noted that the stepmother believed that "Joshua has unlimited potential and that he can reach any goal," while the father's attitude regarding raising a deaf child was "apathetic and fatalistic." *Id.* at 642. There was ample record to support the court's findings that the father's inadequacy in sign language and lack of opportunities for interaction and communication “*would set back Joshua's intellectual development.*” *Id.* 642-647 (*emphasis added*).

In *Stell* the child struggled with debilitating mental health issues due to a history of physical and sexual abuse. The child's aunt provided a stable home environment and was actively engaged in his therapy and mental health treatment, demonstrating a commitment and an ability to address the child's needs that the father could not. The actual detriment

was specific. The uncontroverted and unrebutted opinion of the boy's therapist, Dr. Nyman, was that extraordinary measures to provide security and stability were required to mitigate Nathan's negative formative experiences. He testified that placing the boy with his father would be detrimental because he did not realize how severely damaged his son was. *Custody of Stell, supra*, at 356-361.

In *R.R.B.* the court granted a nonparental custody petition when a suicidal child required extensive therapy and stability at a level the parents could not provide. The parents may have abused the child by beatings with a leather belt, a wooden paddle, and a wire hanger. Doctors diagnosed the girl as suffering from bipolar disorder and post-traumatic stress disorder. The actual detriment found was specific and conceded at trial—preventing RRB from committing suicide or mutilating herself; she testified that she might harm herself if returned to her parents. *R.R.B., supra*, 108 Wn. App. 602-615.

Lastly, in *C.D.* an 8 year old boy threatened suicide, and was then placed with his maternal aunt and uncle after CPS investigated claims of sexual abuse while alternately in the custody of his separated parents. The aunt and uncle were granted nonparental custody of C.D. after a trial court found that returning him to his father would result in actual detriment to the child's growth and development. The actual detriment was specific; if

returned to his father C.D. had threatened to run away or kill himself. Substantial evidence supported the trial court's finding that C.D. would be detrimentally affected if he was returned to either parent. He suffered significant distress from their long-term emotional abuse and potentially physical abuse, and his distress manifested itself in many ways, including through threats of suicide and his behavior. Both the GAL and C.D.'s therapist, Dr. Nyman,³ strongly recommended that C.D. remain in the care of his maternal aunt and uncle. C.D. went to his maternal aunt and uncle as a damaged child. *In re C.D.*, *supra*, 188 Wn. App 817.

The commonalities found in these cases cited by our Supreme Court in *B.M.H.*, and in this court's opinion in *C.D.*, are critical to deciding whether actual detriment to the girls' future growth and development was properly found in this case.

d) The findings of fact focus on Wiggins, and as to the material issue of detriment, are supplemented by the record.

The trial court entered three paragraphs of findings--the first regarding Kristen, the second to Adam, and the third reciting six "General Factual Findings". The findings focus on circumstances at Wiggins "at the time this case was filed" and "at the time of removal". CP 71.

³ Psychiatrist Dr. Barry Nyman testified in the *Stell* trial, and again at the *C.D.* trial, exactly 25 years later.

Lacking a verbatim report of proceedings, no assignment of error is made to the findings of fact, except where otherwise indicated. It is appropriate, however, to point to other parts of the record and the court's oral ruling to highlight what the findings *do not* contain or to amplify what they do, without weighing the evidence. *Lakeside Pump, supra*.

Relevant to Adam the findings state:

At the time of removal this respondent had demonstrated neglect by not providing adequate living circumstances (filth, rodent infestation, inadequate sanitation, [i]nadequate medical care for the children.) There was credible testimony as to verbal and emotional abuse of the children. Failure to protect from emotional and physical abuse by other relatives. Adam may be a fit parent[,] however[,] the girls will suffer actual harm to their development if returned to Adam. CP 71.

Placing the worst possible construction on this finding, it still relates to the past. ("The girls will suffer actual harm to their development if returned to Adam" is a challenged legal conclusion. See below.)

General Factual Findings:

1. Parents' residence on Wiggins (sic) was rat-infested, filthy and unfit for human habitation and the Respondents failed to remediate or change the conditions.

The record established that Adam had moved out of Wiggins and had been living in Lewis County on Burchett Road for 13 months at time of trial. Photographs of the clean and spacious Burchett home were admitted into evidence at trial and are in the record on appeal.

2. Respondents engaged in verbal and emotional abuse of the children calling them bitch, lard-ass, dumb, dumb-ass.

In contrast, the trial court's oral ruling takes note of the remarkable bond between Adam and his daughters:

THE COURT:

There is absolutely no question in my mind, Adam, that you have a very strong bond with your girls. That is clear not only from your testimony, the testimony of witnesses, but from the visitation reports. Honestly, I have rarely seen visitation reports that are that positive that consistently. And so I want to recognize that right off the bat, that that parent bond is there. RP 6:24-25, 7:1-6.

The visitation reports and the girls' Fathers' Day cards to Adam are part of the record on appeal. Ex 14 & 17.

3. Respondents failed to protect the children from similar name-calling and verbal abuse and physical abuse (striking or "popping" the children on the back of the head) by the grandmother.

The trial court's oral ruling spoke to physical abuse, stating "I'm not saying that it's happened consistently or constantly..." RP 9-10.

4. Madison was severely overweight from improper nutrition.

THE COURT:

Adam, I believe you are absolutely sincere in your testimony about working with the girls and be intending to improve their diet, working with them on educational issues. And I certainly will encourage you to continue down that path, because it is important for the girls. RP 10:18:23

5. Both girls suffered breathing issues which are either attributable to or exacerbated by the living conditions with the parents.

Records for two doctor visits were admitted into evidence indicating asthma, treatable with an inhaler. Ex 28.

6. The issues in Findings 4 and 5 have significantly improved or resolved with the girls out of the care of the parents. CP 72.

e) *The findings here do not demonstrate (show) actual detriment to the girls' future growth and development if placed with Adam.*

The focus on Wiggins may be graphic, but it does not resolve the issue of actual detriment. The standard requires that the nonparent establish either that the parent is unfit (not established as to Adam) or that "circumstances *are* such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent". *In re Marriage of Allen, supra*, 28 Wn. App. at 647. *Custody of Stell, supra*, 56 Wn. App. at 365.

The findings must provide a clear basis for a conclusion of actual detriment or harm to the girls' long-term growth and development if they are returned to Adam *as a fit parent*. However, on the key question as to what exactly that actual detriment *is*, the findings are silent, while the cases cited above are not. Unlike *Allen*, there is no finding that either child has a disability that Adam is unable to care for. Unlike *Stell*, there are no findings suggesting that M.S.H. or B.M.W. have any behavioral problems, let alone behavioral problems that Adam would be unable to

handle. Unlike *R.R.B.*, where there was testimony detailing multiple disorders from which the child suffered and concern for the child's safety, there are no such findings here. Finally, unlike *C.D.*, who suffered significant distress from long-term emotional and possibly physical abuse, whose distress manifested itself in many ways, including through threats of suicide and his behavior, none of that is found here. This is a far cry from those situations; there is simply no mention made of a need that a fit parent cannot meet.

Since the findings do not specify exactly what the detriment *is* that will result if the girls are in Adam's custody, what is left is conjecture, which could easily project a positive view of the next 7 to 9 years after this adversity. In light of the trial court's findings and decision, however, one can imagine it posited thus: That Adam's future with his daughters is a predetermined fail; that he will not provide adequate living circumstances and proper sanitation; that the girls will be subjected to verbal and emotional abuse, to physical abuse by other relatives; they will be denied medical care; M.S.H. will gain weight due to improper nutrition; and all around them rodents will run amuck.

Yet none of those hypotheses can be legally presumed about a parent deemed currently fit. If this in fact was the detriment looming large before the trial court, it is apparent that while it was careful not to

use a rearview mirror in determining Adam's current fitness, as to finding actual detriment it focused expressly on the past – what the circumstances *were*, not what they *are*. In that respect, the trial court's conclusion of actual detriment is not only insupportable, it is patently punitive.

The trial court's oral ruling took Adam to task for "a pattern of excuses" for conditions at Wiggins and lack of effort to "get out of that circumstance".⁴ (Conceding that he had indeed vacated the residence.) RP 7-8. That criticism may be merited, but in finding him currently fit, the trial court did *not* find Adam incapable of fulfilling parental functions. It is puzzling that a trial court would find fitness, and then in turn find actual detriment by speculating that that fitness will inevitably fail. There are certainly degrees of fitness in everyday life, but the law recognizes that a parent either *is* or *is not* fit. One that *is* fit should not be deprived of the care, custody and companionship of his children simply because he has not been a perfect parent in the past. *In re Welfare of B.P.*, 188 Wn. App. 113, 165, 353 P.3d 224 (2015)

A trial court is not entirely prohibited from speculating under Washington case law. *In re B.M.H.*, 179 Wn.2d at 238. But the court in *B.M.H.* pointed out that the trial court did not *impermissibly* speculate in

⁴ There were also things about Wiggins that were very positive. RP 8.

that case since there were multiple instances of past conduct on which it based its concern. It stated that "this court will, *if necessary*, speculate about future possibilities in making determinations about domestic relations." *Id.* (*emphasis added*). The court in *B.M.H.* still concluded that the possibly warranted speculation that the mother would interfere with the nonparent's relationship with B.M.H. was insufficient to show actual detriment. Implicit in *B.M.H.*'s discussion of speculation is the fact that even where speculation is permitted, it often will provide an insufficient basis for finding actual detriment. Cf., *Dependency of T.L.G.*, 139 Wn. App. 1, 17, 156 P.3d 222 (2007) (When the State denies a parent's visitation with a child, "[t]he legislatively-mandated risk of harm must be an actual risk, not speculation"). Speculation provides an insufficient basis here. *Stell* is instructive on this very point, where the court explains *how* the trial court erred in failing to find actual detriment. In the face of compelling evidence that the child was a sexual abuse victim requiring extensive therapy and stability that his father could not provide, the trial court *speculated* otherwise and was reversed by this court, stating:

"It is error to award custody based on projections about what will occur in the future. *In re Marriage of Nordby*⁵, 41 Wn. App. 531, 534, 705 P.2d 277 (1985). Although the trial court concluded that

⁵ In *Nordby* the trial court erred by awarding custody to a mother on its projection that a remission of her mental illness would occur in the future.

there was no proof of detriment, because "[a]t most the testimony shows speculation (largely without supporting evidence) about what Thomas may or may not do . . .," *it is the trial court's own conclusion regarding Tom that was speculative*. We do not find any support in the record for the trial court's finding, which is more in the nature of a conclusion..." *Custody of Stell*, 56 Wn. App. 356, 368. (*emphasis added*)

Inversely, given the posture of the parties, that same error exists here. Without findings identifying *exactly what harm will result to the girls if in Adam's custody*, the trial court apparently speculated about what may or may not happen in the future. Its conclusion necessarily includes a presumption that Adam's current parental fitness will deteriorate to the point he can no longer provide for his daughter's basic needs of nurture, health and safety.

Thus the rationale in *Stell* operates against the custody decree in this case on two levels. The trial court erred by speculation, and even that speculation falls far short of the standard.

This was not a focused test looking at actual detriment to M.S.H. and B.M.W. if placed with Adam as a fit parent, because it did not take into account his present fitness and corresponding capacity to fulfil parenting functions. The conclusion that they will suffer actual detriment if returned to their father is not supported by the findings. The nonparental custody decree should be reversed.

f) *The trial court erred in its the finding that “neither parent has demonstrated the ability to adequately parent or protect the children” to buttress its conclusion of actual detriment.*

The trial court’s conclusions of law, properly speaking, are as follows:

It is in the children’s best interests to live with the Petitioner/s because: Returning the children to either parent will result in actual detriment to the children. *Neither parent has demonstrated the ability to adequately parent or protect the children.*⁶ CP 72 *(emphasis added)*

The ability of a parent to “adequately parent or protect” their children is concomitant with parental fitness. The conclusion is in error as to Adam, whose parental fitness was recognized at trial. The recital does, however, point up the inherent contradiction between a finding of parental fitness *and* a finding of actual detriment under the facts of this case, as argued above. In the absence of specifically identifying what the detriment to the girls’ growth and development will be if the girls are in Adam’s care, the trial court buttresses its error with that conclusion.

Adam lost custody of his daughters for thirteen months pursuant to an immediate restraining order, temporary custody order, and a lengthy nonparental custody process. Wiggins was history, and Kristen had left the state. During that time, without the remedial backdrop provided in a dependency, he pushed through a purely adversarial proceeding on a pro

⁶ No challenge is made to findings of fact or conclusions of law as they relate to Kristen.

se basis, filed successive motions resulting in regular visitation with M.S.H. and B.M.W., substantially complied with court ordered drug testing, and sought and participated in additional voluntary substance abuse treatment to demonstrate his fitness as a parent.⁷ He was fully and painfully aware of any prior deficiencies by the time they were propounded at trial, and the finding of parental fitness established his ability to remediate them. It cannot but be wondered what else Adam could have done to demonstrate his ability to “parent and protect” his children.

Adam, as a fit parent, has the ability to adequately parent and protect his children. The competing conclusion should be stricken.

5. THE TRIAL COURT ERRED BY ESSENTIALLY APPLYING A BEST INTERESTS STANDARD, EQUATING IT TO ACTUAL DETRIMENT

The “best interests of the child” standard is unconstitutional as between a parent and a nonparent because it does not give the required deference to parental rights. *Allen*, 28 Wn. App. 646. The “best interests of the child standard” is proper when determining custody between parents, but between a parent and a nonparent, application of a more

⁷ Those same thirteen months were adequate to demonstrate that Kristen had abandoned the children. Adam did not.

stringent balancing test is required to justify awarding custody to the nonparent. *Shields, supra*, 157 Wn. 2d at 142.

a) *The trial court's oral ruling amplify the findings of fact to determine if they support the conclusions of law.*

The present review is limited in that Adam simply argues that the findings of fact are intrinsically insufficient to meet the heightened standard of actual detriment. The court's oral ruling amplifies those findings as deficient and demonstrates that nonparental custody was granted on a lower standard, namely, a consideration of best interests.

b) *The trial court's explanation of the findings manifests a substantive application of the best interests standard.*

THE COURT: And I think, Adam, from my questions for you when you were testifying, I think you probably read into my concerns about your ability to protect from those types of activities happening. I think you are sincere in wanting to do that and that you are very sincere in that you would protect your children –

MR. ADAM HOM: Absolutely.

THE COURT: -- and I am not questioning that at all. My questions -- I don't believe that you are in a place right now where you can. RP 10:1-11

The girls have made great strides where they are. Adam, I believe you are absolutely sincere in your testimony about working with the girls and be intending to improve their diet, working with them on educational issues. And I certainly will encourage you to continue down that path, because it is important for the girls. RP 10:17-23

As for Adam, the reason that I am denying a request for a restraining order is, I don't believe Adam on his own is a danger to the children. And I don't think that there is any reason to restrain his contact with the kids. RP 16:10-13.

So for Adam, I am not finding mandatory limitations. I think that the things that have happened have to some degree been remedied. And I don't think there's any reason to have Adam subject to supervised visitation. RP 17:15-25, 18:1.

“All three of you love the girls. All three of you, I think, have the best interests of the girls at heart. It's just, what is the safest and best place for the girls, and where are we going forward now. RP 18:11-15 (emphasis added)

Honestly, you folks have a -- just like any divorcing couple with kids, you folks have 10 to 15 years together yet with these girls. And that may make your heart happy. That may make your heart sink. It may make you feel like you want to throw up. It is reality. And I would encourage you to work on your communication, work on resolving some of the rift between brothers and families. RP 18:16-23

But at some point, like I said, like it or not, you are now the divorced couple. And you have many years with these kids together. RP 30:22-24

The trial court clearly saw there was no danger to the girls from Adam, no mandatory limitations, no reason to restrain his contact, and no reason to be subject to supervised visitation. Therefore the following explanation, mentioning the children's best interests, “It's just, what is safest and best place for the girls” does not envisage that Adam's custody would be detrimental, but that Thomas and Cathy's would be better, where the girls had “made great strides”.

The court commended Adam's sincerity in wanting to protect his children and work with them on their diet and education. However, the written finding of Adam's fitness demonstrates that it was not sincerity alone; he also has the *capacity* to care for his children. Nevertheless, the court explained that "I don't believe that you are in a place right now where you can." Given Adam's found capacity to properly parent and protect his children ("no danger to them"), the reference can only be aimed at considerations beyond that. Without findings showing specific detriment beyond conjecture, this is evidently a "best interests" consideration.

Finally, likening the parties to a divorced couple draws a further inference to a determination of custody based on best interests as between parents rather than the constitutionally mandated standard of actual detriment.

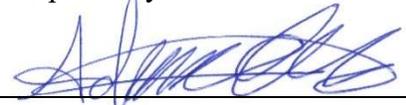
Carefully crafted conclusions invoking an actual detriment standard are not legally sufficient if the findings do not support those conclusions. The trial court erred in substantially applying a "best interests" standard.

V. CONCLUSION

The fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. *In re Welfare of B.P., supra.*, 188 Wn. App. at 165 (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). The same is true where a parent has lost temporary custody to a family member.” *In re Z.C., supra*, 191 Wn. App. at 453. When a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child. *In re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008).

The petitioners failed to meet their burden of proving that Adam was an unfit parent. They have also failed to meet the heightened standard of proving actual detriment to the children’s future growth and development if returned to his custody. The superior court's findings in this case do not meet the clear and convincing threshold for removing M.S.H and B.M.W. from their father’s care. The nonparental custody decree should be reversed.

Respectfully submitted this 21st day of January, 2020



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CERTIFICATE

CR 5(b)(2)

I certify that I delivered a copy of the foregoing Appeals Brief to the following parties, postage prepaid by U.S. mail, and through the Court of Appeals electronic portal on January 21, 2020.

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