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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 W. HOM

Respondents

and

ADAM G. HOM

Appellant

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT 2

 1. Respondents’ Brief is substantially unsupported by references to the record and is without relevant legal authority..... 2

 2. The unchallenged findings of fact do not meet the heightened standard required in nonparental custody cases..... 3

 3. Adam’s Parental Fitness..... 6

 a) There is no middle ground between fitness and unfitness as a parent. 6

 b) The trial court rejected the argument of guilt by association. 8

 c) There are radical differences between Adam and Kristen as parents..... 10

 4. Modification of the Residential Schedule 14

 a) Request for modification of the residential schedule is improper on appeal. 14

 b) The trial court found no restrictions or limiting factors as to Adam..... 14

 c) The trial court found no reason to bar the children from their grandmother’s home. 19

 d) There is no “original” temporary parenting plan. 22

III. CONCLUSION..... 23

TABLE OF AUTHORITIES

Washington Cases

<i>Am. Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 802 P.2d 784 (1991)	3
<i>Custody of Shields</i> , 157 Wn. 2d 126, 136 P.3d 117 (2006)	7, 12, 13
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290, review denied, 136 Wn.2d 1015 (1998).....	3
<i>In re Adoption of M.J.W.</i> , 8 Wn. App. 2d 906, P.3d 1244 (2019)	6
<i>In re Custody of A.L.D.</i> 191 Wn. App. 474, 363 P3d. 211 (2015).....	passim
<i>In re Custody of B.M.H.</i> , 179 Wn. App. 2d 224, 315 P.3d 470 (2013)	7
<i>In re Custody of L.H.</i> , 198 Wn. App. 190, 391 P.3d 490 (2016)	16
<i>In re Custody of S.M.</i> , 9 Wn. App. 2d 325, 444 P.3d 637 (2019).....	7, 10
<i>In re Custody of T.L.</i> , 165 Wn. App. 268, 268 P.3d 963 (2011).....	14
<i>In re Custody of Z.C.</i> , 191 Wn. App. 674, 366 P.3d 439 (2015)	8
<i>In re Dependency of K.S.C.</i> , 137 Wn. 2d 918, 976 P.2d 113 (1999).....	18
<i>In re Marriage of Allen</i> , supra, 28 Wn. App. 637, 626 P.2d 16	4
<i>In re Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993)	3
<i>In re Personal Restraint of Rhem</i> , 188 Wn.2d 321, 394 P.3d 367 (2017)..	3

<i>In re Welfare of Aschauer</i> , 93 Wn.2d 689, 611 P.2d 1245 (1980)	12
<i>Lakeside Pump Equip., Inc. v. Austin Constr. Co.</i> , 89 Wn.2d 839, 576 P.2d 392 (1978)	5
<i>Marriage of Caven</i> , 136 Wn. 2d 800, 966 P.2d 1247 (1998)	15, 17
<i>Mills v. Park</i> , 67 Wn.2d 717, 409 P.2d 646 (1966)	2
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1989)	3
<i>State v. Elliott</i> , 114 Wn.2d 6, 785 P.2d 440 (1990)	3
<i>Ugolini v. Ugolini</i> , 11 Wn. App. 2d 443, 453 P.3d 1027 (2019).....	16
<i>West v. Dep't of Licensing</i> , 182 Wn. App. 500, 331 P.3d 72 (2014)	4
Statutes	
RCW 2.68	15
RCW 26.09	13
RCW 26.09.191	16
RCW 26.10.135	15
RCW 26.10.160	15, 16
RCW 9A.16.100.....	20

Rules

RAP 1.2(c) 2

RAP 10.3(a)(5)..... 2

Cases From Other Jurisdictions

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) 23

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000) 7

I. SUMMARY OF ARGUMENT

Respondents Thomas and Cathy Hom do not answer Adam's chief argument in this appeal, i.e. that the findings of fact do not identify specific actual detriment to the future growth and development of his two daughters if in his custody as a fit parent. Respondents reference "detrimental" only three times in their argument, and their focus is primarily on the girls' mother, Kristen West, who was found unfit at trial. Their challenge was to identify in the findings specific significant needs on the part of M.S.H. and B.M.W. that would not or could not be met in Adam's custody as a fit parent, some serious diagnosed emotional instability that will be exacerbated by the placement, or *some* factor that would be an actual detriment to the girls' long-term growth and development. Since those crucial factors are not in the findings, they turn to hypotheses outside the record, chiefly the speculation that the spectre of Kristen will return if this Court reverses the trial court's decision, arguing that that unlikely event will be "detrimental to the girl's (sic) lives."

However, Adam's past relationship with Kristen was specifically rejected by the trial court as a factor in its decision.

Respondents' various other arguments are answered in turn, but they are beside the point. The findings do not support a conclusion of actual detriment. The nonparental custody decree should be reversed.

II. ARGUMENT

1. Respondents' Brief is substantially unsupported by references to the record and is without relevant legal authority.

At the outset, it must be noted that Brief of Respondents (BR) does not provide a fair statement of the facts and procedure relevant to the issues presented for review—without argument—with a reference to the record for each factual statement as required under RAP 10.3(a)(5). What may be called a virtual statement of the case is discernible throughout (especially sec. I-II), but purportedly factual statements are not referenced to the record. These interwoven assertions include numerous unsupported and conclusory allegations of Adam's wrongdoing, subjective observations, inadmissible hearsay and post-trial material. The collection emerges as largely irrelevant to the issues presented for review, i.e., that the unchallenged findings of fact do not support the conclusions of law.

Respondents attach a "procedural history" which is also unsupported by any reference to the record. It is not cited in their brief.

There are no citations to legal authority.

On review, RAP 1.2(c) provides liberality, but these are still violations of the appellate rules. An appellate court should not have to search through the record for evidence relevant to Respondents' arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). The

appellate court may decline to consider issues unsupported by legal argument and citation to relevant authority. RAP 10.3(a)(6), *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989), *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court will not consider claims that are insufficiently argued), *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991); *Holland v. City of Tacoma*, 90 Wn. App. 533, 537-38, 954 P.2d 290, review denied, 136 Wn.2d 1015 (1998).

Both sides in this case are pro se, but the law does not distinguish between self-represented litigants and those represented by counsel, *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993), and are generally held to the same standard as an attorney. *In re Personal Restraint of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017).

2. The unchallenged findings of fact do not meet the heightened standard required in nonparental custody cases.

Section III of Respondents' brief cites the findings of fact as seemingly dispositive, adding no more than what Adam referenced in his opening brief. Thomas and Cathy miss the mark. Adam's straightforward point is that the trial court's findings—as made—do not satisfy the heightened standard imposed by our appellate courts for determining

whether a trial court may deprive a fit parent of his fundamental right to the care and custody of his children.

While one finding, which is actually a legal conclusion, is challenged (assignment of error 2, Brief of Appellant - BA), the others are not. The crux of Adam's argument is that the unchallenged findings do not support the trial court's conclusions of law, which is an abuse of discretion because it is based on untenable grounds. *West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72, 79 (2014).

Adam concedes that the findings focus on Wiggins, but that 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. 637, 647, 626 P.2d 16 (*emphasis added*).

Thomas and Cathy never really engage on this key point, and merely repeat the findings without meeting the challenge of identifying in them *specific* actual detriment to the children's future growth and development, i.e. any particular or special needs that a fit parent cannot handle or fulfill. *In re Custody of A.L.D.*, 191 Wn. App. 474, 499, 363 P.3d 604 (2015).

Adam turns to the oral ruling to amplify the written findings of fact. *Lakeside Pump Equip., Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 843 n. 1, 576 P.2d 392 (1978). Respondents, on the other hand, artificially enhance the findings by providing extracurricular material, conjecture and dramatic rhetoric, asserting that “*these girls could have died if left untreated in these poor unsuitable circumstances*”. BR p. 5. If that was a genuine and proven factor it would be compelling. It would also be stated in the findings of fact. It is not.

In a train of unsupported and conclusory assertions, Respondents maintain that Adam says “*it wasn't me*”, or he “*just denies.*” BR p. 4, para. 1, has “*no will to quit drinking and drugging*”, para. 2, “*still says he has done nothing wrong*”. BR p. 5, para. 2. But these broad declarations are contradicted by his current parental fitness, and do not identify the *specific* actual detriment to their future growth and development that will result if M.S.H. and B.M.W. are in their father's care as a fit parent. Neither do the trial court's findings of fact, which is the chief issue presented on appeal. The findings do not amount to the extraordinary circumstances required to deprive a fit parent of his fundamental right to parent his children. In that critical point is found an abuse of discretion, and the nonparental custody decree should be reversed.

3. Adam's Parental Fitness

The trial court's finding that Adam is a fit parent is unchallenged and a verity on appeal. *In re Adoption of M.J.W.*, 8 Wn. App. 2d 906, 438 P.3d 1244, 1254 (2019). Respondents are unwilling to come to terms with that finding, and much of their argument showcases that denial.

a) *There is no middle ground between fitness and unfitness as a parent.*

Thomas and Cathy argue that the trial court did not find that Adam was either a fit parent or an unfit parent. "*Judge never said he was either or*", citing RP 14:11-15. BR p. 4-5. "*Judge did not rule fit or unfit*", citing RP 4:21:25. BR p. 6.

The point of the argument is baffling. It is not clear if the argument is intended to help Respondents or just confuse things, but the conundrum is easily resolved by placing the trial court's oral ruling in proper sequence, and considering the legal standard it sought to apply.

THE COURT: ...I'm not making a finding, Adam, that you are an unfit parent. The question then falls to the next stage, which is, will the children suffer actual detriment or actual harm if I return the children to you. And that is a difficult -- a much more difficult decision for me. RP 6:14-19.

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; however, the girls will suffer actual harm to their development if returned to Adam at this time. RP 14:11-15.

However artfully stated, the State of Washington affords only two alternative tests to a third party seeking child custody: (1) the natural parent is unfit, *or* (2) a fit parent causes actual detriment to the child's growth and development. *In re Custody of A.L.D., supra* at 499. A nonparental custody order must be based on *one* of two factors: that the parent is unfit, *or* that placement with an otherwise *fit* parent would cause actual detriment to the child's growth and development. These factors are mutually exclusive alternatives. *In re Custody of S.M.*, 9 Wn. App. 2d 325, 338, 444 P.3d 637 (2019) (*emphasis added*). There is a "constitutional presumption that a fit parent acts in his or her child's best interests". *Custody of Shields*, 157 Wn. 2d 126,149, 136 P.3d 117 (2006), citing *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). Our courts have consistently held that the interests of parents yield to state interests only where "parental actions or decisions seriously conflict with the physical or mental health of the child". *In re Custody of B.M.H.*, 179 Wn. 2d 224, 315 P.3d 470, 477 (2013). "Specific facts showing specific significant special needs that could not be met by the parents are required to establish actual detriment; this is 'a highly fact-specific inquiry'." *In re Custody of J.E.*, 189 Wn. App. 175, 190, 236, 315 P.3d 470 (2015), citing *Shields, supra* at 236.

If Respondents' argument is aimed at establishing actual detriment upon this middle ground, no such parental limbo exists in our state law in the relationship between children and parents. The rights of neither are fairly served by that concept. The closest analogy would be a dependency, in which the state would render transitory assistance to both an unfit parent and his children, geared ultimately towards family unification, or termination of parental rights if unification cannot succeed. But that is not the objective, or even Respondents' obligation, in a nonparental custody proceeding. *In re Custody of Z.C.*, 191 Wn. App. 674, 705, 366 P.3d 439 (2015).

Here the trial court found Kristen an unfit parent, recognized Adam's parental fitness, and moved on to the alternate consideration of actual detriment to determine the custody of his daughters.

b) The trial court rejected the argument of guilt by association.

Notwithstanding the foregoing, Respondents next appear to argue that Adam should be considered unfit because Kristen was found unfit. *"Why should Adam be looked at any differently than Kristen?... He is just as guilty as her... Both are equally to blame and to say otherwise is not okay and is not right."* BR p. 4-5. In the same place Respondents describe Adam and/or Kristen as 'drinking, drugging, drooling, bouncing off the walls, working the system', and other extraneous particulars. None of

these colorful assertions are supported by references to the record. In point of fact, the trial court rejected the argument of guilt by association:

THE COURT: Adam raises, in his trial brief, case law which is absolutely correct, and that is, we do not take away people's kids because of poor choices in partners. And so that is not a consideration on its own for me for any part of this decision. RP 5:6-10.

This Court has indeed observed that “a poor choice of a partner is not a reason for the State to interfere in the life of a family.” *In re Custody of A.L.D.*, 191 Wn. App. 474, 509, 363 P.3d 604 (2015), citing *In re Dependency of M.S.D.*, 144 Wn. App. 468, 182 P.3d 978 (2008).

Thomas and Cathy remain unpersuaded by this Court’s policy, and persist in their focus on Kristen¹: “*I am sure they will be back together if the court reverses [this] decision, which would be detrimental to the girl’s (sic) lives*”. BR p. 7. In this, they finally identify and argue their case for actual detriment to the girls’ growth and development. It is purely speculative. The trial court did not pinpoint Kristen as *the* actual detriment, the extraordinary circumstance that would keep Adam from providing for his daughters’ basic nurture, health, or safety.

¹ Kristen appears fifteen times in Respondents’ twelve page brief.

c) *There are radical differences between Adam and Kristen as parents.*

Instead of focusing on the girls and conditions and circumstances that render it impossible for a fit parent to provide for them, Respondents appear to argue that Adam's custody will be detrimental because his parental fitness will fail just as Kristen's did. But a "determination of fitness is not made based on a single point in time, but looks from a point in time forward." *In re Custody of S.M.*, 9 Wn. App. 2d 325, 339, n. 5 (2019). This point is key in considering the differences between the two parents in this case, whom Respondents feel are "*equally to blame.*" BR p. 4, para. 2. From the moment the record begins, it shows radically different positions for each parent, culminating in a finding of fitness for Adam, and unfitness and abandonment for Kristen. Briefly recapped:

1. Adam's presence is visible throughout the entire record. He doggedly sought visitation with M.S.H. and B.M.W. over Thomas and Cathy's objection, through successive pre-trial motions. See, e.g., CP 19-22, 23-26, 49-52, 53-60. Although Thomas and Cathy resisted, their own "procedural timeline" documents his efforts. BR addendum. His "strong parental bond" with M.S.H. and B.M.W., commended by the trial court, RP 6:24-25, is no accident.
2. Adam's Motion for Contempt, CP 19-22, resulted in court ordered visitation, albeit supervised, for the first time in almost five

months. Ex 14 & 24. The record does not show that Kristen sought visitation. She left the state, RP 16:67, and failed to appear at trial. CP 69. Thomas and Cathy's assertion that Adam sent her away "to better his chances at court", BR p. 4, para. 2, p. 7d., is a patently subjective observation and unsupported by the record.

3. Adam substantially complied with court-ordered drug testing for six months prior to trial with clean results. CP 117-149. Kristen did not. There is no evidence of a "positive UA for Adam" on 2/2/19 as alleged in the BR addendum.
4. Adam voluntarily sought an outside substance abuse assessment and engaged in treatment, included random drug testing. Ex.11-13. There is no record of Kristen doing the like.
5. Unlike Adam, Kristen was found to have shown "*extreme neglect*", "no contact with the children for an extended period of time", CP 71, abandonment and child abuse. CP 78, no. 5 (*emphasis added*). None of those things were found as to Adam, except neglect and verbal and emotional abuse "at the time of removal" (distinguished below at 4.(b)). CP 71 & 77. CPS reports referenced in Respondents' "procedural timeline", were not admitted into evidence at trial. BR Addendum, p. 1.

Despite the contrasts above, Thomas and Cathy fix on the trial court's reference that it saw a pattern of excuses from Adam, and "it's not my fault". BR, p. 4, para. 1, RP 7:9-12. In context, the trial court had just found him fit as a parent and stated that "the question then falls to the next stage, which is, will the children suffer actual detriment or actual harm if I return the children to you" (Adam). RP 6:14-18. But the trial court's findings did not identify *what* those excuses were as pertaining to actual detriment to the girls' growth and development, or explain *how* they showed that Adam was "lacking the necessary capacity for giving parental care." *In re Custody of A.L.D., supra*, at 500, citing *In re Welfare of Aschauer*, 93 Wn.2d 689, 694, 611 P.2d 1245 (1980). That would have been an essential finding in showing an extraordinary condition, circumstance or impairment in which a fit parent would cause "actual detriment or harm" to the future growth and development of his children.²

The human tendency to make excuses has little to do with a proper "focus on the characteristics and capabilities of the child", or identify "some handicaps or special needs *that even a fit parent cannot handle or fulfill.*" *Custody of A.L.D., supra* at 499 (*emphasis added.*) *Shields*,

² In a case where actual detriment *was* found, the father refused to accept his son's disclosure of ongoing sexual abuse, did not protect him., and exposed him to further sexual abuse. *Custody of C.D.*, 188 Wn. App. 817, 825, 356 P.3d 211 (2015)

supra, at 150, calls for “a focused test looking at actual detriment to the child *if placed with an otherwise fit parent*” (*emphasis added*). An embattled and embarrassed parent may indeed try to explain away some of his defects to a judge, but even if he does, the law presumes that a fit parent acts in the best interests of his children. *Shields, supra*, at 143.

Finally, the pivotal case *In re Custody of S.M., supra*, at 338, stands for the proposition that a parent may remedy the factors which form the factual basis for a nonparental custody order, be it unfitness or detriment. Assuming, arguendo, that Adam was unfit “at the time of removal”, he had remedied that problem by the time of trial over a year later. Any conclusion of actual detriment based exclusively and incorrectly on *past unfitness* is not only unsustainable, it suggests that the factor of actual detriment cannot similarly be remedied as *S.M.* supposes. By the time of trial, Kristen was gone and Wiggins was history. Adam alone was standing upon the field to show his daughters that a parent still loved them enough to demonstrate his ability to properly care for them.

Respondents’ argument essentially attempts to relitigate Adam’s established parental fitness and is irrelevant to the issues presented on appeal. Kristen is not a factor because she abandoned the children.

4. Modification of the Residential Schedule

Thomas and Cathy turn next to the Residential Schedule (CP 83), arguing that it was “*incorrectly filled out*”. BR p. 5. They contend that it should be amended to include mandatory limiting factors as to Adam and that visitation should therefore “*be lowered*”, also because “*the presence of the Grandmother poses a threat to the wellbeing of the girls*”. If “*reversed*”, “*the visitations should revert back to the original temporary parenting plan*”.

a) *Request for modification of the residential schedule is improper on appeal.*

There is no record on appeal that these issues were raised below by request for reconsideration or otherwise. There are statutory remedies in which Thomas and Cathy would bear a “heightened burden” pursuant to RCW chapter 26.09 to disturb the present arrangement, including a showing of adequate cause. *In re Custody of T.L.*, 165 Wn. App. 268, 275, 268 P.3d 963, 967 (2011). Were it to surpass those barriers, the argument still lacks merit and doesn’t answer any of the issues raised on appeal.

b) *The trial court found no restrictions or limiting factors as to Adam.*

Thomas and Cathy maintain that the Residential Schedule (p. 2, sec. 3b.) “*contained inaccuracies*” and “*should have the boxes checked that state that Adam Hom is guilty of neglect, child abuse, and sex*

offense”. BR p. 11. The argument proposes that the Residential Schedule be amended to reflect findings the trial court specifically rejected.

Adam raises no challenge to any findings of neglect, and verbal or emotional abuse for which “there was credible testimony” (CP 71-72). It was in the past and Adam is currently fit. In that light, there are distinctions in finding limitations. The requirements of RCW 26.09.191 (Restrictions) and its relevant counterpart in nonparental custody proceedings, RCW 26.10.160 (Limitations), require *specific* findings by the trial court. “Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute.” *Marriage of Caven*, 136 Wn. 2d 800, 809, 966 P.2d 1247 (1998). Respondents request an ex post facto finding of a mandatory limitation due to neglect, but the trial court did *not* find a “substantial refusal to perform his parenting duties”. CP 84. As to verbal or emotional abuse, the trial court did *not* find that Adam “abused or threatened to abuse a child”, or that he was guilty of “*repeated* emotional abuse” (*emphasis added*). CP 84.

Additionally, even if relevant offenses are arguably found, the law states that if the court expressly finds, based on the evidence, that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child, and that the probability that the parent's or another person's harmful or abusive conduct will recur is so

remote that it would not be in the child's best interests to apply certain limitations of RCW 26.10.160, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply those limitations. RCW 26.10.160(2)(n).

The findings made by the trial court on mandatory limitations have collateral consequences. *In re Custody of L.H.*, 198 Wn. App. 190, 195, 391 P.3d 490 (2016), *Ugolini v. Ugolini*, 11 Wn. App. 2d 443, 449, 453 P.3d 1027 (2019) (“collateral consequences that extend beyond the orders’ duration”). Thomas and Cathy may be disappointed that the trial court found no limitations for Adam, but the collateral consequences point to his ability to parent and have unsupervised residential time with his daughters.

Respondents’ insistence on including “sex offense” as a mandatory limitation is profoundly misguided by virtue of its grave implications and merits a robust reply. Washington State, in its statutes and judiciary, is particularly solicitous in protecting minors from sex offenders. There are concrete safeguards in place, such as the Judicial Information System (JIS) which includes personal information for criminal and domestic-related cases, statewide criminal case history, and personal domestic violence case and protection order history. RCW 2.68. The mandatory limiting factors enshrined in RCW 26.10.160 protect children, inter alia, from a parent who has sexually abused the very child(ren) at issue. Thomas and

Cathy cross a line by suggesting that any such limitation applies here. BR at p. 5 states “*Adam was not up front about criminal history*”, and provides an incomplete selection from the trial court’s oral ruling, “*I’ll be honest, Adam. Not being up front about your criminal conviction, that was just bad form, brother.*” The full context in the ruling runs thus:

THE COURT: So what I have considered in establishing a visitation schedule at this point is, I looked at what the testimony was. And I’ll be honest, Adam. Not being up front about your criminal conviction, that was just bad form, brother.

MR. ADAM HOM: Actually, I kind of was up front about it. I didn't understand what she was asking me, because I had two.

THE COURT: So the residential schedule -- again, for Kristen, and the order will address both parents, so I’m just going to go through both parents here.” RP 16:22-25, 17:1-8

Inasmuch as being confused about a question during cross-examination can be called “bad form”, being chided by the trial court for it is probably one of the least of Adam’s difficulties as a pro se litigant fighting tooth and nail for the custody of his children. He responded that he misunderstood the question, and the trial court moved on, having previously referred to Adam’s testimony as credible. RP 6:24-25, 7:1-3.

The trial court has discretion to determine whether the evidence presented meets the requirements of RCW 26.09.191 (similarly RCW 26.10.160). *Marriage of Caven*, 136 Wash.2d at 806, 966 P.2d 1247. The trial court has the advantage of having the witnesses before it, and

deference to its findings is of particular importance in deprivation proceedings. *In re Dependency of K.S.C.*, 137 Wn. 2d 918, 925, 976 P.2d 113 (1999). There is nothing in the record that supports Thomas and Cathy's sordid contention that sex offense is a factor here, and the trial court's unequivocal statement was that "for Adam, I am not finding mandatory limitations" (RP 17:22-23).

Respondents' argument underscores their view that Adam is hopelessly a bad actor, and that it is in his daughters' best interests to live with them instead of their father. In making this argument, however, Thomas and Cathy inadvertently draw further inference to an overall decision by the trial court based on a "best interests" standard rather than the proper standard of actual detriment to the children (see BA p. 32, sec. 5, Assignment of Error 3). The trial court specifically excluded from its consideration two other allegedly detrimental factors offered by Respondents: 1. Adam's past relationship with Kristen, RP 5:6-10 (as argued above), and 2. religious preferences (RP 10:24-25, 11:1-25). In referencing Adam's past conviction the trial court made no such exclusion, and honestly indicated that it bore at least some weight. However, the State of Washington does not remove children even from felons on the basis that the custodian has a criminal history. *In re Custody of A.L.D.*, 191 Wn. App., *supra* at 507. It may be that the State's

redemptive policy is expressly vindicated by the tenacity with which Adam brings his case before this Court, in the legal fight of his life for the custody of his two daughters. In any event, this Court has noted that the test for fitness for custody is the present condition of the parent and not any future or past conduct. *Custody of A.L.D., supra* at 506. The relevant and key issue is whether actual detriment exists to the girls' future growth and development if in Adam's custody as a fit parent, not whether he can ever meet Thomas and Cathy's personal parental litmus test.

c) *The trial court found no reason to bar the children from their grandmother's home.*

Respondents argue that "*the girls' grandmother poses a threat to the well-being of the girls*". BR p. 11b.

However, in crafting the Residential Schedule the trial court knew perfectly well that Adam and the girls would regularly reside in the same home as their grandmother. At Cathy Hom's prompting, RP 26:22-25, the only limitation specified was that she should not be left entirely alone with the girls or used for day care:

THE COURT: I stepped around that, and I apologize for that. I haven't had -- that does not mean that you can't -- if you're at a family event and you are there at the girls and your mom is there, that you can't go to the bathroom. You can go to the bathroom. It just means --

MR. ADAM HOM: Okay.

THE COURT: -- don't use your -- don't use your mom for daycare—

MR. ADAM HOM: Babysitter.

THE COURT: -- or babysitter type of thing there. RP 27:11-22.

It appears that Respondents are distressed by the presence of the girls' grandmother, whom they cast as "*posing a threat*" because she is invariably abusive, when the trial court "wrestled with that finding" in finding it more likely than not. BR pg. 11b., RP 9:15-17. But the only question here is whether the girls will suffer actual detriment if in *Adam's* custody. Inasmuch as abuse is the issue, three points are pertinent:

- 1) Any abuse by the grandmother was not consistent or constant, RP 9:25 10:1, and it was in the past. If it were more than that, that would have been in the findings as superseding Adam's parental fitness and a cause of actual detriment. It is not.
- 2) There was no physical abuse on the part of Adam; it is not in the findings.
- 3) Adam would not permit *anyone* to abuse his daughters:

MR. ADAM HOM: One last thing we could all agree on while we're here, no more hitting the girls, anybody, hitting the girls. I promised them that I would never let anybody -- I'd do everything in my power not to let anybody hit them again.

THE COURT: I think Adam has said that he would never allow people to hit the girls. RP 27:23-25, 28:1-5, 8-9.

It is clear that there would no old school discipline on Adam's watch, even if a relative felt it may be justified. See *Ugolini v. Ugolini, supra, In re Dependency of H.S.*, 188 Wn. App. 654, 356 P.3d 202, 204-207 (2015) (While perhaps not the best way to discipline, the law states reasonable and moderate physical discipline is acceptable. RCW 9A.16.100.)

Thomas and Cathy's argument can be interpreted as a further conjecture aimed at establishing actual detriment. Perhaps they surmise, as the trial court did, RP 10:1-5, that Adam would be unable to stand up to his mother in the matter of discipline. Yet there is nothing in the findings to support that theory. There is no description of some peculiar condition or impairment in Adam, as a fit parent, that would prevent him from properly parenting and protecting his children. Just as it is erroneous to identify Kristen as the looming *potential* actual detriment to the children, it is insufficient to target the girls' grandmother in the same manner. In the trial court's estimation "...I think grandma, too, loves the girls. That is absolutely clear in my mind." RP 26:12-13. In any event, the argument is based on the speculation that a fit parent cannot properly protect his children, a conjecture conflicting with the trial court's order for residential time in the same home with their grandmother.

d) *There is no “original” temporary parenting plan.*

Finally, Thomas and Cathy request that if the Residential Schedule “*is reversed*”, the visitations should revert back to the “*original temporary parenting plan.*” No such parenting plan exists in the record, only proposed residential schedules. RP 16:16-21. A Temporary Non-Parent Custody Order was entered on August 17, 2018. CP 12-18. The order did not call for any restrictions whatsoever on the girls’ grandmother, only “visitation as may be arranged by the parties and confirmed in writing (text)”. CP 16.

Respondents’ foray into the Residential Schedule is perhaps a stab at identifying actual detriment, but if it is, they point to actual detriment where even the trial court did not expressly find it. As the argument for ex post facto imposition of limiting factors to residential time fails, so does any reason for decreasing it, which is not even properly before this Court.

The Residential Schedule does not contain the errors alleged. Respondents maintain that it “*should have the boxes checked that state Adam Hom is guilty of neglect, child abuse, and sex offense.*” BR p. 11. The boxes were not checked because the trial court found no reason to check them. On the whole, the argument is a detour around the key issues presented for review.

III. CONCLUSION

Having brought this petition for nonparental custody, Thomas and Cathy should be uniquely situated to argue where actual detriment can be identified. It is telling that they scarcely mention it except in passing, where they maintain that actual detriment to the girls' growth and development will undoubtedly occur if Adam and Kristen get back together. But if that unlikely hypothesis were a basis for finding actual detriment it would indict a multitude of parents everywhere on suspicion alone. Untold numbers of children could be plucked from their homes without identifying any particular or special needs on their part which preclude their fit parent from providing for their basic nurture, health, or safety.

It cannot escape notice that Respondents' focus is not on M.S.H and B.M.W. and their needs, but on their parents' and grandmother's defects, alleged or otherwise. To focus on Kristen is beside the point; she is an unfit parent and no challenge is raised in her regard by this appeal. To focus on Adam is to relitigate his established parental fitness by recycling allegations rejected by the trial court. The elephant in the room is that the decree depriving Adam of custody punishes him for the past. Thomas and Cathy's argument is not about actual detriment at all, but about what is in the girls' best interests. In the words of the trial court,

“It's just, what is the safest and best place for the girls, and where are we going forward now.” RP 18:13-15. Respondents’ argument lends support to Adam’s contention that the trial court substantially employed an incorrect standard camouflaged as the proper standard.

Respondents do little otherwise to negate Adam’s argument that the findings do not support a legal conclusion of actual detriment, but is based rather on speculation. They do not even argue a special bond with the girls, whose “very strong bond” is with Adam. RP 6:24-25, 7:1-8.

The trial court erred in concluding that actual detriment to M.S.H. and B.M.W. will result based on findings that fail to meet strict scrutiny by the clear, cogent and convincing standard required in nonparental custody cases. The trial court’s decision is untenable, and that is an abuse of discretion. (Assignment of error number one.)

That Adam has not “demonstrated the ability to adequately parent or protect the children” is a legal conclusion inconsistent with the findings, since no clear and present circumstances are found to support it. It is contradicted by the trial court’s unequivocal conclusion of his *current* parental fitness, and cannot sustain a finding of actual detriment to M.S.H. and B.M.W. by mere fiat. (Assignment of error number two.)

The trial court essentially based its decision on an incorrect standard, i.e., best interests as between parents. The decision is thus untenable, and that too is an abuse of discretion. (Assignment of error number three.)

Thomas and Cathy do not effectively argue against these errors. None of their arguments support the colossal intrusion of depriving a fit parent of the custody of his children under the laws of our state. They project a modicum of emotion by reciting sad but unsupported references. Adam could describe an alternate but equally sad experience for M.S.H. and B.M.W. throughout this ordeal, as well as his own distress, but it is against the rules. Suffice to say that his legal briefs cannot adequately express the pain of their separation.

Adam's daughters should be returned to his custody, where their "very strong bond" can flourish throughout the rest of their adolescent years, creating memories which will sustain and enrich their relationship for a lifetime.

The nonparental custody decree should be reversed.

Respectfully submitted this 20th day of April, 2020



Adam G. Hom, Appellant pro se

CERTIFICATE

CR 5(b)(2)

I certify that I delivered a copy of the foregoing Reply Brief of Appellant to the following parties, postage prepaid by U.S. mail, and through the Court of Appeals electronic portal on April 17, 2020.

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