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Division II
State of Washington
No. 53774-5
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In re: Custody of B.M.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Laura TODD (Petitioner)
v.
Travis MILLAR, & Desiree TODD (Respondents)

BRIEF OF APPELLANT

Desiree Todd, ProSe Appellant
4117 124th Ave S.E. #404
Bellevue, WA 98006
desi.simone.stuff@gmail.com
(425) 442-9131

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I. INTRODUCTION

Desiree Todd is appealing the decision of the Pierce County Superior Court Hon. Judge Grant Blinn (hereafter referred to as “trial court”) which granted non-parental custody to her mother, Laura Todd, the grandmother of BM pursuant to RCW 26.10. This appeal is primarily concerned with the denial of Desiree’s substantive and procedural rights to due process guaranteed by the Constitutions of The United States and The state of Washington. The trial court’s denial of Desiree’s due process rights resulted in Desiree’s inability to be adequately heard, and ultimately resulted in the erroneous findings of fact and conclusions of law which took away her fundamental right to maintain the familial connection and bond with her daughter, and her right to raise her child without interference from the State via a non-parental custody petition.

In addition to the procedural injustices, this case also contains essential questions regarding the quality and sufficiency of proof necessary to overcome the considerable deference given to a parent versus a non-parent in a custody dispute.

Throughout this appeal, the Appellant, Desiree Todd, will be referred to as “Desiree” as she shares a last name with the Appellee, Laura Todd, who will be referred to as “Laura” to avoid confusion by using their common last name to identify them.

B.M.’s Father Travis Millar has chosen not to participate in this appeal. Desiree and Travis ended their familial relationship in or about April 2018. Though they both participated in the trial, Travis Millar has refused to support this appeal financially and refused to participate in the process in any way. Accordingly, this appeal will be singularly focused on the errors of the trial court as they specifically relate to Desiree. The inability to assert any errors related specifically to Travis Millar is acknowledged, and therefore, those potentially appealable errors are hereby waived.

II. ASSIGNMENTS OF ERROR

Error #1. The Trial court erred by denying Desiree's motion for continuance to engage counsel.

Error #2. The trial court erred by re-assigning the case on the day of trial to a non-family court. The lower courts committed procedural errors which compromised Desiree's rights to due process of law and effected the outcome of the case. Rather than arguing all procedural errors, and for the sake of brevity, only the court's violation of PCLSPR 94.04(f)(4) is assigned as an appealable error in this appeal.

The Pierce County Local Rule PCLSPR 94.04(f)(4) specifically mandates all contested non-parental custody cases be assigned exclusively to a designated family court. In this case on the first morning of trial there was an emergency conflict with Judge Kirkendoll's schedule (Family Court Judge Department 17). The case was re-assigned to Department 8, Judge Grant Blinn, which is not a designated family court.

Error #3. The Trial court erred by giving significant weight to the testimony of a witness who admitted to being bribed by Laura on cross examination, and also admitted (in part) she had threatened Desiree's life and made written statements vowing to do anything within her power to make sure Desiree would never see her child again. Evidence of these conversations was presented to the trial court

Error #4. The Trial court erred by finding that Desiree was an unfit parent simply because she defended herself against the false accusations made against her (*CP at 172*).

Error #5. The Trial court erred by finding Desiree had a long term substance abuse problem.

Error #6. The Trial court erred by finding Desiree had “substantially refused to perform parenting functions”

Error #7. The Trial court erred by finding Desiree is currently an unfit parent.

Error #8. The trial court erred by finding that Desiree had engaged in medical neglect contrary to the factual record.

Error #9. The Trial court erred in finding that BM would suffer actual detriment if left in Desiree’s care.

III. STATEMENT OF CASE

BM’s mother Desiree Todd 32, and Grandmother Laura Todd 50, have had a difficult relationship. Desiree left home at age 16 as a result of what she considered unbearable emotional, psychological, and physical abuse. Only sporadic contact was maintained between the two until Desiree became pregnant with her first and only bio child, BM, six weeks prior to her 29th birthday. BM was born with the common and correctable birth defect “club-foot” at her left foot.

One week after BM’s birth, Laura and her husband Niels moved away from BM’s home town of Tacoma, Washington to where they now reside in Mesa, Arizona. At that point Laura started to become obsessive with B.M. Laura sent messages to Desiree via text and Facebook on a daily basis, sometimes dozens of times per day. Laura routinely referred to BM as “my baby” and “my [shortened

first name]”. *CP at 147, 150*. Even though living many states away, Laura routinely berated Desiree criticizing her parenting and even threatened to remove people from her life if she didn’t do as she was being told. (*CP at 128*). Simultaneously with the threats and criticisms, Laura frequently demanded Desiree bring BM with her to Arizona for visits.

Laura paid for 4 trips to Arizona for Desiree and BM between April and December of 2017. Those visits were full of conflict as a result of Laura’s incessant and demeaning critique of every aspect of Desiree personally, but especially her parenting. Desiree attempted to maintain healthy boundaries with her over-bearing mother, but those efforts were always met with accusations of drug use and living a lifestyle unfit for a child. (*CP at 128, 151, 139*) Laura wasn’t present to observe how and where Desiree lived after BM’s birth. Since Laura couldn’t control the situation directly, and couldn’t see Desiree or BM except in photos, and video chats she assumed the worst. Desiree sent pictures of BM to Laura on an almost daily basis, but Laura was never satisfied . (*CP at 140*). Unlike most worried grandparents who live too far away to see their grandbabies on a daily basis, Laura turned her fears into a dramatic declaration forming the core of the Petition for non-parental custody. Laura’s obsessive behavior is clear from her correspondence with Desiree prior to filing the Petition for non-parental custody. (*CP at 139, 151*)

At 6 days of age, BM began treatment at Mary Bridge Children’s Hospital for her clubfoot. BM arrived at all appointments in a healthy, clean, and happy condition (as noted in all exams) for weekly replacement of the immobilizing cast which was the primary method of treatment proscribed by her orthopedic pediatrician. Either Desiree or BM’s father took BM to all 25 of her appointments during 2017. (*CP at 114*) Of those 25 appointments, 4 were attended 2 to 3 weeks later than originally scheduled. 3 of those 4 instances were due to Desiree being in Arizona at the insistence of Laura. And one missed appointment was the result of Desiree experiencing difficulties with transportation from

rural Graham into Tacoma. There is no other reference to “car troubles” or transportation issues in the medical record.

BM had surgery on November 7, 2017 to help correct the clubfoot condition which her doctor had noted was difficult in voicing his frustrations with both the clinical difficulties as well as his frustrations with the patient’s attendance due primarily to out-of-state travel. Following the surgery, BM became ill while in Arizona for Thanksgiving. As small children often do when feeling ill, BM threw-up. The vomit landed directly on her cast which quickly unraveled as a result of the moisture. Desiree and Laura both did all they could to acquire a replacement from providers in Arizona but ultimately had to rely on a splint placed in the emergency room. Unfortunately, the emergency-room splint proved ineffective and resulted in partial relapse to the clubfoot when BM and Desiree returned to Tacoma a few days later to visit the orthopedic surgeon.

From December 2017 through March 2018 further progress was made in correcting BM’s foot despite the Thanksgiving setback. All 9 of the remaining appointments in 2018 were attended without significant issues other than 1 episode where the cast had become wet and was removed 20 hours earlier than normal with a minor amount of relapse which was corrected at the time of the visit. In March 2018 BM’s prognosis was changed and treatment graduated to a brace and bar system instead of weekly casts. Follow-up appointments were reduced to monthly/as needed for the purpose of ensuring the shoes still fit.

Desiree and BM’s father ended their relationship in April of 2018. Desiree moved in with her Grandmother. In late spring of 2018, Desiree took BM to Arizona with the intent to try to accept Laura’s offer to live in Arizona with Niels and herself. The conflicts between the two only became worse. Desiree and BM left Arizona as a result in July 2018. Desiree later made statements to family members that if anything ever happened to Her and Travis both, she wanted it known that her mother,

Laura, was absolutely not to raise BM. (*CP at 125*). When Laura heard about those statements she became enraged and vowed revenge. *Id.*

In early September of 2018 Laura again coaxed Desiree into another visit for BM in Arizona so that her husband's extended family from Germany could meet BM. While discussing the visit, Laura told Desiree that the house would be so crowded. Thus the plan was changed to fly BM to Arizona and have Desiree fly down to Arizona 5 days later to pick-up BM and return home. Desiree was anxious to get BM back home in time for a scheduled appointment with her orthopedic surgeon to discuss the follow-up surgery that her Doctor had recommended at the time of the first surgery. (*CP at 130*)

48 hours Before Desiree's scheduled flight Laura brought suit for non-parental custody with an emergency ex-parte motion on order to show cause on September 12, 2018. Seemingly, the point of the deception and kid-napping was specifically to satisfy the first element of RCW 26.10.032(1) "...the child not being in the custody of either parent".

Desiree did not have enough money to hire a lawyer to help defend her against the non-parent custody petition and the allegations it contained. The hearing on order to show cause proceeded without any ability on Desiree's part to timely present responsive briefings. As a result, temporary orders were entered which granted custody of BM to Laura. The temporary custody order further allowed Laura to move BM to Arizona without any further hearing. Visitation was to occur in Washington, or in Arizona at Laura's expense, one weekend per month for 8 hours per day.

In order to visit BM for her 16 hours every month, Desiree would have to incur significant travel expenses to travel to Arizona, a room for two nights, cost of visit activities, and the cost of a supervisor at \$40/hr x 16hrs for the monthly visits. The cost was significant and nearly prevented her from saving enough money to hire a lawyer.

In late May of 2019, Desiree had finally saved enough money to hire a lawyer to represent her for the upcoming trial despite the setbacks and additional expenses. Those additional expenses in fact even

necessitated a cancellation of her monthly visit in April so she could save enough money. Two weeks before trial, Desiree was able to select an attorney she felt could handle her case, but her attorney was headed for a two week vacation and wouldn't be available until just after June 11, 2019 which was the date set for trial. Desiree called Laura's attorney, Chelsea Miller, to request the courtesy of agreeing to a short continuance since her lawyer would not be back in town soon enough to prepare for trial. Ms. Miller flatly refused. Desiree filed a motion for continuance 1 week prior to the trial and noted the hearing for the morning of the trial. (*CP at 152*).

On the morning of the trial, Family Court Judge Karena Kirkendoll who had previously been assigned the case, (*CP at 87*) had an emergency conflict. The case was immediately re-assigned to Judge Grant Blinn Department 8. Department 8 is typically assigned criminal matters. The continuance was denied by Judge Blinn, which resulted in Desiree conducting the trial ProSe and unprepared. As a result, the Trial afforded very little chance for Desiree's case to be fairly presented. On June 21, 2019 non-parental custody orders were filed which granted custody of BM to Laura.

IV. ARGUMENT

Error #1 The Trial court erred by denying Desiree’s motion for continuance to engage counsel.

The trial court erred by denying Desiree’s request for a continuance filed a week prior to the start of the trial. (*CP at 152*).

The liberty interest of parents may be the oldest of the fundamental liberty interests recognized by the Supreme Court. [*Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 \(2000\)](#) .

Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth

Amendment, and the Ninth Amendment. [*Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71](#)

[L.Ed.2d 599 \(1982\); *Stanley v. Illinois*, 405 U.S. 615, 615 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551](#)

[\(1972\)](#). When denial of a motion to continue allegedly violates constitutional due process rights, the

appellant must show either prejudice by the denial or the result of the trial would likely have been

different if the continuance was granted.” [*In the Matter of the Dependency of V.R.R.* 134 Wn. App.](#)

[573, 141 P.3d 85 2006 \(Citing *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 \(1994\)\)](#)

It is true that in Washington State the right to have an attorney represent a parent in cases that seek to terminate parental rights both temporarily and permanently, is not absolute. Only for those cases brought by the state under the “dependency” laws is there a right to have an attorney appointed to represent an indigent parent at the public’s expense. RCW 13.34.090(2) There is no such provision for somebody in Desiree’s situation: unable to afford to hire an attorney immediately to protect her parental rights against another citizen filing a civil suit against her as opposed to the state itself. Arguably, the situation for Desiree is no less dire than if her opponent was the State and the loss of custody permanent. But Washington law is clear that no publicly funded attorney is available for defense of a

civil suit. It has been argued somewhat successfully in the past that the right to one's child(ren) is far different than a civil suit at law which is capable of awarding financial compensation as its only method of providing justice. Perhaps that was among the reasons the Washington State Legislature had in mind when it voted to repeal the Washington laws which provide an ability for a citizen to take another citizen's child from them without any real oversight by the State or County governments. And in the case of a mother and/or father who don't have an extra \$10,000 to \$20,000 available to hire a lawyer, they are very unlikely to instantly learn enough about the law to have a chance of being fairly heard and therefore little chance to protect their rights to their children. If the parents' opponent has enough money to hire an attorney, there is almost no chance at all to keep their child no matter what the facts might be. The Washington State Constitution, and even the US Constitution are powerless to protect such a parent from the inevitable outcome of a ProSe trial litigated against a lawyer who has had a minimum of three years of advanced post-graduate education not to mention substantial experience in conducting trials.

When a parent in such a dire predicament is able to scrape together enough money to overcome that burden and finally attain representation, justice should demand that they be allowed to complete that effort and have their side fully and properly presented to the court. In Desiree's case, the attorney she engaged happened to be unavailable on the date of the trial. Laura and her attorney gave no courtesy, no reasonable time for Desiree's attorney to prepare. Further, Ms. Miller completely disregarded the case schedule requirements on deadlines for witness disclosure, and in fact only disclosed witnesses and facts they were attempting to prove at trial roughly 3 weeks after the motion for summary judgment had been noted for hearing. In fact it was the total lack of any factual or witness disclosures that led Desiree to file a motion for summary judgment as it appeared there was not even going to be an attempt to provide any factual support to the outlandish accusations contained in the original Petition.

In addition to the tactically deceptive methods of preventing normal discovery, Desiree's opponents also took every chance to make it more difficult for her to afford an attorney. Laura filed a motion to clarify the court's prior temporary order regarding items to be included in the simple phrase "travel expenses to be paid by the Petitioner (Laura)" Not surprisingly, she was able to get a modification to the order which required Desiree to pay for her own lodging while in Arizona to visit BM (because Grandma refused to allow Desiree to stay in her house to visit her child) and pay for all transportation and meals while she was in Arizona because again, Grandma also refused to pick her daughter up at the airport to visit her child and would certainly not be providing any food during the visits.

Laura didn't stop there though, she also demanded and was granted by the court a requirement that all visits be professionally supervised at Desiree's expense. Not because any of the indicators under RCW 26.09.091 were present, rather because she couldn't get along with her daughter.

And when it appeared that Desiree was indeed going to have an attorney represent her at last, she was denied any courtesy or consideration from Laura and her attorney. In an adversarial contest, that should perhaps be expected. The last line of defense against aggressively unreasonable litigants pushing the limits of fairness for the sake of victory should be the assigned judicial officer. A judge is given great discretion in deciding whether or not a continuance is fair. But in this case, Judge Blinn ruled that the considerations of Desiree's constitutionally guaranteed procedural due process right to have effective counsel to assist her in protecting her rights to her child were outweighed by the inconvenience of having 1 out of state witness come back at a later date. *(RP at 9 ln 23 – 10 ln 1)* Surely, if Desiree could afford the extreme expense of hiring an attorney for trial, she could be ordered without significant hardship to pay for a round-trip plane ticket Dallas-Seattle for a re-scheduled trial date.

The decision that a plane ticket for one witness should outweigh the constitutional promise of having an opportunity to be fairly heard (*RP pg. 10 ln #1*) before your child is taken away from you is on its face a manifest, and frankly gross, abuse of discretion.

Error #2 The trial court erred by re-assigning the case on the day of trial to a non-family court.

Pierce County Local Rule PCLSPR 94.04(f)(4)¹ mandates all contested non-parental custody cases be handled exclusively by a designated family court including ordinary and dis-positive motions. This rule was ignored when re-assigning the case to Judge Blinn , at the very last moment before trial on the morning of June 11, 2019. The rule speaks for itself. And the rule was clearly violated. The premise behind a designated family court hearing the important cases is the idea that a judge who specializes in family law matters is going to be familiar with relevant developing law and thus more likely to rule justly ; employing the appropriate standards of proof and exercising procedural fairness in cases which assigning punishment or monetary damages are completely inadequate remedies. In this case, Judge Blinn forced Desiree to go to trial unprepared and ProSe , he reasoned that the Petitioner’s one out-of-town witness’ convenience outweighed Desiree’s constitutional rights to due process. That error was extremely prejudicial to Desiree and was quite likely the most powerful element in producing the unjust result in this case. Throughout the trial various rulings made by Judge Blinn had similar prejudicial effect upon Desiree, but they are all born of the same primary issue: not having an attorney to represent her.

Error #3 The Trial court erred by placing significant weight on the testimony of a bribed (RP pg. 159 ln #6-12, pg. 186 ln #20 – pg. 187 ln #25) and clearly partial witness.

Washington state law prohibits bribery of a witness as follows:

RCW 9A.72.090

¹ PCLSPR 94.04(f)(4) Case Assignment. All Nonparental [sic] Custody actions shall be assigned to Family Court (FAM 1 or FAM 2).

- (1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:
 - (a) Influence the testimony of that person; or
 - (b) Induce that person to avoid legal process summoning him or her to testify; or
 - (c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or
 - (d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child.
- (2) Bribing a witness is a class B felony.

The Trial court erred by allowing the testimony of a witness who had been bribed. Laura and her witness, Misty Stephenson actually admitted to the bribery upon cross examination. (RP pg 158, ln #24 – pg 159 ln# 17 & pg 186 ln# 20 – pg 187 ln# 25 as to Misty) & (RP pg 384 ln# 24 - 385 ln# 17 as to Laura) Judge Blinn has committed judicial misconduct by not referring these admissions to the Pierce County Prosecutor for the apparent commission of felonies by both Misty and Laura.

Furthermore, written evidence was produced containing repeated statements made by Misty Stephenson to both Laura and Desiree vowing to do whatever she could to ensure Desiree never saw her [child] again, and also continually threatened to physically harm and even murder Desiree over the course of 2 months in late 2018. (RP pg 167 ln# 5 - pg. 175 ln #25). The trial court not only failed to act on the bribery crimes, but actually placed considerable weight on the testimony of a bribed and very obviously biased witness.

Error #4 The Trial court erred by finding that Desiree was an unfit parent because she defended herself against the false accusations made against her. (RP pg. 480 ln #16 – pg. 481 ln #6).

Incredibly, Judge Blinn admonishes Desiree for not simply admitting all the false accusations made against her were actually true. Judge Blinn makes a specific finding that Desiree is unfit specifically because she has maintained her innocence in defending against false accusations of drug problems and

other falsehoods perpetuated by her mother's campaign to attack her character and ability to be a mother to her daughter. Nothing more needs to be said about the shocking inappropriateness of this error in finding a fact so contradictory to the very foundational concepts of jurisprudence... except to point out that such a bizarre ruling should rightly raise suspicions that some other bias on the part of the Judge might offers a better explanation for his actions.

Error #5 The Trial court erred by finding Desiree had a long term substance abuse problem.

Error #6 The Trial court erred by finding Desiree had “substantially refused to perform parenting functions” &

Error #7 The Trial court erred by finding Desiree is currently unfit as a parent

Error #s 5 – 7 are all errors which are based on arguments that the factual record is insufficient to support the findings made and do not satisfy the appropriate standard of proof notwithstanding Judge Blinn's claims to the contrary. Thus, they are addressed together in this section for brevity.

In Washington, an appellate court reviews de novo whether the findings of fact support the conclusions of law. [In re Custody of A.F.J., 179 Wn.2d 179, 184, 314 P.3d 373 \(2013\).](#) A trial court's custody disposition is not disturbed on appeal absent a manifest abuse of discretion." [In re Custody of J.E., 189 Wn. App. 175, 182, 356 P.3d 233 \(2015\)](#) (quoting [In re Custody of Stell, 56 Wn. App. 356, 366, 783 P.2d 615 \(1989\)](#)) A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." [In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 \(1993\).](#)

Desiree has no criminal record other than traffic tickets, and one citation for driving with a suspended license due to unpaid traffic tickets. Desiree has absolute zero involvement with any controlled substances in any public record. The only supposed “evidence” of Desiree’s drug use is the

testimony of her mother (though she simultaneously admits she has never witnessed any drug use by Desiree) and the testimony of her bribed and very partial witness. Non-parental custody cases typically start with a parent's arrest and/or conviction for a controlled substance violation. Desiree has no record of drug use at any time in her life. Desiree has no history to be recalled from any competent witness including no history as a juvenile. Of critical importance are the 2 separate, observed UA tests completed at approved labs. The results were communicated directly to the court as is customary to ensure validity. One test returned a positive result for Marijuana but no other substance, and the second test was negative for any substance. The trial court completely ignored those two test results, and refused to even acknowledge them throughout the trial.

The non-parental party bears the substantial burden of showing the parent's current unfitness or actual detriment to the child. [*In re Custody of Shields*, 157 Wn.2d 126, 142, 136 P.3d 117 \(2006\).](#) Throughout this case, the court made no effort to discover any information regarding current parental fitness by the ubiquitously employed method of appointing a Guardian Ad Litem (GAL), or even just a basic family investigator. Nor did Laura ever propound any discovery requests for information from Desiree at any time during the case. Instead it has been Laura's position that Desiree must bare the burden of bringing forth evidence to prove she is a fit parent or rebut a presumption that she is unfit. The trial court adopted this approach by conducting a trial that did not presume Desiree's fitness, but instead presumed her unfitness. In the vast majority of similar cases, a GAL is appointed to make an independent assessment of a parent's general fitness by conducting surprise visits at the parent's home, by interviewing the parents and other family members, and gathering evidence of financial wherewithal, quality and cleanliness of the family dwelling, among other factors to be considered in determining current fitness of a parent. Without any effort made to investigate Desiree's current fitness and actively ignoring the only available information directly indicative of current fitness, there are no

tenable grounds for the trial court finding Desiree is unfit to parent BM and retain her basic human right to care for her offspring.

Error #8 The trial court erred by finding that Desiree had engaged in medical neglect contrary to the factual record.

The Trial court ignored Desiree's evidence which summarized all appointments in a table which shows full compliance with the vast majority of appointments; 30 out of 34. 3 out of the 4 re-scheduled appointments were due to Desiree and BM being in Arizona as Laura frequently demanded during BM's first year. And just 1 appointment out of 34 was re-scheduled due to car troubles. The doctor's notes from that visit further indicate there was no effect whatsoever on BM's treatment as her cast was well maintained throughout the extra time between appointments. There was 1 appointment which mentions a cast had become wet and needed to be removed, but Desiree was able to get BM in to the doctor's office the very next day which resulted in only a 20 hour delay in re-casting. At Laura's request, Dr. Rajcich wrote a letter summarizing the overall record of care he had provided to BM as her primary pediatrician and orthopedic surgeon. Dr. Rajcich makes very clear what impact Desiree's compliance has had on the difficulties BM has experienced with her clubfoot treatment, "[BM's clubfoot] has not been the typical course **with or without good compliance** [from the parents]" (emphasis added) In other words, no matter what judgment is made regarding Desiree's compliance with appointment scheduling or the underlying cause of each such instance, in the expert opinion of BM's primary physician, there has been no impact to the growth and development of BM.

The Arizona doctor, Dr. Miller appears to state that the condition of BM's foot, especially including a need for a second surgery, is the result of poor compliance with treatment ordered by Dr. Rajcich from Tacoma. However, a close read of the wording used reveals otherwise. In multiple places in the record Dr. Miller states, "*Per report...*" meaning per the report of Laura Todd. Furthermore, Dr. Rajcich

repeatedly mentions the need for a second surgery or even potentially a third surgery as early as November 2017 (*CP at 115-118*) and thus Laura's attempt to blame Desiree for BM needing another surgery is plainly false.

Error #9. The Trial court erred in finding that BM would suffer actual detriment if left in Desiree's care.

The trial court makes the argument that Desiree is certain to miss future doctor appointments (with a focus on "car troubles" despite her missing only 1 appointment due to car troubles out of 34 total appointments) and that any missed appointments would cause actual detriment to BM's growth and development. Judge Blinn claims drug use is a factor which has some nexus in establishing "actual detriment" (*RP at 481 ln 25*). As mentioned in the argument regarding error #5, this finding is in direct contradiction to Judge Blinn's own narrative given just a few moments earlier in which he states rather incredibly: (*RP at 477 ln 21*) "*I don't know exactly what is interfering with performance of parenting functions*"

The only parenting functions described by Judge Blinn are getting BM to medical appointments (*RP at 478 ln 13*) and providing a stable home environment. The latter is presumably achieved by moving less frequently. (*RP at 480 ln 10*). However, no specific facts of chaotic living environments are referred to for example. But even if specific examples from testimony could have possibly been offered by Judge Blinn, they would still be a year or more old and outside of the definition for "current fitness"

Getting BM to Medical Appointments

No reasonable person would conclude that 1 missed appointment out of 34 total appointments over a period of 18 months due to having car problems means that future car problems are so certain to re-occur that BM would be in actual detriment of harm to her growth or development due to an assumed inability to attend physician appointments. No reasonable person would conclude that 1 missed

appointment due to car trouble provides anything more than a purely speculative danger. Furthermore, even if several car-trouble absences were found in the factual record, they would not provide an adequate basis for finding unfitness or actual detriment as prior actions are not appropriate indicators of current unfitness or actual detriment. [*In re Custody of A.L.D.*, 191 Wn. App. 474, 506, 363 P.3d 604 \(2015\); *In re Dependency of Brown*, 149 Wn.2d 836, 841, 72 P.3d 757 \(2003\).](#)

The other 3 missed appointments in the medical record are all the result of visits in Arizona demanded by and paid for by Laura. If custody of BM were left with Desiree it is certainly safe to assume that the source of the other 3 missed appointments out of 34 total would no longer be applicable– Desiree won't be visiting Laura in Arizona. It is abundantly clear that the relationship between Desiree and Laura is broken beyond any hopes of future reconciliation.

Perhaps most importantly of all, the trial court completely disregarded the written testimony from the only expert witness to provide an opinion on whether and to what extent the 4 re-scheduled appointments have caused harm to BM or affected her overall growth and development. Dr. Rajicich made it very clear that good compliance was completely irrelevant to BM's treatment.

Chaotic Living Environment

The other causes of actual detriment given by Judge Blinn are the fake "drug problem" and supposed "drug houses" where Desiree is accused of living in the past. Those unsupported accusations along with a few anecdotal recollections from Laura's ex-husband (*RP pgs 207-208*) and mother describing completely benign moments from the infrequent contact they have had with Desiree a year or more before trial taken together with 4 re-scheduled doctor appointments out of 34 form the entirety of the evidence which the trial court claims meets the significant burden of proving by clear and convincing evidence that Desiree is currently unfit to raise her daughter. These items very plainly do not support a conclusion of unfitness.

V. CONCLUSION

Desiree Todd deserves what all US citizens deserve: a right to be adequately represented by counsel and thus be fully heard in a fair forum before her most sacred rights are forcibly taken from her. The right to one's child is no doubt the ultimate of precious and sacred rights we enjoy and defend with conviction. Desiree does not expect a free attorney to help her, but she does expect a reasonable accommodation to hire an attorney and have a short amount of time afforded to her for the preparation of her case. This is particularly true considering how hard she had to work to overcome the difficulty in raising thousands of dollars on short notice, including overcoming the obvious effort from her opposition to raise her visitation expenses and thus prevent her from saving enough money to obtain a lawyer before trial. It is an expectation as an American to have a fair opportunity to be heard. Whether identified as "Due Process", "Substantive Due Process", or something else we all instinctively believe in having "our day in court". To then have the convenience of your worst enemy be given more consideration than one of the most important rights we are guaranteed in the constitution (that being an expectation to a fair process) is something that all reasonable people would feel represents a manifest abuse of discretion or worse.

Being told you are an unfit parent simply because you have tried to defend yourself from allegations you know are false, shocks the conscious. Frankly, such a draconian ruling should call into question Judge Blinn's continued participation in the judiciary without at least some corrective action or discipline.

The findings of fact were made without any, or very tenuous, legitimate evidence and therefore do not support the conclusions of law under the heightened burden required by non-parental custody actions. No facts developed in the trial could reasonably be considered "clear and convincing" evidence that BM would face actual (not presumed or speculated) detriment to her growth or development if allowed to remain in the care of her mother.

Desiree Todd respectfully requests that Division II of the Court of Appeals for the State of Washington grant this appeal and overturn the erroneous ruling of the trial court. BM should be immediately returned to her mother in observance of Desiree's constitutional right to the undisturbed care for her child absent clear and convincing evidence of her unfitness as a parent. At a minimum, and in the alternative, this case should be remanded for a new trial in front of a different judge so that Desiree may finally have her day in court. BM should also be returned to her mother pending trial if this case is remanded, unless and until it can be proven by clear and convincing evidence presented in a fair forum with representation by her lawyer that Desiree is currently unfit to parent BM.

I, Desiree Todd, hereby certify under threat of perjury according to the laws of the State of Washington that the content of this brief is true and correct to the best of my abilities and recollection. Filed this 6th Day of April, 2020 and signed at Bellevue, Washington.

/s/ Desiree Todd

TABLE OF AUTHORITIES

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