



DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 32441-9

Spokane County Superior Court Case No. 12-3-01869-1
The Honorable John Cooney
Superior Court Judge

APPELLANT'S OPENING BRIEF

In Re:

KIMBERLY MOEHLMANN, ET AL

Respondents.

v.

KELLY M. LAMBERT,

Appellant.

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I. Facts

The Appellant gave birth to her daughter ALL on the date of December 19, 2009. CP generally. ALL's father was not determined at the time of this matter, therefore, she was the child's only natural parent at issue. RP 76. The Appellant is a disabled, retired veteran due to a back injury and the subsequent depression caused by this injury, and receives a small monthly disability pay check. RP 22-23 & 64-69. After giving birth to ALL the Appellant who was living in Utah at the time, had some difficulties and needed a temporary place to stay while she got situated. RP 224. She moved in with her mother and her mother's new husband, the Petitioners, who lived in Olympia. RP 223-225 However, that did not go well and eventually she moved out of their home and went on her own. RP 223-225

After moving out of her mother's home and to Bremerton, the Appellant started dating a gentleman who had an old sexual abuse charge on his record from when he was very young. RP 128. The Petitioners learned of this situation and called CPS on the Appellant, stating because she was dating this man she was not caring for the baby properly and did not have a proper living environment for her daughter. RP 225-226. CPS investigated the matter and dismissed the case as unfounded. RP 167-168.

All in all the Petitioner's filed four CPS or police complaints about her and her boyfriend, with no results. RP 225-226.

Following more difficulties with the Petitioners, the Appellant moved back to Utah for almost two years, taking care of her daughter the entire time without incident. RP 117, 223-228. Unfortunately, things did not go well in Utah and the Appellant returned to Washington, and as indicated sought temporary housing assistance with the Petitioners. RP 223-225. This lasted for two weeks and she moved out of their home after she saw that the Petitioners were intent on taking custody of her daughter, because she wanted to reunite with her Bremerton boyfriend. RP 57-58. She then moved in with her step sister at her residence in Spokane. RP 57-58.

While with her step sister [who, unbeknown to the Appellant had some felonies for financial crimes on her record], she and her sister went to see an attorney and were advised that if she wanted to take her parents out of the picture that she should agree to change custody of ALL to her step-sister. RP 210-226 & 274-279. However, this agreed Petition was only to be temporary just to avoid her parent's intentions to try and take her child. *Id.* & RP 62. The plan for the Appellant was for her to move from Spokane to the Bremerton area to obtain her own residence nearer to where her boyfriend lived, leaving her daughter temporarily with her step sister until she could become situated. RP 62 & 274-276. She also filed an anti-

harassment Petition and obtained anti-harassment restraints against her mother. RP 59-60 &127.

After finding out that the Appellant had filed the Petition with the step-sister and had moved to the west side to be near her boyfriend, the grandparents quickly filed their own Petition and sought temporary custody because of her involvement with this former sex offender, her alleged lack of stability, and because she left her daughter with a felon, her step sister. CP 3-9. The Petitioners stated that the basis of their Petition because it was in “the best interests of the child” because of there is a “suspicion of neglect and molestation.” CP 3-9. [Parenthetically, the Findings of Fact and Conclusions of Law reiterated that this change in custody was in the “Best Interests” of the subject child. CP 197-202.]

At the temporary hearing the court commissioner dismissed the step-sister’s agreed Petition and granted custody of ALL to the grandparents by temporary order. CP 85-86. Adequate cause was also found and the commissioner also ordered that the mother not allow her boyfriend to be around ALL, and further ordered that a GAL be appointed in the case at the request of the Petitioners. CP *Id.*

After the Petition was filed and her move to Bremerton the Appellant remained in the same house for almost a two year period up the date of trial. RP 19-20. From the date of the hearing on temporary orders

until trial the mother showed a substantial amount of stability. The Appellant did become pregnant with her boyfriend's child and gave birth to ALL's sibling sister about a year before trial. RP 307. No doubt because of the Petitioners' many complaints about her boyfriend potentially being around ALL, as well as her boyfriend's history, CPS instituted their own investigation of Appellant and her new baby with her boyfriend. RP 322-372. The results of that investigation was that CPS found he was appropriate to visit his new baby and did not restrict this contact. *Id.*

At trial the grandmother testified that the mother was unstable before the matter was filed even though she had been at the same residence for at least two years by the trial date. RP 101-104. The Petitioners also found the Appellant's military medical records left at her home and tried to show that because she had mental health issues in the past she was unfit to be a proper parent for ALL. RP 37-40. The Petitioner's primary concern seemed to be that the Appellant was allowing her boyfriend to live in her home, even though that was entirely denied and completely refuted. RP 103-104. It was clearly shown that the Appellant had one address [RP 19] and her boyfriend had another. RP 364. At no time was there any evidence that the Appellant and her boyfriend lived together at the time of trial, nor did the Petitioners present any evidence that the Appellant was unfit in anyway,

it was all speculation and hope on their part based on her history and acquaintances. *Id.* & RP 142 – 204.

Although not presented by the Petitioners, another obvious issue in the case was whether the Appellant's boyfriend was still a risk to her daughter. The boyfriend provided clear testimony that was unrefuted, that not only he had been cleared by King County CPS to visit their mutual daughter, he also had gone through treatment and was found to be a level one, least likely to offend person. RP 364-372.

As indicated, by the time trial came around the Appellant had been living at her home in Bremerton for over two years, had given birth to a step sibling to ALL, had no other negative things occur in her life, had participated in counseling and not been hospitalized for any mental health issues. RP 19 – 37. In spite of the fact that there was little to no evidence that the mother was unfit at the time of trial, the court found that she was unfit because of her past choices to move around to different homes, that she had not visited as much as she could have under the temporary orders, and had a relationship with a former sexual abuser, even though the incident he was charged with occurred almost 13 years before this matter. RP 325-372.

As indicated, the Petitioners and the court also based their claim of unfitness on the Appellants failure to visit as much as she could under

the temporary orders. In a somewhat interesting attempt to redefine the concept of “abandonment” as a failure to visit consistently during the interlocutory period of the case, the Petitioners focused heavily on the mother’s temporary schedule. RP 42-45, 105, 175-176 & 325 - 329. This was in spite of the fact that the mother explained that she did not always have transportation and was pregnant, or had a new baby most of that period of time, therefore, she could not travel from the West side to Spokane often and had difficulties arranging visits with the grandparents. RP 294.

Finally, a look at the ruling and lack of proof provided by the Petitioners shows that the court and the Petitioners basically placed the entire burden of proof on the Appellant to disprove the outdated negative allegations about her military life, her past instability rather than her current two year stability, her visitation under the temporary orders, and allegedly exposing her daughter to a past sex offender. RP 397. Unfortunately, there was really nothing she could have done about these problems since they were all far in her past. The court also did not recognize that the Petitioners even admitted several times the fact that she did not visit during the interlocutory time did not mean she was unfit, that they did not know anything about any current mental health problems or that the Petitioners themselves had moved many times not only in their lifetime, but even currently. The Petitioners also had no evidence to show that the mother and

her boyfriend lived together to even say she had him around the child during the period of time the restraining orders were in effect, let alone say she was unfit. RP 101-372. The Petitioners never filed a contempt motion alleging that the subject child had been around the mother's boyfriend from the date those orders were entered until trial. See CP generally. As also mentioned although the Petitioners requested a GAL, they never followed through with the appointment of a GAL. Instead the Petitioners blamed that on the mother for not filing a financial declaration, however, the Petitioners never dealt with the reality that they could have noted a hearing on that issue at any time if they sincerely believed a GAL would have helped prove their case. RP 114, & 166-167. (The mother never saw a need for a GAL and since it was not her burden of proof to show she was fit, it was thought that the Petitioners would have wanted an inquiry by a GAL.)

II. Error by the Judge

It was error for the judge to rule as follows:

1. Finding that the Appellant mother was unfit because of her "past actions", which were all past circumstances or incidents prior to this case's filing, rather than focusing on her current fitness.
2. Finding the Appellant mother's unfit because of her relationship with her boyfriend, even though CPS already found him fit to visit their new

baby and there was no evidence that they even lived together, or that the mother ever violated the temporary restraining orders to allow him around her daughter.

3. Failing to place the burden of proof on the grandparents to show that the mother was currently unfit, and making the natural mother disprove general past allegations of fitness, contrary to the *Shields* cases instructions.

4. Focusing on the temporary period and mother's visitation or lack thereof under those orders, even though it is considered by law to be an artificial period of time in the case and irrelevant to fitness.

5. Basing its determination that the mother was "unfit" on the totality of all her "past life choices" rather than how she was currently "unfit" to parent her daughter, basically mimicking the errors in the *Shields* case.

6. Entering Adequate Cause orders and Findings of Fact and Conclusions of Law on the "Best Interests" standard in contravention of the law in such cases.

7. Failing to apply the required presumption that the mother is to be considered fit from the outset of trial, therefore, requiring the grandparents to disprove that presumption with clear and convincing evidence.

III. Law & Argument

- A. The standard for the determination of a third party case is based on the standards outlined in *Shields v. Harwood* at 136 P.3d 117, 157 Wn.2d 126 (Wash. 2006).

In 2006 the Supreme Court vacated the nonparental custody orders in the case of *Shields v. Harwood*, outlining the legal standards and the burden of proof in third-party custody cases, along with the proper standard for such a final determination. They said,

Next, we turn to Harwood's assertion that the trial court impermissibly placed the evidentiary burden on her to prove that custody with Harwood would be in C.W.S.'s best interests.

Harwood is correct. Although the trial court referred to the actual detriment standard, the record reflects that it applied the "best interests of the child" standard. As a result, the trial court failed to accord Harwood the benefit of the presumption that placement of C.W.S. with her, a fit parent, would be in C.W.S.'s best interests and failed to place a heightened burden of proof upon Shields, a nonparent.

First, the trial court applied a "totality of the circumstances" analysis, which is appropriate when applying the "best interests of the child" analysis in custody disputes between two parents (or nonparents). The trial court weighed the seven factors contained in RCW 26.09.187 for determining the "best interests of the child" by comparing Harwood (the parent) and Shields (the nonparent). The trial court attempted to justify its use of the seven factors by explaining in its memorandum decision that "[i]n spite of the fact that the 'best interests of the child standard' ... is insufficient to overcome the constitutional right of the parent to rear his or her child, it appears appropriate for the Court to consider and weigh the facts set forth in RCW 26.09.190 in evaluating the totality of the circumstances presented by the case at bar." *Id* at p. 127-128.

In this case the Judge found that given the mother's several prepetition bad choices (another term for the "totality of circumstances") that she was unfit, basically using the "best interests" standard. RP 397.

Additionally, the Petitioner did not provide any evidence during the trial that she was somehow currently unfit, other than she was in a romantic and parenting relationship with her boyfriend. They simply proved that they were worried about her life choices in the past, but never proved at any time that she currently was unfit. They did not rebut her testimony that she in anyway was currently unstable, that she was or had been allowing her boyfriend to be near her daughter, or that they even lived together. All in all, they provided no facts to refute the presumption that she was a fit and proper person for custody of her daughter.

All that the Petitioners did was have the mother Appellant answer questions about her past before the Petition, and about what her visitation during the temporary order period. It was conceded that the Appellant was rather unstable for a while before the petition, while she sought a place to live and that she had a mental health history when she was severely injured at boot camp and had to leave the military due to this injury. However, there were no questions about her current situation other than her relationship with her boyfriend, who again, admittedly had a former sex abuse conviction that was 13 years old. Not once was there any proof from any witness that she had violated court orders, put her daughter in danger, or did anything so egregious to negate the presumption of fitness.

Other facts proven by the mother, or not refuted, showed that her boyfriend had a different residence than her, that she had obeyed the temporary orders to keep him away from her daughter, and that ironically CPS of Bremerton had found that her boyfriend was a fit and proper parent to visit her new baby with this man. They presented no rebuttal evidence to say she had let her boyfriend even around her daughter, there were no contempt findings saying she violated the temporary restraints in that regard, she had no current history of instability, there was no evidence to show that her long ago mental health issues interfered with her current fitness as a parent, and that what she did with her step-sister in trying to circumvent the grandmother's threats to "take her child" was somehow a finding that she was unfit.

By not showing any evidence of her current unfitness, they completely shifted the burden of proof to force the mother to show to the court that her past history really did not matter. This again was completely contrary to the instructions in the *Shields* case.

B. The Petitioners did not meet their heavy burden of proof in this matter.

The court in this case acted as if once the Petitioners showed that the Appellant mother had past mental health issues, was unstable before the petition was filed, and had made the choice to keep seeing a former sexual offender, that she had to prove the presumption that she was fit. This was

very similar to the *Shields* case facts in that Ms. Shields had not visited with her son for years while in Oregon, had suffered from some past emotional health issues, and had been around marital abuse in the past. *Id.* The court in *Shields* and subsequently, has been very clear that the Petitioners in these RCW 26.10 cases have a heavy burden of proof and may not simply try and prove their case by supposition or forcing the natural parent to defend themselves against a difficult past history. The importance of a courts shifting and failure to emphasize the proper burden of proof standard in these cases was recently expressed in the following manner by our courts,

Under chapter 26.10 RCW, a third party can petition for child custody, but the State cannot interfere with the liberty interest of parents in the custody of their children unless a parent is unfit or custody with a parent would result in "actual detriment to the child's growth and development." *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 338, 227 P.3d 1284 (2010); *In re Custody of Shields*, 157 Wn.2d 126, 142-43, 136 P.3d 117 (2006). The law's concept of the family rests in part on a presumption that "natural bonds of affection lead parents to act in the best interests of their children," *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447), and only under "extraordinary circumstances" does there exist a compelling state interest that justifies interference with the integrity of the family and with parental rights. *Shields*, 157 Wn.2d at 145 (quoting *In re Marriage of Allen*, 28 Wn.App. 637, 649, 626 P.2d 16 (1981)). See *In re Custody of B.M.H.*, 179 Wn.2d 224 (2013).

As indicated, at no time did the court reinforce or grant Ms. Lambert the presumption that she was a "fit and proper parent" at the outset of the case. Nor did the court make the Petitioners show specific facts that

the mother was currently unfit. At many times during the case the mother's counsel asked the Petitioners one by one if they had specific facts that the mother had current mental health problems, that she was currently unstable, or that they had any evidence that CPS was wrong in finding no problems with the boyfriend, and they simply indicated that they had nothing to refute these facts, but instead simply worried about it.

Summarizing, the court made the Appellant mother show that her past did not matter in this case, that her boyfriend was no risk to her daughter, that she was stable, that she did not abandon her child during the temporary period, that she had no current mental health issues, and that these past things did not make her unfit. As indicated the Appellant did show that she had been stable for two years prior to trial, once she got situated with her own place. Her boyfriend testified that he was a low risk to offend, was looking forward to having his records sealed because he had no problems for 13 years, and did not live with her. She testified that Bremerton CPS already approved her boyfriend for visitation with her new baby daughter, that she was pregnant and had a new child to care for by herself, which made it difficult, if not impossible, to make the trip from Bremerton to Vantage for visitation. And at no time did the Petitioners even try to show any facts to refute these things.

The Petitioners did not even call an expert witnesses, no CPS workers, although they could have easily subpoenaed them, and they had no medical doctors testify about the child or the mother. All they presented were some old military records that she was depressed several years ago because she failed in her goal to make the military her career, like her father and again, her boyfriend's past history of an abuse charge and conviction. No GAL was actually appointed by the court as ordered because the Petitioners failed to push the issue, such a professional could have at least investigated their allegations. Instead they blamed the Appellant mother for one not being appointed because she did not file a financial declaration, even though they could have filed a motion to force the issue. Again, it was not the mother's job to show she was fit, she enjoys that presumption at the outset of the case by case law.

The following taxonomy is shown to illustrate the failure by the Petitioners to prove by clear and convincing evidence that the mother was currently unfit:

Unrefuted Facts About Mother's Fitness

| <u>Fitness issue</u> | <u>– Testimony/explanation</u> | <u>– Petitioners' Response</u> |
|----------------------|--------------------------------|--------------------------------|
| | <u>provided</u> | |
| Stability | Two years at same residence. | No answer |

| | | |
|--|--------------------------------------|---|
| Abandoned during Temp. period | Pregnant new baby/ transport issues. | Unrefuted ¹ |
| Sister custody Pet. | Intended temp/ avoid Petitioners | Unrefuted Did not call sister Did not call attorney No evid. was perm. |
| Lives w/ abuser | Does Not live w/him | Unrefuted |
| Boyfriend a risk | Level 1 off./low risk | Unrefuted |
| Did not expose child to offender during case | No viol. Temp Order | Unrefuted No Evidence |
| Past Mental Health | No significant problems | Unrefuted No professional test No GAL appointed No current evidence |

As can be seen, the Petitioners' did not meet their burden of proof as they provided nothing more than simple facts about the Appellant's past history, and nothing to show her current status made her unfit. Each and every allegation was not followed with any evidence or witness that either the mother's boyfriend's testimony, or her testimony was incorrect. In fact,

¹ *Kovacs v. Kovacs*, 121 Wn.2d 795, 810, 854 P.2d. 629 (1993):
It is error to use the Temporary Orders to determine custody issues as they create an artificial setting for the parties. Additionally, the Appellant was pregnant and could not travel the 350 miles to visit all the time, not only because of her new baby, but because she did not have transportation at times. See also section E herein.

the entire trial ended with testimony from the mother's boyfriend explaining how he was a low risk offender, and from one of her friends that testified that she was very stable and a good mom. RP 322 -372.

C. The court's focus on the Appellant's past history, even if she was unstable prior to the Petition was improper.

It was patently obvious that the Petitioner's entire case revolved around the mother's past mental health history in the military, the amount of times she moved before the Petition was filed, and her decision to be with a former sex abuser. The Petitioners also focused on the mother's "abandoning" her child by giving custody of ALL to her step sister and not visiting as much as she could have under the temporary orders. However, the mother explained why she did that Petition in that she was extremely worried about her mother's threats to take her child away from her because she was seeing her boyfriend. She explained that this Petition was a mistake but was also told by an attorney that it would keep her mother away from her daughter. The Petitioners never called the sister as a witness to prove this was not a mistake, and did not call the attorney as a witness, even though these people lived and worked in Spokane and could have been subpoenaed. Finally, the agreed Petition with the sister was dismissed summarily two years before trial, therefore, the commissioner must not have felt that there was any credence to the allegations in that pleading and case.

As to the allegation of mental fitness, the Petitioners focused on the mother's old military history where she had fallen and severely hurt her back which caused her to be severely depressed since it destroyed her plans to make the military her career to follow in her father's footsteps. These problems were clearly being dealt with by the Appellant and her current mental health status was really not at issue at the time of trial, therefore, it was error for the court to say she was unfit currently using any of those old facts. She had at one time felt years ago that she was a failure and had no future left and was suicidal one time because of this terrible back injury and her lost dreams. She had not been suicidal since then and did not even need strong mental health medicines. RP 64 – 68.

The petitioners continued with their historic theme by going into facts about where she had lived before the Petition and how unstable she was before that time, however, and ironically, the Petitioners were themselves highly unstable with anywhere from 7 to 13 different residences in just a few years and a similar amount of different employments. E.g. RP 245 – 252. Therefore, it is hard to see why the judge felt the mother stability issues were a problem for her even though she had been at the same residence for almost two years at the time of trial. RP 396-397.

It is important to look at the law on RCW 26.10 cases, as well as similar matters to see what our courts have focused on as the basis for

decisions in such matters. For example, in the case of *In re Mahaney*, 51 P.3d 776, 146 Wn.2d 878 (2002) the court clearly gave instructions to focus on the present ability of the parent to properly care for a child rather than the past, especially when they had a sordid past or questionable history. The *Shields* court also said the focus should be on the present fitness since the court must presume they are presently fit unless disproven. Finally, the court in *In re Marriage of Nordby*, 705 P.2d 277, 41 Wn.App. 531 (1985) although superseded by RCW 26.09.187, provided insight into what the court should look at in these cases.² The *Nordby* court stated:

The test for fitness of custody should be the present condition of the mother and not any future or past conduct. *In re Marriage of Woffinden*, 33 Wash.App. 326, 654 P.2d 1219 (1982). See also *Atkinson v. Atkinson*, 38 Wash.2d 769, 231 P.2d 641 (1951). It was therefore error for the trial court to award custody to [the other party] on its projections that a remission of her illness would occur in the future. *Id.* Emphasis added.

As can be seen, the fact that a parent had past problems, or even anticipated future problems that are speculative, is not relevant to whether they should lose custody of their child in such cases. And if the court focuses on the past to the primary exclusion of their current fitness it is error. That has occurred in this matter.

- D. The mother's boyfriend although having a criminal record for sexual abuse, had many years with no problems or crimes, presented unrefuted evidence

² It has also been cited with approval by this Division at *In re Custody of BJB*, 189 P.3d 800, 146 Wn.App. 1 (Wash.App. Div. 3 2008).

that he was a low risk for reoffending, was found to be a proper visitation candidate for the mother's new baby girl by CPS, and lived in a separate residence, yet his involvement seemed to be the primary basis' for the court's finding of unfitness of the mother; that finding was inappropriate.

After everything is boiled down, it seems clear that the thrust of the Petitioner's case focused on the mother's current boyfriend and his past criminal finding of sexual abuse of a child when he was younger. There was a presumption that seemed to be used that simply because she associated with him romantically, and had a child with him that she automatically was unfit. Certainly there is a general sentiment in family law statutes dealing with visitation that residing with a former sex abuser should be a factor in limiting visitation, however, the statute itself comes into play only when the past abuser actually lives with the parent who wants visitation, and does not restrict the contact of the parent if they are not living with them. See RCW 26.09.191, and more particularly RCW 26.10.160(b) & (e) states:

(b) The parent's visitation with the child **shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct:** (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the

offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies. **(Emphasis added)** . .

. . (e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises visitation in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence. . .

If visitation is an issue in the case, and there is evidence that a non-custodial parent “resides with a person” who has in the past been guilty of such crimes, then there should be limitations placed on that visitation. Nowhere in RCW 26.10 does it say that if the natural mother has a romantic relationship with such a person that they are deemed unfit. Additionally, even a visiting non-custodial parent with such a roommate can show that this statutory presumption is rebutted by evidence that the boyfriend is not a risk to be around children. *See subsection (e).*

In this case the Appellant and her boyfriend seemed to rebut this presumption by placing into the record under oath that he had gone through treatment years ago, the conviction was 13 years old, he had been deemed a level one offender “least likely to offend,” had been cleared to visit with his new baby daughter by CPS of Bremerton, and had no history in 13 years of any type of criminal behavior or violations of his parole or probation. Likewise, this was the time for the Petitioner’s to come forward with evidence that this presumption was improper, with evidence from CPS and/or the state parole board that the boyfriend was not a low risk. All the Petitioner could muster was to file another complaint with CPS of some kind of problem with the child, even though there was no evidence that the mother had ever let her boyfriend come around the subject child since the temporary order were entered. All in all the Petitioners never came even close to any clear and convincing evidence that the mother was unfit.

- E. The Petitioners could not rely on the mother’s failure to visit during the interlocutory period or her alleged brief abandonment to her step-sister to make her appear unfit.

As indicated the Petitioners additional basis for claiming unfitness was the mother’s alleged abandonment during the temporary period and when she left her daughter for an admittedly short period of time with her step-sister under the guise of an agreed third-party petition. First, the third-party custody statutes tell us to look at RCW 26.09 for guidance in these

matter. RCW 26.10.010. RCW 26.09.260 gives us guidance as to what facts constitute abandonment or failure to perform parenting activities enough to justify even a modification of a parenting plan. Subsection (8) indicates as follows:

(8)(a) If a parent with whom the child does not reside a majority of the time **voluntarily fails to exercise residential time for an extended period, that is, one year or longer**, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child. (Emphasis added)

To constitute a failure to exercise their residential time and thus create a need for a change in the plan it must be shown that the failure to visit must be for an extended period of time, even one year. In this case we are only talking about a few months while the mother found a place to live. The Petitioners may say, yes but she was getting ready to give the baby to her step-sister forever. However, this is not true as she clearly testified that this was just temporary. In order for the Petitioners to rebut this or prove to the contrary, they would have had to call the step-sister to disprove this allegation. They did not, and it was not rebutted.

Additionally, case law indicates that “abandonment” even for a prolonged period of time is not sufficient in RCW 26.10 cases to show unfitness. The case of *In re Custody of E.A.T.W.*, 227 P.3d 1284, 168 Wn.2d 335 (Wash. 2010) clearly stated that simply failing to visit or see the child, even for prolonged period of time does not equal unfitness in these kind of

cases. Therefore, although it was proven that the mother did not visit as much as she should have under the Temporary Orders, and tried to give custody of her daughter for a short time to her step-sister, this does not mean she was unfit, especially with her un rebutted explanation of why she did that action.

F. From the start of this case the “Best Interests” standard was used by the Petitioners, all the way through to the final orders.

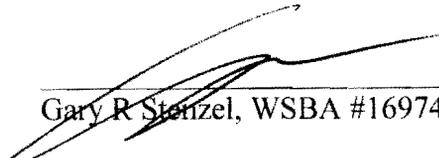
As is clear from the clerk’s record, not only did the original and amended petition allege that it was in the child’s best interests to place the subject child with the grandparents, the final findings of fact and conclusions of law also reiterated that that was the standard in this case. See CP 197-202. Not only did the *Shields* case indicate that that was the wrong standard, the Supreme Court in *In re SCD-L* at 170 Wn.2d 513, 243 P.3d 918 (2010), also indicated that it is a fatal error to find adequate cause based on that standard. This too was done in this case adding to the error by the court and reinforcing complete vacation of the orders.

V. Conclusion

The Appellant was found to be unfit by the court even though the Petitioners pled the wrong “best interests” standard, and failed to meet their burden of proof that she was unfit. The Petitioners focused on the Appellant’s past history of military mental health issues, failure to visit her

daughter as much as she could during the interlocutory phase of the case, that she also had a history of instability even though it was minimal, and the fact that she had a child with a convicted sex offender. Each of these facts were dealt with by the mother at trial and the Petitioners did not rebut those facts with current history or any facts that showed that what she said about her stability, her boyfriend, CPS, or her reasons for what happened in her life regarding her daughter's custody, were not true. The case should be dismissed and her child returned to the mother's care.

Respectfully submitted this 4th day of December 2014, by,

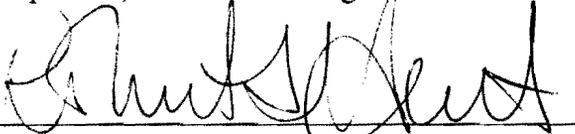


Gary R. Stenzel, WSBA #16974

Declaration of Mailing

I, Robert Hervatine, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on December 4, 2014, affiant enclosed in an envelope a copy of this Appellant's Opening Brief addressed to: Benjamin Platt, Attorney at Law, 1020 N. Washington St, Spokane WA 99201.

Said address being the last known address of the above-named individual, and on said date deposited the same so addressed by regular mail with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington.

A handwritten signature in black ink, appearing to read "Robert Hervatine", written over a horizontal line.

Robert Hervatine, WSBA # 41833

STENZEL LAW OFFICE