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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 32441-9

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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KIMBERLY MOEHLMANN, ET AL, Respondents.

v.

KELLY M. LAMBERT, Appellant.

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RESPONSE BRIEF OF RESPONDENTS

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## I. STATEMENT OF THE CASE

The appellant in this case is Kelly Lambert, and she is the biological mother of the child, Angellynn (A.L.L.), who was born on December 19, 2009 (CP 4). Ms. Lambert did not legally determine who the biological father of the child was, but believes that Angellyn's father is a gentleman named Mr. Mayfield, who is not a party in this action. (RP 21, 76). The Respondents in this case are Kimberly Moehlmann, who is the mother of Ms. Lambert, and Rob Moehlmann, who is the stepfather of Ms. Lambert, making them the grandparents of A.L.L. (CP 4, 87) (RP 101).

At the time of the child's birth in December of 2009, Ms. Lambert was living in Utah with her boyfriend, James Decou, but found that he was being unfaithful, and therefore she decided to move from Utah to the Moehlmann's home in Olympia, Washington approximately around May of 2010 (RP 52, 77). During this time, the Moehlmann's both helped care for A.L.L. by conducting standard parenting duties, and providing emotional and financial support for the child as Ms. Lambert was unable to provide for her on her own (RP 52). Despite this, Ms. Lambert decided to move out of her parent's home just three (3) months later and move in with a new boyfriend named Joseph Favazza, to Bremerton, WA where

he was residing (RP 53, 77). Mr. Favazza is a registered sex offender, who was found guilty of first-degree child molestation, yet Ms. Lambert took A.L.L. and had her live with Mr. Favazza, knowing full well of his criminal history (RP 53). She became aware of this within one (1) week of knowing him and still decided to date him and move in with him (RP 28, 53-54, 77-78). Once the Moehlmanns initially found out about this, they became highly concerned for the safety of the child, and called CPS due to the compounded issues that existed at that time: Ms. Lambert had no job, no stable housing of her own, and a boyfriend who is a registered child molester (RP 101).

After living in Bremerton for about three (3) months, she decided to move back to Utah without informing the Moehlmanns, and took Mr. Favazza with her (RP 53). She lived in Utah for just a short three (3) months, and during that had time received a lot of assistance from a Sabrina Badger, in helping her with her parenting tasks (RP 184-185, 242). Ms. Lambert would drop off A.L.L. to Ms. Badger for weeks at a time while living in Utah (RP 146, 185). Then subsequently, Ms. Lambert got kicked out of her apartment upon the landlord's discovery of Mr. Favazza's criminal history as a child molester, and therefore, she decided to move back to Bremerton

with Mr. Favazza and stayed there until August 2011 (RP 54). Shortly after that, Ms. Lambert moved back in with her parents, who had since moved to Spokane, WA for work (RP 55). At this point, the Moehlmanns picked back up the parental duties that they were contributing to previously when Ms. Lambert and A.L.L. had lived with them (Id). However, despite the amount of help she was receiving, she still decided to move out again to Utah, for the third time, except instead of taking Mr. Favazza again, she took a new boyfriend, Jeff Pollard, whom she had just met (RP 56). Ms. Lambert and Ms. Pollard broke up early in 2012, and not to anyone's surprise, Ms. Lambert decided to move *again* and relocate back to Spokane, WA with her parents (RP 57, 90). At this point, the Moehlmanns, *once again*, picked back up the duties they had the previous two (2) times when Ms. Lambert and A.L.L. had lived with them (Id). The Moehlmanns had made it very clear that they wanted the child to be safe and in stable housing, without any dangerous people around her putting her at risk (RP 217). In addition to those general concerns, the Moehlmanns continuously noticed signs of A.L.L. being sexually abused (CP 184). The child was making body movements indicating hypersexual behavior at a child of infant age (RP 171-172, 267) (CP 184). They expressed

concerns to Ms. Lambert, medical providers, law enforcement, and CPS. (CP 184, 223). This resulted in numerous complaints to CPS through either physicians or law enforcement (RP 137, 227).

As a result, Ms. Lambert decided she was tired of listening to her parent's concerns, and moved in with Jeri Ann Cozza in Spokane around March of 2012, just a couple of weeks after moving back from Utah (RP 57-58). She claims that Ms. Cozza is A.L.L.'s Aunt, but this is not true, as the Court record will indicate (RP 21-22, 107). She lived with Ms. Cozza and her boyfriend, Mr. Hoffman, both of which are convicted felons, until July of 2012 (RP 22, 85-87). During this month, Ms. Lambert filed her own Nonparental Custody action in Spokane County Superior Court, in fear that the Moehlmanns would file before her, requesting that Ms. Cozza have nonparental custody of A.L.L. (RP 20-23, 59-60, 106-107). She states in her own petition, under penalty of perjury, that she has physical and mental health issues which do not allow her to provide the proper care for her child at this point in her life (RP 23-24, 110). The temporary residential schedule that she filed stated that Ms. Lambert have one (1) visit per month with A.L.L. from Friday at 5 pm to Sunday at 5 pm. In this agreed order, Ms. Lambert chose to give herself only one (1) visit her month, and she

essentially gave up custody of A.L.L. to Ms. Cozza (RP 34, 36, 60, 111). Ms. Lambert then, moved to Bremerton and left A.L.L. with Ms. Cozza and Mr. Hoffman (Id).

From the period of July 27, 2012 to October of 2012, A.L.L. primarily resided with Ms. Cozza, and Ms. Lambert made **no efforts** to see her child for four (4) consecutive months (RP 62). Ms. Lambert states that her intention was to do this on a temporary basis, and it was never her intention to give up custody (Id) yet Ms. Cozza and Ms. Lambert hired an attorney, had all the paperwork drafted and entered, and voluntarily gave herself only one (1) visit per month (RP 34). Soon afterwards, the Moehlmann's obtained temporary custody and Ms. Lambert's Petition was dismissed (RP 112).

On the same date that Ms. Lambert filed her custody action, the Moehlmanns filed for a Non-Parental Custody action to ensure that this child would be properly cared for by them (RP 102). Very soon after the Petition was filed, on July 9, 2012, Ms. Lambert filed a retaliatory Domestic Violence Order of Protection (DVPO) to try and gain temporary custody over her child again (RP 127). And just two (2) days prior to filing the DVPO, Ms. Lambert had spoken to Petitioner for 45 minutes on the telephone (RP 198), which just

indicates, she was not in fear of the Moehlmanns, nor was she being harassed by them, but rather Ms. Lambert was worried they would try to take her child (RP 127). She never once stated that she was scared of Kim or Rod Moehlmann (RP 132).

The Non-Parental Custody action filed by the Moehlmanns went to Court on October 26, 2012 to determine adequate cause and establish temporary custody (RP 124). Adequate cause was determined, and temporary custody was placed with the Moehlmanns (CP 85-86).

From the period of July 2012 to October 2012, Ms. Lambert never came to see her child (RP 124-125, 194-195). And after Adequate Cause was determined on October 26, 2012, Ms. Lambert only exercised 7 out of the ordered 32 visits giving Ms. Lambert 4 days every other week with A.L.L. (RP 124, 211). Furthermore, throughout the pendency of this case, she provided no financial support, Christmas presents, birthday presents, or anything of that nature for the entire duration of the case (RP 134-135).

On June 25, 2013, the Moehlmanns filed an Amended Nonparental Custody Petition (CP 87). In this petition, the Moehlmanns included added allegations of molestation and Ms.

Lambert's decision-making by putting the child in danger, and also that Ms. Lambert has both physical and mental health problems that do not allow her to provide for the child (CP 91-94). Ms. Lambert's Petition was eventually dismissed and the Moehlmann's obtained temporary custody (RP 112).

In addition, Ms. Lambert has further continued her relationship with Mr. Favazza, despite a break up occurring in between. She has even had a child with him, Serenity Favazza, born July 13, 2013 (RP 37). They currently live in the same city, very close to one another and see each other on a regular basis (RP 388).

Trial was conducted on February 18, and 19 of 2014, and at trial, all the parties testified and numerous exhibits were admitted (RP 383). In addition to the parties, testimony was offered by Mr. Favazza and Jessica Barlow. Mr. Favazza and Ms. Lambert both expressed their desire to wed one day soon (RP 345, 369).

The Court made the finding that according to the *Shields* case, a Court may award custody to a nonparent in an action against a parent only if the parent is unfit or placement with an otherwise parent would cause detrimental to the child's growth and development (RP 384). The Court proceeded to say that this is

substantial and will only be met in extraordinary circumstances (Id). And Despite the fact that the [Moehlmann's] Petition does not specifically use the terms "parental unfitness" or "actual detriment," 1.13 of the Moehlmann's Petition states with specificity Ms. Lambert's "actions constituting parental unfitness." (RP 384). And although not clearly pleaded, the Moehlmanns have alleged Ms. Lambert is unfit or an unsuitable parent (Id). The Court was able to see that the evidence presented to them characterized Ms. Lambert as unfit, and as an unsuitable parent (Id).

Further, the Court found that Ms. Lambert suffers from mental health problems, namely her depression, and they affect her ability to parent A.L.L. (RP 393) in that when she is at her lows, she lacks motivation and spends a great deal of time sleeping (Id). However, her depression alone does not make her unfit or unsuitable parent. (Id). Ms. Lambert's unstable lifestyle also affected her ability to parent (Id). Since the birth of A.L.L., Ms. Lambert has moved more than nine (9) times in about the first 2 ½ year period of A.L.L.'s life, moving about every 3 ½ months while in the care of Ms. Lambert (RP 51-52). This lacks consistency and stability, to say the least (Id). With the mental and physical problems, and the lack of consistency and stability, the Court

further stated that this contributes to Ms. Lambert to being an unfit or unstable parent (RP 393). In addition, Ms. Lambert has shown a willful and consistent failure to protect to protect A.L.L.'s welfare and safety (RP 394).

The Court elaborated on Ms. Lambert's consistent behavior of endangering A.L.L., by stating all the reasons why she has failed to do so. The reasons being Ms. Lambert's spontaneous temporary order granting nonparental custody to Ms. Cozza, a 5-time felon, and her roommate/boyfriend, who is also a felon and had just been convicted of harassment-threat to kill, while Ms. Lambert was residing with Ms. Cozza (RP 389). And if carelessly allowing her child to reside with two felons was not enough, after the Temporary Nonparental Custody Order was entered, Ms. Lambert moved to Bremerton, while stating in the residential schedule that Ms. Moehlmann was not to have any contact with the child, which is completely retaliatory and has no basis (RP 394).

Furthermore, the trial Court elaborated on Ms. Lambert's questionable choices in maintaining an intimate relationship with Mr. Favazza, a person convicted of first-degree child molestation (RP 395). Although the CPS allegations were unfounded, the Court can still consider the facts that led to the allegations being made

(Id). And in response to any allegations of child abuse, Ms. Lambert simply confirms her commitment to Mr. Favazza, while stating her plans to marry him. Ms. Lambert's focus is not on her child's safety and welfare (Id). And based on her mental health issues, her lifestyle of instability, her careless granting of custody to felons, and her consistent failure to protect A.L.L. from a sex offender, Ms. Lambert has shown herself to be both an unfit parent as well as a parent that acts in a manner that adversely affects the safety and welfare of her child (RP 395-396). In addition, her failure to exercise visitation by missing more than 25 visits further presents her failure to be there for her child (RP 397).

The Court ruled that Ms. Lambert is allowed reasonable visitation, and that the child shall not allowed around Mr. Favazza (RP 398-399) (CP 192). The Court also found that the Moehlmanns are to have sole decision-making authority due to Ms. Lambert's failure to adequately perform parental functions, as well as a prolonged failure to exercise visitation of A.L.L., resulting in a history of neglecting to perform parenting functions (RP 401).

This ruling was transferred to the Final Orders, filed on March 20, 2014, stating the limiting of Ms. Lambert's time due to "willful abandonment that continues for an extended period of time

and substantial refusal to perform parenting functions” (CP 190). And in addition to the Court restricted any and all contact between the child and Mr. Favazza, either directly or indirectly (CP 192) further, Mr. Favazza may not be in Ms. Lambert’s residence while child is visiting (Id).

## II. ASSIGNMENTS OF ERROR

- A. The Appellant is an unfit parent according to the correct standards set out in *Shields*. And placing the child with the mother would result in actual detriment to the child’s growth and development, even despite her fitness.
- B. The burden of proof was placed on the Moehlmanns to prove unfitness of the Appellant, and they did so by presenting necessary evidence to meet their burden.
- C. The Appellant’s relationship with her boyfriend contributes heavily in determining the fitness of the Appellant.
- D. Where circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.

## III. ARGUMENT

- A. Ms. Lambert is an unfit parent according to standards set out in *Shields*. And placing the child with her would result in actual detriment to the child’s growth and development, despite her fitness.

In order to adhere to the constitutional mandate of deference accorded parents in child custody disputes with nonparents, a Court may award custody of a child to a nonparent in a proceeding

against a parent only if the parent is either unfit or if placement with that parent would result in actual detriment to the child. *U.S.C.A. Const.Amend. 14; RCW 26.10.030(1)*. And the primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Shields v. Harwood, 136 Wn.2d 126, 136 P.3d 117 (2006)*.

Additionally, under *RCW 26.10*, in a nonparental action for child custody, a Court may not erroneously apply the "best interests of the child" standard in making its custody decision. *Id.*

The trial Court in the current case, made it very clear that the standard they were using was one to determine fitness and unsuitability of the parent. The trial Court judge specifically states that: "Unfitness or unsuitability to a parent would be found where fault or omission by the parent adversely affects the child's welfare, preservation of the child's freedom from serious physical harm, illness, or death (RP 396). There must be a showing of actual detriment to the child rather than mere speculation that the child's growth and development would be detrimentally affected by placement with the parent." (The trial judge even acknowledges that the facts presented in this case ***precisely*** displays why Ms. Lambert is an unfit parent [emphasis added]. (*Id.*).

Ms. Lambert argues that her “prepetition of bad choices” that she was unfit, basically uses the “best interests” standard which is incorrect. Yet, it is not the incorrect standard of proof that has unfairly disadvantaged her, but rather her bad choices that have caused her to be unfit in the first place. Many of the bad choices she has made have contributed to the current fitness of the Appellant. She has, on more than one occasion, abandoned her child, which is indicated in her deliberate and voluntary act of giving nonparental custody to Ms. Cozza, which she fully admits to at trial (RP 57-58). And further, she admits to having full understanding of what she was doing at the time (RP 21). She has also refused to perform parenting functions as the result of this abandonment, and due to this abandonment, does not provide for the safety and welfare of A.L.L. during the crucial years of the child's life. Ms. Lambert has not been present for over half of the child's already very short life. And despite Ms. Lambert's claims that the duration of abandonment cannot be constituted as actual abandonment in that it was not for a duration of a year or longer, the fact of the matter is that she gave up custody to Ms. Cozza so willingly, and has failed to see the child for up to four (4) month period, all throughout the duration of A.L.L.'s life. At the point of trial, A.L.L.

was just three (3) years old, and Ms. Lambert had failed to regularly see her child from July of 2012 when she gave up custody, all the way up until the date of trial. And despite case law indicating that incidents of failure to exercise visitation is not single-handedly enough to equate unfitness, all of the foregoing acts of unfitness displayed by Ms. Lambert will compound to equate complete unfitness and unsuitability as a parent. And Ms. Lambert's argument that Moehlmanns did not provide evidence to prove she was currently unfit is incorrect.

Furthermore, when Ms. Lambert had claimed under penalty of perjury in her petition to give custody to Ms. Cozza in 2012, she willingly stated that she has "physical and mental health issues which did not allow proper care" and if you fast-forward to the trial in 2014, Ms. Lambert willingly admits these health issues have not changed (RP 24). Not only was this a past issue, it is a current issue as well. Physical and mental health illnesses are not something that exist only in the past. And when you compound the other attributing factors of unfitness along with her mental illness, the level of unfitness is further expanded. These other attributing factors are stated in more detail throughout this brief.

B. The burden of proof was placed on the Moehlmanns to prove unfitness of the Appellant, and they did so by presenting necessary evidence to meet their burden.

The Court in *Shields* has standing and under chapter 26.10 RCW, a Court may award custody of a child to a nonparent in a proceeding against a parent if a parent is either unfit or if placement with that parent would result in actual detriment to the child. Under the detriment standard, the nonparent has a heightened burden to establish that actual detriment to the child's growth and development will occur if the child is placed with the parent, consistent with the constitutional mandate of deference to parents in these circumstances. *Shields*, 136 Wn.2d 126 (2006).

Ms. Lambert adamantly argues that the Moehlmanns are not in accordance with determining the fitness of Ms. Lambert as a parent as was set out in the *Shields* case, and just like the *Shields* case, the parent shall have a reversal in ruling by the Appellate Court.

However, what separates *Shields* from the current case at hand, is that the Court first concluded that Harwood was a fit parent. This was not an issue that was in dispute between the parties. *Id.* In the current case, it was never determined that Ms. Lambert was a fit parent, and there was constant dispute in that regard. What was actually determined after a fair trial, was that Ms. Lambert was

found to be unfit according to the trial Court judge. Never once was it determined that she was ever a fit parent. From the point of filing, through all temporary orders, and until the conclusion of trial, Ms. Lambert was never found to be a fit parent. The Court in *Shields* held that the aunt (nonparent) lacked standing because she did not produce substantial evidence as to the mother's unfitness as both the parent and nonparent were already found to be fit. *Id.* However, this is clearly not the case here, since the determination of Ms. Lambert's unfitness had been established from the evidence produced by the Moehlmanns and never once was she determined to be fit.

The trial Court in *Shields* had erroneously applied the "best interest" standard in applying who they believed the child would be better with, not whether the parent was unfit. Therefore, a reverse ruling was granted. Currently, Ms. Lambert is attempting to claim that the Moehlmanns did not meet the same burden just like it was found in *Shields*. However, the incorrect standard of proof was not the basis for the determination in this case, and rather the fitness of the parent was the basis for the trial court ruling.

Here, the primary issue is not that A.L.L. would be better with the Moehlmanns according to the "best interest" standard. Because

in actuality, it is evident that based on the entirety of this case, never once was Ms. Lambert ever determined to be a fit parent due to the evidence provided by the Moehlmanns. It is and always was an issue of Ms. Lambert being unfit, and therefore, she is incorrect in that the trial Court used the wrong standard of law.

Also, the history of events play a heavy role in determining the fitness of the parent. Due to Ms. Lambert's history and continued pattern of being in maladaptive relationships and situations, she has failed to protect her child from the negative effects of those relationships and situations. Despite her claims that she is a fit and stable parent, there is reasonable inference to the contrary. Not only is her history with men an issue, but she has abandoned her child by agreeing to give up custody to Ms. Cozza, a five-time felon, who resides with her felon boyfriend, Mr. Hoffman (RP 22, 85-87). All the while using the single excuse of not wanting her parents to have custody. And even further, she states effortlessly that she believes her child-molester boyfriend is safer than her own parents (RP 30, 388). This is not progress in any way, nor is it merely reflecting on past behavior. This is a culmination of her past and present fitness, and is a direct display of her current inability to remedy her parental deficiencies.

Also, despite Ms. Lambert's ongoing participation in counseling due to her mental illness, she displays her inability to internalize the information she gained from counseling and to convey the information into changed behaviors. Notably, the only improvement is that Ms. Lambert has lived in her residence for a period of two (2) years. Yet, she chooses to live very close to the man that the Court had so much trouble with to being with, Mr. Favazza (RP 388). She chose to leave the child with Ms. Cozza and move to Bremerton to be by her boyfriend and still currently resides there. The Courts restricted all contact between this man and the child, and also had ongoing CPS investigations. Yet, she decides rather than ending the relationship, she would rather move across the state to be with him, and in addition, have a child with him and make plans to marry him, as she stated at trial (RP 345, 369).

Ms. Lambert states that her ability to keep Mr. Favazza away from A.L.L. during the temporary period should contribute to her fitness as a parent, yet on the day of trial, she was so guilelessly straightforward about her willingness to keep him in her life, and would allow him be around the child if that had been allowed. (RP 33). If Ms. Lambert uses her ability to keep A.L.L. away from Mr. Favazza as reason for being fit, this is problematic as she threw all

good reasoning away at trial when she stated her plans to have a very involved future with him. This is clearly unfit in that this contradicts her argument, and it makes no logical sense. If she had rid of Mr. Favazza from her life to protect the safety and well-being of A.L.L., the circumstances could be different, yet she chose to create a future with Mr. Favazza instead.

In addition, throughout the entire pendency of the case, Ms. Lambert consistently displayed instability in her life. She was unable to financially support her child, which was indicated by her inability to stay in one place for more than three and a half (3 ½) months, while also providing no financial support when temporary placement was with the Moehlmanns (RP 134-135).

Ms. Lambert argues that the Moehlmanns have also moved on multiple occasions, and therefore she should not be penalized for that. Yet, the Moehlmanns' reasons for moving were always work-based and the duration of time spent in each location was always for more than a couple of years (RP 182). Ms. Lambert's moves were all due to lack of stability, and her continual need to follow a boyfriend she just met. Also, the frequency of Ms. Lambert's relocation far outnumbers the Moehlmanns'.

Furthermore, Ms. Lambert has failed to be there for A.L.L. when she chose to *consistently* miss her visitation with the child. Rather than making efforts to be there for the child in any way she could, she failed to even make half of her allotted visits by making only 7 of 32 visits. Ms. Lambert adamantly claims this was a financial issue, yet she is incapable of proving to the Court that she did not have the sufficient funds to visit her child. Rather than filing a financial declaration, Ms. Lambert orally listed her financial obligations on the record, which indicated to the Court that there was in fact, surplus funds in her income that could have covered all of the possible expenses to visit her child (RP 47-48), yet she continued to make excuses as to why she couldn't visit her child.

Furthermore, while Ms. Lambert seems to adamantly discourage the Court looking only at her past behaviors, it appears she is requesting that the Court rely on the future and possibility that Ms. Lambert would be a fit parent. At trial, Ms. Lambert's counsel inquired about the possibility of Ms. Lambert being fit in the future when questioning Mrs. Moehlmann (RP 145). What Ms. Lambert's counsel was asking was that rather than reviewing and assessing all of the poor choices she has made thus far, the Court should just believe she could be a fit parent in the future with

absolutely no reasonable merit or basis. This is far reaching, and an unreliable source of information as all the evidence presented at trial only indicated otherwise.

C. Ms. Lambert's relationship with her boyfriend contributes heavily in determining the fitness of the Appellant.

Ms. Lambert made it clear that she does not currently reside with Mr. Favazza, but that she lives very close to him and sees him regularly, and he stays overnight (RP 27). And also, Ms. Lambert and Mr. Favazza both, made it very clear that they plan on marrying (RP 345, 369). I fail to understand how her complete and utter disregard for the Court's concern with Mr. Favazza being around A.L.L. should not contribute to the Ms. Lambert's fitness and visitation with the child. In addition, the only reason why Ms. Lambert does not currently reside with Mr. Favazza is because when this action was filed, the Court restricted contact between A.L.L. and Mr. Favazza.

Ms. Lambert states that one of the contributing factors to indicate that she is a fit parent is that the Moehlmanns presented no rebuttal evidence to say she let her boyfriend around the child. Yet, I fail to see how Ms. Lambert makes this situation better by

creating a future with a man that the Court is so heavily displeased with, as was elaborated on in the previous paragraphs.

Ms. Lambert further argues that CPS in Bremerton has already approved her boyfriend for visitation with their new baby daughter, trying to allude that Mr. Favazza is not a threat to A.L.L. Mr. Favazza may be a father to his new child with Ms. Lambert, but A.L.L. is not his child. And just because a child molester would not molest his own child, does not mean he wouldn't molest someone else's child.

What Ms. Lambert did was rather than addressing the concerns that the Moehlmanns had regarding Mr. Favazza, Ms. Lambert chose to avoid the situation by filing away her custody to a felon, then filing for a DVPO in retaliation for the Moehlmanns filing their action, and then, chose to move closer to Mr. Favazza anyways. Although, Ms. Lambert claims she currently does not reside with Mr. Favazza, she has resided with him before, and has placed herself in a situation where living with Mr. Favazza and/or seeing him in the future will be frequent due to the new child she has with him. In addition, Ms. Lambert claims that due to her new child with Mr. Favazza, she was unable to make some of her visitation with A.L.L. These are not acts of God that have deterred

Ms. Lambert from seeing A.L.L. She had the resources and the time to do so. The reality is that she has failed to make time with her child due *only* to the situation and environment she has created for herself, which has resulted in her inability to properly care for her first child.

Ms. Lambert cites to *Kovacs v. Kovacs* as support to indicate that due to being pregnant, she could not travel, and due to a new baby and her inability to have transportation, she did not exercise all of her visitation. However, the chief difference between that case, and the current case at hand, is that the Appellant/Mother in *Kovacs* lived in Spokane, WA while her husband lived in Irvine, CA, which is anywhere from 1000-1200 miles apart, and driving would take approximately 22 hours, and oftentimes flying would be a common method of transportation. However, in the current case, Ms. Lambert lives in Bremerton, WA and the Moehlmanns are in Spokane, WA, which is approximately only 300 miles away from each other, and just a 5 hour drive. These cases cannot possibly be compared in determining the difficulty of travel, when traveling across the state is clearly less burdensome than going two states away, as was the case in *Kovacs*. This also shouldn't justify the magnitude of missing 29 out of 36 visits with her own child.

D. Where circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.

Unfortunately, when a family is emotionally torn asunder, often the Courts remain as the only means of resolving the future relationships of the parties. Judges are sometimes asked to exercise Solomonic wisdom in these matters. *Warnecke v. Warnecke*, 28 Wash.2d 259, 182 P.2d 699 (1947); *In re Marriage of Murray*, 28 Wash.App. 187, 191, 622 P.2d 1288 (1981).

According to *In Re Allen*, the Court found that perhaps the most fundamental difference between the [two opposing] parties lies in their basic personalities. 28 Wash.App. 637, 626 P.2d 16 (1981). The father's attitude toward the child's future development is described as apathetic and fatalistic. *Id.* This is not to say that the father and his family were not concerned and interested in the child's development. But the stepmother's actions on the child's behalf clearly suggested that she believes the child has unlimited potential and that he can reach any goal, given proper help. Her dedication, devotion and determination to provide this is almost overwhelmingly reflected in the record. 28 Wash.App. 637, 642, 626 P.2d 16 (1981).

In the current case at hand, the Moehlmanns have heavily contributed to the development of A.L.L. While the child was in the care of the Moehlmanns, A.L.L. suffered no medical conditions, and had improved vastly with her speech. The child had major speech problems earlier in her life while in the care of Ms. Lambert. The child's speaking ability was considerably behind for her age group. While Ms. Lambert did not do anything to improve her speech issues, the Moehlmanns had made active attempts to improve the child's development. They took A.L.L. to regular speech therapy sessions, while Ms. Lambert had never attended a single speech therapy session for her child, although she was informed of them (RP 119-120). In addition, A.L.L. was not getting her proper immunizations when she was with her mother (RP 120). The child went over a year and a half without a single doctor's visit to get her appropriate shots (RP 148). After being in the care of the Moehlmanns, A.L.L. is now up to date on her health checkups, and immunizations (RP 148-149). And the child's speech is now in accordance with her proper age group. All in all, Ms. Lambert failed to keep her child up to date on all proper immunizations, as well as failing to address her speech problems. Furthermore, not only did the Moehlmanns make active attempts to improve the wellbeing of

the child, the Moehlmanns also voluntarily took parenting classes at Lutheran Services to better themselves in the parenting roles. The program was called "Parent-Child Interactive Teaching." Both of the Moehlmanns completed the course, and also received Certificates of Training for completing the Kinship Conversion program (RP 120-148).

Ms. Lambert's lack of involvement and interest in A.L.L.'s development is highly troubling. When her attorney asked about her daughter in Court, she merely stated that her child likes "Dora, and Jake" (RP 284). This does not display a mother-child bond. Rather, Ms. Lambert loosely describes what popular television show her daughter enjoys, while failing to provide any significant instances of basic support and development of a growing child with specific needs. While the Moehlmanns are not the biological parents of this child, they have clearly taken more efforts to parent the child and further in the health and development of a growing young girl.

Clearly, parental unfitness will outweigh the deference normally given parents' rights. But where the parents' actions threaten the child's welfare, the state's interest takes precedence. *Allen* quotes *Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 824, 356 N.E.2d 277 (1976), where the Court stated:

Examples of cause or necessity permitting displacement of or intrusion on parental control would be fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like.

Where circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed. *Allen* quoting: *Turner v. Pannick*, 540 P.2d 1051 (1975).

Where Ms. Lambert has already displayed her instability and constant poor decision-making by placing her daughter in potentially harmful situations, she further adversely impacts the child's growth and development by failing to provide the proper care regarding the health and intelligence of the child, which seriously impacts the welfare of the child.

Similarly, in *In Re Allen*, the Court found that the child's future development would be detrimentally affected by placement with his father. There is ample record to support the Court's findings. The child's inadequacy in his use of language and lack of opportunities for interaction and communication would set back his intellectual development. The Court further elaborated by stating that the child had become integrated into the family with the stepmother. And by the award of custody to the stepmother, the

family unit remains essentially the same. Where the reason for deferring to parental rights the goal of preserving families would be ill-served by maintaining parental custody, as where a child is integrated into the nonparent's family, the de facto family relationship does not exist as to the natural parent and need not be supported. In such a case, custody might lie with a nonparent. 28 *Wash.App.* 637 (1981).

In the current case, A.L.L.'s future development would be detrimentally affected by placement with the mother. Ms. Lambert continuously displays inadequacies as a mother by not properly providing for the child, being in a maladaptive relationship with a child molester, and by failing to contribute to the development growth of the child's health and intelligence. In addition, the child has formed an unbreakable bond with the Moehlmanns. The child recognizes the Moehlmanns as her stable parental figures as she has already been fully integrated into their family.

It was formerly thought that blood ties between parent and child were extremely important. And although it is still extremely important, now it is learned that kinship is not as important as stability of environment and care and attention to the child's needs. *In Re Allen, citing, J. Goldstein, A. Freud, A. Solnit, Beyond the*

*Best Interests of the Child (1973)*. And in the current case at hand, the psychological relationship between the Moehlmanns and A.L.L. is equivalent to that of a natural family entity.

#### IV. CONCLUSION

From the foregoing information, it is clear that Ms. Lambert is an unfit parent, and even if she was fit, the child would still result in actual detriment in growth and development if A.L.L. were to be placed with Ms. Lambert. The Moehlmanns have met their burden in proving the unfitness of Ms. Lambert and since the child's growth and development would be detrimentally affected by placement with Ms. Lambert, her parental rights are outweighed in this matter.

Based on the foregoing facts and authorities, Kimberly and Rod Moehlmann respectfully urges this Court to uphold the trial Court's decision in granting the Nonparental Custody Order and placing the child with the Moehlmanns.

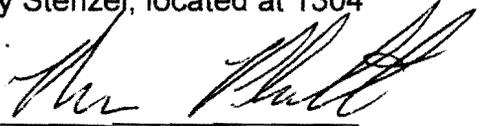
DATED this 8<sup>th</sup> day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 8, 2015, I served a copy of this appeal brief by personal service on Attorney at Law, Gary Stenzel, located at 1304 W. College Ave. LL, Spokane, WA 99201.

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

Benjamin D. Platt