COA No. 33013-3-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Custody of:

H.A.R.

PAMELA and THEODORE SUCHLAND,

Appellants,

and

AMANDA MARIE SUCHLAND (Mother);

JEREMY JOHN REYNOLDS, (Father);

Respondents.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The court erred by dismissing the Suchlands' de facto parentage action.

2. The court erred by dismissing the Suchlands' nonparental custody petition.

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> In a custody dispute between parents and a non-parent, the non-parent (here, the Petitioners) must establish parental unfitness or that placement with a parent would result in actual detriment of a child. The Court is finding that the Petitioners did not meet their burden of proof by a preponderance of the evidence and therefore the Petition will be denied.

4. As to the nonparental custody petition, the court erred by making this certain finding in finding of fact 2.13:

> The Court finds more likely than not that the Respondent, JEREMY REYNOLDS, has not physically abused his daughter and the Respondent, JEREMY REYNOLDS, does not pose a danger to his daughter.

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Issues Pertaining to Assignments of Error

A. Did the court err by dismissing the Suchlands' de facto parentage action when the court determined from the undisputed facts that the father did not consent to and foster the parent-like relationship with the grandparents? (Assignment of Error 1).

B. Did the court err by dismissing the nonparental custody petition when substantial evidence did not support its determination the Suchlands failed to prove by the requisite quantum of proof that the father was an unfit parent and/or placement with the father would result in actual detriment to the child? (Assignments of Error 2, 3, 4, 5).

II. STATEMENT OF THE CASE

Pamela and Theodore Suchland filed a nonparental custody petition on August 7, 2014. (CP 3). Their petition was later amended to include a de facto parentage action. (CP 47).

An adequate cause hearing was held on October 15, 2014, on both the nonparental custody petition and the de facto parentage action. (10/15/14 RP 11). Although finding no adequate cause to proceed on the de facto parentage, the court stated the Suchlands had made more than a prima facie showing of abuse

and found adequate cause to go to trial on the nonparental custody petition. (*Id*. at 34-38).

Later on November 5, 2014, the de facto parentage action was dismissed after the court determined adequate cause did not exist. (CP 193). It reasoned the de facto parent doctrine can apply only when it is established that both legal parents consented to the petitioner serving as a parent to the child. The court recited the relevant evidence:

> 1. The biological parents [Amanda Suchland and Jeremy Reynolds] lived together with the child [H.A.R.] until the early summer of 2012.
>
> 2. When the parents separated, the Mother moved with the child into the home of the Grandparents in Odessa, Washington. The Grandparents are the Mother's parents.
>
> 3. The child has lived in the Grandparents' home continuously from the time the Mother moved into their home in 2012 until the present. During this time, the Grandparents have provided almost all of the physical care and most of the financial support for the child.
>
> 4. On July 3, 2012, the Father brought a parentage Action in Adams County Superior Court against the Mother seeking a residential schedule for his daughter.
>
> 5. On October 22, 2012, the Father obtained an ex parte order in the Adams County case giving him custody of the child pending a show cause hearing. This order was vacated on motion of the Mother shortly after it was entered.

6. A Temporary Order was entered in the Adams County parentage action on February 19, 2013. This order placed the child in the primary custody of the Mother, but granted residential time with the Father on an every-other weekend basis. The Father's weekend time began with "reunification" daytime visits with without overnights, and expanded to full weekends from 6 p.m. on Fridays until 6 p.m. on Sundays beginning in June of 2013. The Mother was given sole decision making authority under this Temporary Order.

7. The Father exercised most of the residential time with his daughter that was provided under the Adams County Temporary Order. During this time, he was aware that the child was living in the home of the Grandparents, but he never saw or had contact with her when he would pick up or drop off the child in the Grandparents' home. There is no evidence that the Father was actually aware that the Mother had abandoned the child and had left her in the exclusive care of the Grandparents prior to late 2003 or early 2004.

8. Around the time the Father began exercising overnight weekend residential time with his daughter, a number of complaints were filed with CPS alleging that the Father was physically abusing his daughter during his visits. The Father consistently denied the allegations and voluntarily participated and cooperated with CPS in these investigations.

9. On January 23, 2014, the Grandparents filed a dependency action concerning the child in Spokane County Superior Court. In their petition, the Grandparents alleged abandonment by the Mother, physical abuse by the Father, and that neither parent was adequately caring for the Child. The Father obtained legal counsel and responded to the petition by denying the allegations the Grandparents made.

> 10. Venue for the dependency was transferred to Lincoln County Superior Court by order dated January 24, 2014. This order also continued placement of the child with the Grandparents pending a Shelter Care hearing that was set for February 4, 2014, and it suspended the Father's visitation with the child until further order by the court.
>
> 11. Through the disqualification of the Lincoln County Judge, the appointment of the undersigned, and a number of other events, the Shelter Care Hearing was not brought before the Lincoln County Superior Court until June 30, 2014. By that time, the Father had not visited or even seen his daughter for over six months.
>
> 12. A Shelter Care Hearing was not actually conducted on June 30, 2014, but an agreement was reached by the parties. Included in this agreement was a provision allowing the Father supervised visits with his daughter. Additionally, the court granted the parties leave to proceed outside the dependency case with legal actions relating to the care and custody of the child.
>
> 13. The Lincoln County dependency action was dismissed by this court on October 22, 2014.
>
> 14. The Grandparents brought this present Third Party Custody in August of 2014 and they thereafter amended their petition to allege a de facto parentage cause of action. The Father retained counsel to defend these allegations, a Response has been filed, and the Father is again contesting the Grandparents' allegations, and is asserting rights as the biological parent of the child. (CP 196-98).

Finding these facts undisputed, the court determined "the Father has not been entirely out of contact or uninvolved in his daughter's life." (CP 199). It further observed Mr. Reynolds

brought an action seeking primary custody of H.A.R. and it was denied. (*Id*.). He then exercised residential visits, which were "involuntarily interrupted by the filing of the dependency action and the resulting order placing the child with the Grandparents and suspending the Father's residential time." (*Id*.). The court, however, noted:

> While perhaps the Father could have acted faster in bringing the dependency action to resolution, any delay on his part cannot reasonably be construed as his agreement or consent for the Grandparents to take over his role as a parent or as an effort on his part to foster a parent-like relationship by the Grandparents with his daughter. (*Id*.).

It stated the "Father's lack of consent to this situation is clearly shown by the positions he has taken in opposition to the Grandparents' legal actions and by his efforts from shortly after separating from the Mother to assert rights as a parent. (*Id*.).

The court concluded the "Grandparents have failed to present a prima facie case that the Father consented to and fostered the Grandparents' parent-like relationship with the child" and dismissed the de facto parentage action. (CP 200).

The case proceeded to bench trial on the Suchlands' nonparental custody petition.

Mr. Reynolds testified Amanda Suchland had not been at the grandparents' home since his first visit with H.A.R. (12/12/14 RP 118). He acknowledged taking no action in Adams County to have her placed with him. (*Id*.). He did not know anything about who was caring for H.A.R. and had not called the Suchlands to check on her. (*Id*. at 118-19).

Dr. Linda Powell saw H.A.R. for a well-child examination on June 7, 2013. (12/12/14 RP 135). There were no issues. (*Id*.). One week later on June 14 at Pam Suchland's request, the doctor checked on H.A.R. before a visit with Mr. Reynolds. (*Id*. at 136). She had a faint discoloration on her forehead, a healing scratch, and a small bruise. (*Id*. at 137). On October 29, 2013, bruising was seen by Ms. Suchland and a visit ensued to Dr. Powell. (*Id*. at 139). There were some knee scratches from when H.A.R. said she fell on the sidewalk. But as to a thigh bruise, she said her father hit her there and it hurt. (*Id*.). Even though she had concerns, Ms. Suchland the grandmother, did not ask Dr. Powell to make a report to CPS. (*Id*. at 141). The doctor did make a CPS report as a mandatory reporter. (*Id*.).

On November 12, 2013, after another visit with her father, H.A.R. came home complaining of an injury. (12/12/14 RP 143).

She said her dad struck her bottom and scratched her because he and his girlfriend, Kristy Pierce, did not want her to touch the cat. (*Id*. at 145). He grabbed her hard on the left upper leg and it hurt enough to make her cry. (*Id*.). H.A.R. also indicated her stepsister, Hannah, hit her in the back. (*Id*.). All the while, Ms. Suchland sat quietly in the room and did not make eye contact with her granddaughter. (*Id*.). Dr. Powell noted a one-inch scratch on H.A.R.'s right buttock, but saw no bruises. (*Id*. at 146). The doctor called CPS again. (*Id*.).

On November 25, 2013, Dr. Powell saw a bruise below H.A.R.'s right knee and a smaller bruise mid-shin. (12/12/14 RP 147). She said her father kicked her in the shin. (*Id*.). Dr. Powell again called CPS. (*Id*. at 148). On a December 31, 2013 visit to the doctor, H.A.R. had a new scratch on her nose. She said her dad did it when she was jumping on the couch. (*Id*. at 149). On a January 14, 2014 visit to Dr. Powell, H.A.R. said her father slapped her on the back of the head and kicked her. (*Id*. at 150-51). The doctor felt H.A.R. was more guarded this time than on previous occasions. (*Id*. at 151). She believed H.A.R. when she said she was kicked and hit by her father. (*Id*. at 153).

Ritzville Police Chief David McCormick was contacted by Ana Schultz of CPS regarding child abuse and controlling behavior allegations against Mr. Reynolds involving H.A.R. (12/12/14 169). Although Ms. Schultz had pictures of H.A.R.'s bruises and scratches, she did not show any to the chief. (*Id*. at 172). If he had seen them, Chief McCormick would have had the matter investigated. (*Id*. at 173).

David Wiyrick, a private investigator who used to be in law enforcement, testified he would have concerns about abuse upon seeing pictures of H.A.R. (12/12/14 RP 181-83, 186). He felt some showed marks caused by face-squeezing. (*Id*. at 187). Mr. Wiyrick would have started a criminal investigation. (*Id*.). He indicated Chief McCormick had not seen H.A.R's pictures or medical records. (*Id*. at 188).

Susan Elg, a licensed mental health professional, has a primary focus on family therapy for children and their parents. (12/2/14 RP 197-99). She had meetings with Mr. Reynolds and H.A.R. on October 28, 2014; November 4, 2014; November 11, 2014; and November 18, 2014. (*Id* at 200). At the first visit with Ms. Elg, Mr. Reynolds and H.A.R. did not greet each other when they arrived. (*Id*. at 202). She did not hug her father, but rather

pushed him away. (*Id*. at 203). Ms. Elg observed there was no eye-contact between them and felt there was no intimate parent-child relationship. (*Id*. at 205). Even after the fourth visit, Ms. Elg believed there was a lack of familiarity and a connection between Mr. Reynolds and H.A.R. (*Id*. at 209-10). She noted a lack of emotional availability and the lack of attachment was more significant. (*Id*. at 210-11).

Ms. Elg did not see any coaching by the adults "in this particular family." (12/2/14 RP 212). As for the father-daughter relationship, Ms. Elg saw the father trying to look good to her and his daughter, but his responses did not reflect that was the nature of their relationship. (*Id*. at 216). Ms. Elg was appointed by the court to do these visits. (*Id*. at 217-18). Although she could not say whether Mr. Reynolds was an unfit parent, she opined it would be an actual detriment to H.A.R. if she were placed in his care. (*Id*. at 228, 235). Ms. Elg further noted there were occasions of emotional abuse by the father in his competitiveness with H.A.R. and playing keep-away, laughing at her, making her frustrated and upset. (*Id*. at 233). The allegations of abuse were cause for concern for Ms. Elg. (*Id*. at 235).

Lisa Martin, an old neighbor of the Suchlands in Odessa, testified her 4-year-old was friends with H.A.R. (12/2/14 RP 242-43). One time her daughter spilled and H.A.R. said her dad hit her when she spilled. (*Id*. at 245). From February or March 2013 to January 2014, Ms. Martin noticed that after H.A.R.'s visits with her father, she was withdrawn and lethargic – unlike her normal self. (*Id*.). The same scenario played out many times after her visits with Mr. Reynolds. (*Id*. at 246). After they stopped, H.A.R. was much better, lit-up, and happy. (*Id*.).

Mr. Suchland said H.A.R. lived with them full time the last 2 ½ to 3 years. (12/2/14 RP 255). Between February 2013 and January 2014, he had concerns about his granddaughter after visit with her father. (*Id*. at 261). She would be quiet and silent for a couple of days sometimes before she snapped out of it. (*Id*.). The bruises and marks on H.A.R. were also of concern to him. (*Id*. at 262-63). He suspected she was being abused by her father. (*Id*. at 268). Mr. Reynolds did not pay child support for his daughter. (*Id*. at 269). Mr. Suchland made no CPS or law enforcement calls. (*Id*. at 270). He saw more signs of abuse after overnights with her father started. (*Id*. at 272).

Odessa Police Chief Haley Coubra testified that Pam Suchland came to the police on June 28, 2013, about her concerns with H.A.R. (12/2/14 RP 272-84). She had a bruise on her forehead. (*Id*. at 284). The chief told Ms. Suchland she needed to document every time she noticed an injury on H.A.R. (*Id*.).

Pam Suchland said Mr. Reynolds did not try to get his daughter between February 2013 and January 2014. (12/2/14 RP 324). Under the residential plan, H.A.R. was with Amanda Suchland and Mr. Reynolds had visits. (*Id*. at 325-26). At various times in 2013, Ms. Suchland saw H.A.R. had bruises after visits with her father. (*Id*. at 330-40). On February 24, 2013, H.A.R. had a bruise and she said she was hit on the head by Hannah, her stepsister. (*Id*. at 334). On October 13, 2013, H.A.R. had another bruise after she was kicked by Hannah. (*Id*. at 340).

On September 5, 2012, the father came to the grandparents' home drunk and Amanda Suchland let him see H.A.R. (12/3/14 RP 451). With a seal puppet H.A.R. got at a yard sale, Mr. Reynolds grabbed her hand and would not let go. (*Id*.). Pam Suchland then realized everything her daughter said about Mr. Reynolds hurting H.A.R. was true. (*Id*.). She noted a bruise on H.A.R.'s upper left knee on May 18, 2013; bruises on her shin on October 28, 2013,

after her father hit her; bruising on October 29, 2013; a scratch inflicted by the father on November 11, 2013; bruises on her right knee on November 24, 2013; bruising on the bridge of H.A.R.'s nose on December 30, 2013; and bruising on her leg on January 12, 2014. (*Id*. at 453-69). These occurrences were after visits with her father. (*Id*.). Ms. Suchland believed Mr. Reynolds was hurting H.A.R. (*Id*. at 473).

Amanda Suchland lived with Mr. Reynolds for three years before having H.A.R. and for two years after. (12/3/14 RP 356). When she left Mr. Reynolds, their daughter was 2 ½ years old. (*Id*.). She saw him abuse H.A.R. by pinching her, ignoring her when she was hungry, and hitting her on the bottom. (*Id*. at 357). This would occur when she was out of the room. (*Id*. at 359). The father would also push H.A.R.'s swing so hard she would fall out. (*Id*. at 358). She brought up her concerns with Mr. Reynolds. (*Id*.). The mother testified he hurts H.A.R. (*Id*. at 374). In an apology letter to Amanda Suchland, Mr. Reynolds acknowledged he was mean, insulting, degrading, and demeaning to her. (*Id*. at 402-04). Between February 2013 and January 2014, the father did not try to get H.A.R. back. (*Id*. at 408-09). Amanda Suchland consented to her parents being the legal guardians of H.A.R. (*Id*. at 411).

Barbara Heathail, a SCAN visitation facilitator, oversaw supervised visits between Mr. Reynolds and H.A.R. on July 19 and 26, 2014. (12/3/14 RP 422-24). She felt the father exhibited appropriate behavior and was a good parent. (*Id*. at 426-30).

Attorney Keely Chapman was the guardian ad litem in another case, a dependency, involving Mr. Reynolds and Amanda Suchland. (12/3/14 RP 537-39). Ms. Chapman could not verify or disprove abuse of H.A.R. by Mr. Reynolds. (*Id*. at 574).

Dr. Teresa McDowell, a psychologist with the Spokane School District, also had a private practice and met H.A.R. the first week of August 2013. (12/3/14 RP 577). Pam Suchland contacted Dr. McDowell. (*Id*. at 584). There was intake with Ms. Suchland over two sessions. (*Id*. at 585). The first session with H.A.R. was on August 7, 2013. (*Id*.). Over subsequent sessions, H.A.R. indicated her father hit her on several occasions and caused bruises. (*Id*. at 589-607). Dr. McDowell made at least three reports to CPS and wrote letters of concern. (*Id*. at 598, 600, 606). She opined it was very likely H.A.R. was being abused by her father. (*Id*. at 608). H.A.R. consistently made disclosures of harm by the father and there were visible marks and bruises. Each disclosure followed visits with the father. (*Id*. at 616-17). Dr. McDowell was

concerned Mr. Reynolds was not engaged in a risk assessment or therapeutic interaction and there was possible substance abuse by him. (*Id*. at 617). In her opinion, Mr. Reynolds was an unfit parent. (*Id*. at 618).

Ms. Elg was recalled to give her views on the SCAN visitation. (12/4/14 RP 649-50). She was concerned about what was not stated in the SCAN reports and the presence of other people besides Mr. Reynolds at the visitation. (*Id*. at 651). Since the parent-child relationship was being dealt with, Ms. Elg wondered why Ms. Pierce was there. (*Id*.). It appeared Ms. Pierce was the one who facilitated the interactions and played a significant role. (*Id*. at 651-52). H.A.R.'s karate-chopping her father was of concern and hitting him with her flip-flops concerned Ms. Elg as this behavior was perhaps a reflection of how the two interacted with each other and it was unusual for children H.A.R.'s age to be physically aggressive with parents in visits. (*Id*. at 652-54). Moreover, the father did not take a role in discouraging her from hitting him. (*Id*. at 655). Ms. Elg noted the father had regular visitation from February to December 2013, but stopped January 14, 2014, and did not resume until July 2014. She was concerned

Mr. Reynolds did not see his daughter for over six months. (*Id*. at 660).

Ms. Pierce testified Mr. Reynolds and H.A.R. had a normal father-daughter relationship. (12/4/14 RP 667). She said the abuse allegations were untrue. (*Id*. at 665). The allegations began to escalate October, November, and December 2013 to January 14, 2014. (*Id*. at 670). She acknowledged Mr. Reynolds did not pay child support in 2014 for H.A.R. (*Id*. at 674-75). The allegations started after the overnight visits started in June 2013. (*Id*. at 676).

Jeremy Reynolds met Amanda Suchland in the summer of 2007 and they separated around September 2012. (12/4/14 RP 679). H.A.R. was born on April 21, 2009. (*Id*.). A parenting plan was in place in Adams County. He had and exercised visitation with his daughter. (*Id*. at 680-81). He was notified of the abuse allegations in June 2013. (*Id*. at 681). Mr. Reynolds testified the grandparents had made the allegations. (*Id*. at 682). CPS told him his daughter was seeing Dr. Powell. (*Id*.). He became aware H.A.R. was going to a therapist, Dr. McDowell, around September or October 2013. (*Id*. at 683). Mr. Reynolds said he did not hit, pinch, kick, or physically harm his daughter. (*Id*. at 689-90). Each

time he returned H.A.R. to the grandparents, she had no bruises. (*Id*. at 729). When asked by the social worker if the grandparents were the primary caretakers for H.A.R., Mr. Reynolds said she was living at the grandparents' home. (*Id*. at 706).

In its oral decision as to certain issues, the court determined Amanda Suchland was an unfit parent. (12/4/14 RP 786, 788). The court also felt Pam Suchland was not credible and Susan Elg had no credibility at all. (*Id*. at 784, 789-90).

On January 12, 2015, the court entered findings and conclusions on the nonparental custody petition. (CP 539). It denied and dismissed the petition for nonparental custody and de facto parentage action. (CP 544). An order of dismissal was filed, denying and dismissing both. (CP 573). This appeal follows.

III. ARGUMENT

A. The court erred by dismissing the Suchlands' de facto parentage action.

A person petitioning for de facto parentage must show that (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4)

the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, personal in nature. *In re Parentage of J.B.R.*, 184 Wn. App. 203, 208, 336 P.3d 648 (2014). Here, the only element at issue is whether the father consented to and fostered the parent-like relationship with the grandparents. (CP 93).

From undisputed facts recited in its decision dismissing de facto parentage action, the court concluded the Suchlands failed to present a prima facie case that the father consented to and fostered the grandparents' parent-like relationship with the child. (CP 200). Although they do not dispute the facts recited by the court, the Suchlands contend its conclusion does not flow from those findings. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Moreover, the court failed to consider that the evidence did show the father consented to and fostered the parent-like relationship.

The mother and father lived together with H.A.R. until early summer 2012, when they separated and the mother immediately moved to her parents' home in Odessa with the child. (CP 196). Although Mr. Reynolds brought a parentage action in Adams County on July 3, 2012, seeking a residential schedule with H.A.R.,

nothing happened until October 22, 2012, when he got an ex parte order giving him custody of the child pending a show cause hearing. (CP 197). About four days later, the mother vacated the order. (*Id*.). A temporary order was entered four months later with the mother getting primary custody of H.A.R. and the father gaining some residential time. (*Id*.). And he did exercise most of the residential time with H.A.R. Overnights began in June 2013. (*Id*.).

But these facts have no bearing on whether Mr. Reynolds consented to and fostered the parent-like relationship with the grandparents. Indeed, they cannot because the court found the father was unaware "that the Mother had abandoned the child and had left [H.A.R.] in the exclusive care of the Grandparents prior to late 2003 [*sic*] or early 2004 [*sic*]." (CP 197). The facts are therefore irrelevant to the issue the court had to decide. *J.B.R.*, 184 Wn. App. at 208.

On the other hand, a relevant undisputed fact is that the grandparents "from the time the Mother moved into their home in 2012 until the present . . . have provided almost all of the physical care and most of the financial support for the child." (CP 196). Mr. Reynolds found out about this parent-like relationship in late 2013 or early 2014. From then to the present is the appropriate time

frame to see whether the father consented to and fostered that relationship with the Suchlands. *See J.B.R.*, 184 Wn. App. at 205-07 (prior attempts to visit not determinative).

The grandparents filed a dependency action in Spokane County as to H.A.R. on January 23, 2014. (CP 197-98). A January 24, 2014 order changed venue to Lincoln County and continued placement of the child with the grandparents pending a shelter care hearing set for February 4, 2014, and suspended the father's visitation with H.A.R. until further order by the court. (CP 198). For various reasons, the shelter care hearing did not come before the court until June 30, 2014. (*Id*.). Even though father had legal counsel, he made no attempt to get the hearing set earlier so he could visit H.A.R., much less get custody of her. By the time of the June hearing, "the Father had not visited or even seen his daughter for over six months." (*Id*.). This is clear evidence that Mr. Reynolds consented to and fostered the parent-like relationship H.A.R. had with her grandparents. Visitation was agreed to in lieu of a shelter care hearing, but the father's entry back into the life of his daughter was precipitated by the dependency and is of no moment. *J.B.R.*, 184 Wn. App. at 207, 212). In these circumstances, the court erred by dismissing the grandparents' de facto parentage action as its

conclusion did not flow from the undisputed findings. *Ridgeview Properties*, 96 Wn. App. at 719.

B. The court erred by dismissing the Suchlands' nonparental custody petition.

The court determined the grandparents failed to prove by a preponderance of the evidence the requirements for granting a nonparental custody action that the father was an unfit parent and/or placement with the father would result in actual detriment to the child. *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013). By employing a preponderance of the evidence standard, however, the court did not use the correct quantum of proof for a third-party custody action. The proper standard is clear and convincing evidence. *In re Custody of A.L.D.*, 191 Wn. App. 474, 501, 363 P.3d 604 (2015). This was an error of law and by itself is an abuse of discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

Challenged finding of fact 2.7 provides:

> In a custody dispute between parents and a non-parent, the non-parent (here, the Petitioners) must establish parental unfitness or that placement with a parent would result in actual detriment of a child. The Court is finding that the Petitioners did not meet their burden of proof by a preponderance of the evidence and therefore the Petition will be

> dismissed. (CP 541).

The portion of finding of fact 2.13 challenged by the Petitioners states:

> The Court finds more likely than not that the Respondent, JEREMY REYNOLDS, has not abused his daughter and the Respondent, JEREMY REYNOLDS, does not pose a danger to his daughter. (CP 542).

When the trial court has weighed the evidence, review is limited to determining whether substantial evidence supports the findings, and if so, whether the findings in turn support the conclusions of law. *Ridgeview Properties*, 96 Wn.2d at 719. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id*. Credibility determinations are solely the province of the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). But the existence of facts cannot be based on guess, speculation, or conjecture. *Belli v.* Shaw, 98 Wn.2d 569, 574, 657 P.2d 315 (1983); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The findings must also be supported by more than a scintilla of evidence. *Smith v. Yamashita*, 12 Wn.2d 580, 582, 123 P.2d 340 (1942).

Here, the court ignored the overwhelming evidence presented by the grandparents that, more likely than not, the father physically abused H.A.R. Dr. Powell, a physician, and Dr. Teresa McDowell, a psychologist, both had concerns about H.A.R.'s safety. Dr. Powell made at least three CPS reports after she saw bruises and scratches on H.A.R., who stated her father hit her, following visits with him. (12/2/14 RP 141, 146, 147). Dr. McDowell saw H.A.R. for counseling from August 2013 to December 2014. (12/3/14 RP 587, 615). There was already an open CPS referral. (*Id*. at 594). H.A.R. told Dr. McDowell her father hit her on several occasions and grabbed her face. (*See, e.g., id*. at 598, 600, 604, 606). The psychologist opined it was highly likely the father was abusing his daughter. (*Id*. at 608). H.A.R. consistently reported abuse by her father and never recanted. (*Id*.). After the visits stopped in January 2014, H.A.R. no longer had marks or bruises and seemed to be doing well. (*Id*. at 611).

Ritzville Police Chief McCormick testified he would have investigated child abuse allegations against the father if Ana Schultz of CPS had shown him pictures of H.A.R.'s bruises. (*Id*. at 169-173). Odessa Police Chief Coubra told Pam Suchland to document every time she noticed an injury on H.A.R. (*Id*. at 282-

84). Ms. Suchland observed bruises and scratches on H.A.R. following visits with her father and was concerned Mr. Reynolds was hurting her. (12/2/14 RP 334, 338, 340; 12/3/14 RP 448, 452, 459-60, 463, 473). The controverting evidence was the father's testimony he had not hurt his daughter. (12/4/14 RP 686, 689-90).

The undisputed physical evidence and unbiased observations of mandatory reporters along with H.A.R's consistent disclosures about Mr. Reynolds's hitting H.A.R. certainly was substantial evidence under a clear and convincing standard, much less by a preponderance of the evidence, of his physically abusing her. *Ridgeview Properties*, *supra*. The evidence to the contrary came from the father's self-serving testimony and whether it should thus be discounted is also a credibility issue. *Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015).

Even though questions of credibility are for the finder of fact, the determination must nonetheless be based on more than a scintilla of evidence. *Smith*, 12 Wn.2d at 582. In light of the unbiased evidence showing the father had indeed physically abused his daughter, the court's determination to the contrary was impermissibly supported by a mere scintilla and was therefore insufficient. *Id*. There can be no dispute that physical abuse of a

child by her father makes the parent unfit. *See In re Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001).

The court erred by determining in the portion of finding of fact 2.7 that the grandparents had failed to prove parental unfitness by a preponderance of the evidence, the wrong standard. (CP 541). The court also erred by making the portion of finding of fact 2.13 that, more likely than not, Mr. Reynolds did not physically abuse H.A.R. (CP 542). Substantial evidence does not support those findings and they cannot stand. *Ridgeview Properties*, *supra*.

Moreover, as for the part of finding of fact 2.7 where the court found placement of the child with the father would not result in actual detriment to the child, it supported this finding in 2.13 by determining Mr. Reynolds did not pose a danger to H.A.R. (CP 542). If it equated "danger" with "actual detriment," the court unduly limited its consideration of "actual detriment" to that one factor in any event. *See*, *e.g.*, *In re Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008); *In re Interest of Mahaney*, 146 Wn.2d 878, 51 P.3d 776 (2002). This is also legal error, constituting an abuse of discretion. *Spreen*, 107 Wn. App. at 349-50.

A trial court's custody disposition will not be disturbed absent a manifest abuse of discretion. *A.L.D.*, 191 Wn. App. at 504. Here, the court used the wrong standard of proof:

> I believe the law is very clear that the burden is on the – it could be very significant in close cases on the nonparents; however, I think the law is also clear it's not clear, cogent, and convincing evidence or beyond a reasonable doubt; it's the preponderance of the evidence standard that applies. (12/4/14 RP 781).

This is a legal mistake constituting an abuse of discretion and is reversible error. *Spreen*, *supra*.

Whether it was harmless cannot be determined as the record shows the court's stated disdain for the opinions of guardians ad litem, experts, and the grandmother as "less than candid and less than credible." (12/4/14 RP 778, 784-85). The court also had no use for court-appointed Ms. Elg's testimony:

> At the end of the day, regardless of what I decide in the case, I'm going to tell you this right now, it's not going to be based on anything that Ms. Elg testified to. I found no credibility with that lady at all. She was lobbied by the grandmother here very effectively. She had her mind made up and she was extremely biased. What did she say about that keep-away with the ball? Controlling and it was karate chops and these things. I found her testimony uncredible [*sic*]. I found it absurd. (*Id*. at 789).

The statements on the record have nothing to do with whether the court found her credible based on her testimony, but rather whether the court's bias prevented it from assessing the evidence impartially. As a whole, remand is required as it cannot be said on this record that the error in the standard of proof used was harmless.

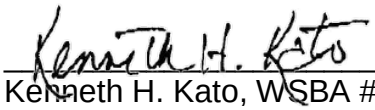
The court manifestly abused its discretion when it made a legal error by employing the incorrect standard of proof. Substantial evidence also did not support those challenged portions of findings of fact 2.7 and 2.13 so the court's conclusions do not flow from them. *Ridgeview Properties*, *supra*. The court's dismissal of the nonparental custody petition should be reversed and the case remanded for further proceedings.

IV. CONCLUSION

Based on the foregoing facts and authorities, the Suchlands respectfully urge this Court to reverse (1) the dismissal of the de facto parentage action and (2) reverse the dismissal of the non-parental custody petition and remand for further proceedings.

DATED this 10th day of January, 2017.

Respectfully submitted,



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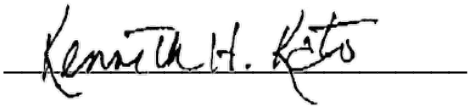
I certify that on January 10, 2017, I served a copy of the Brief of Appellant by USPS on Amanda Suchland, PO Box 171, Odessa, WA 99159, and Jeremy Reynolds, 415 E. Broadway, Ritzville, WA 99169; and by email, as agreed, on Gloria Porter at gloria@gloriafinnporter.com.