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Court of Appeals
Division III
State of Washington

NO. 336522

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION THREE

In the matter of the Custody of

S.S.-L.S.

Minor Children.

ANNA BARR, Respondent

ROBERT SKAGGS, Respondents.

BARBARA BARR, Appellant.

Yakima County Superior Court Case NO. **13-3-01029-4**

APPELLANT'S BRIEF

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I. INTRODUCTION

This case involves Civil Rule 56 (CR 56) and its application to Washington's Non-Parental Custody Act, title 26, Chapter 10.

The issues are twofold. First, whether the trial court erred when it granted father's CR 56 motion for summary judgment, dismissing grandmother's petition, denying her a 2 ½ day hearing (trial), scheduled commence in 4 days. Second, whether RCW 26.10.032 creates a substantive right to a hearing after petitioner satisfies the statutorily mandated burden of proof, known as "adequate cause". RCW 26.10.032(2).

Petitioner contends the trial court erred when it dismissed her nonparental custody action by granting the biological father's CR 56 motion for summary judgment.

In the alternative, Petitioner contends RCW 26.10.032 creates a substantive right to a hearing, as in this case - a 2 ½ day bench trial, and trial court erred as a matter of law when it summarily dismissed Petitioner's case, after the trial court found adequate cause, ordered temporary custody to the nonparent, and *sua sponte*,

appointed a Family Court Investigator to investigate custody issues and file a report with court.

Petitioner, Barbara Barr (hereinafter Ms. Barr) is the maternal grandmother of two minor children: Soren (age 4) and Lilith Skaggs (age 1 ½) when the petition was filed.¹ Respondents Anna Barr and Robert Skaggs (hereinafter Mother, and Mr. Skaggs, respectively), are the biological parents.²

II. ASSIGNMENT OF ERROR

1. The court erred when it granted Mr. Skaggs' motion for summary judgment June 25, 2015, after the trial court previously made a finding of adequate cause, issued a temporary order of custody, and scheduled the case for a 2 ½ day trial for June 29, 2015. (CP 414).
2. The court erred when it ruled: "Petitioner has raised no genuine issue of material fact to support her claim." (CP 414)
3. The court erred when it ordered Ms. Barr to return the children to Mr. Skaggs. (CP 414)

¹ The children shall be referred to as "S.S." and "L.S."

² Mother did not contest the nonparental custody petition and default order was entered January 23, 2014. (CP 229)

4. The court erred when it ruled: “No adequate cause was ever found.” (CP 414)

5. The court erred when it refused to consider evidence contained in the CPS reports, the Family Court Investigator’s report, the police reports, S.S.’s school records, Father’s Washington State Patrol Criminal History Report, and JIS materials, in determining whether to grant or deny Ms. Skaggs’ CR 56 summary judgment motion. (CP 414)

6. Court erred by ruling Mr. Skaggs’ motion filed April 9, 2015 was a dispositive motion that could deny Ms. Barr her full hearing June 29, 2015. (CP 313)

7. The court erred as a matter of law when it deprived Ms. Barr of her substantive right to a trial on the merits, after the court found adequate cause. (CP 414)

III. ISSUES FOR THE COURT

1. Did the Trial Court Err by Granting Mr. Skaggs’ CR 56 Motion for Summary Judgment? (Errors 1-5)

Answer: Yes.

2. Does a Petitioner Have a Substantive Fight to Hearing, if a Petitioner Meets the Threshold Requirements of Standing and “Adequate Cause” under RCW 26.10.032(2)? (Error 6-7)

Answer: Yes

IV. STATEMENT OF THE CASE

A. Procedural Facts.

On October 31, 2013, Ms. Barbara Barr filed a summons and petition for nonparental custody of her two minor grandchildren S.S. and L.S., ages 4 and 1 ½, respectively. In her Petition, Ms. Barr asserted temporary emergency jurisdiction under RCW 26.27.231, alleging that neither parent “was in a position to care for the children”. (CP 9, 11)

With the petition, Ms. Barr applied for an ex parte custody order. (CP 22-26) In a declaration under oath Ms. Barr stated that CPS contacted her. That, having spoken personally with someone at CPS, she was advised that “if no one came forward to seek custody of the children that they would become “wards of the state”. (CP 13) The court granted her motion, issued an ex parte restraining order, and an order to show cause, placing the children in her primary

care, until the matter could be heard in 14 days on November 14, 2013. (CP 18).

On November 14, 2013, Ms. Remy, Ms. Barr's attorney, was in trial on another matter. The matter was continued to December 4, 2013 and the court ordered the children remain with Ms. Barr. (CP 30). On December 4, 2013, Ms. Barr filed a Motion for a Temporary Nonparental Custody Order. (CP 88).

The hearing was not held on December 4, 2013. The court signed an order re-noting the hearing to December 19, 2013.

On December 19, 2013, by agreement of the parties, it was re-noted again and finally heard January 9, 2014. Throughout this time, the children remained with Ms. Barr pursuant to the exparte order of October 31, 2013. (CP 91)

The order continuing hearing dated December 19, 2013 read in part: "Temporary Restraining Order shall remain in place. Custody & visitation shall be status quo." (CP 185).

On December 2, 2013, Mr. Skaggs filed his Response, denying the allegations, claiming an absence of evidence to support

petitioner's claim.³ (CP 53-54). He also filed numerous narrative declarations from friends, family, and neighbors who testified to Mr. Skaggs' parenting ability. (CP 32-52).

The trial court found adequate cause on January 9, 2014. (224-225).

Before the January 9th hearing, Ms. Barr filed the following additional pertinent pleadings and "Sealed Confidential Reports": CPS Summary Reports (CP 173; 486-491); WATCH Criminal History for Robert Skaggs (CP 172, 492-640) ; Declaration of Barbara Barr in s/o Residential Schedule (CP 174); and YPD Incident Report 13YO030099 (CP 186; 641-666). Mr. Skaggs filed the following: Father's Narrative Declaration January 6, 2014 (CP 195-197), and additional sworn declarations from friends; (CP 193-194; 198-220)

On January 9, 2014, the court heard arguments from Ms. Barr's counsel and Mr. Skaggs. (RP, January 9, 2014.) The court made a finding that the father (Mr. Skaggs) was unsuitable, granted Ms. Barr's motion for temporary custody of the minor children and

³ An order of default was taken against mother, Anna Barr, January 23, 2014.

provided Mr. Skaggs supervised visitation once per week. (CP 224-225); (RP, January 9, 2014)

The court, *sua sponte*, appointed the Court Family Investigator to investigate and prepare a report for the court regarding primary placement of the children, alternate residential provisions, and to consider any limiting factors under RCW 26.09.191. (221-223).

The children remained with Ms. Barr while the case proceeded. Ms. Barr scheduled mediation with the Dispute Resolution Center for June 17, 2014. (CP 241) Mr. Skaggs refused to participate. (Id.) On November 14, 2014, the parties were unable to reach an agreement at settlement conference. The court ordered a 2 ½ day trial, noting each party intended to call 4-5 witnesses. (CP 243-244). Trial was scheduled for June 29, 2015. (CP 248)

Mr. Skaggs made no attempt, whatsoever, to visit his children between January 9, 2014 and the time summary judgment was granted on June 25, 2015. (CP 396) ⁴

⁴ This fact, combined with totality of other facts, seriously calls into question father's fitness as a parent.

April 8, 2015, Mr. Skaggs filed a Motion for Dismissal of Nonparental Custody Case. (CP 249-303).

On April 24, 2015, the court ruled Mr. Skaggs' motion was a dispositive motion and denied the motion for failure to give sufficient notice. (CP 313).

In opposition to Ms. Skaggs' motion for summary judgment, Ms. Barr filed additional pleadings including the Court Investigator's Report (CP 232, 667-730), S.S.'s school records and IEP (CP 381, 731-780), Declaration of Ann Spitze (CP 386-387), Declaration of Ms. Barbara Barr (CP 390-393, 394-398), and CPS records and reports (CP 172, 486-491) (hereinafter collectively referred to as "confidential reports")

May 13, 2015, Mr. Skaggs re-filed the same legal memorandum, but renamed it: "Motion for Summary Judgment". (CP 314).

June 3, 2015, over Mr. Skaggs' objection, the court granted Ms. Barr a continuance to June 25, 2015, and ordered Ms. Barr to file a response (to Mr. Skaggs' summary judgment motion) by June 18, 2015. It further ordered: "[I]f adequate cause has not previously

been found” and ordered Ms. Barr to file proof “that tribe has been notified.”⁵ (CP 380)

At no time did Mr. Skaggs move to strike any of Ms. Barr’s pleadings or confidential reports. (CP)

The court heard oral arguments June 25, 2015. Afterwards, it court granted Mr. Skaggs’ summary judgment, dismissing Ms. Barr’s petition with prejudice, and ordered Ms. Barr to return the children no later than 5 p.m. the following day. (CP 414), (RP at 44) While the court prepared the written order, Ms. Remy, counsel for Ms. Barr, attempted to point out that on January 9, 2014, the court did in fact made a finding of adequate cause and issued a temporary custody order. (RP at 44-45). The order, however, did not expressly state: “The court finds adequate cause.” (CP 224-225)

On August 27, 2015, the court denied Ms. Barr’s motion to vacate, CR 60. (RP. 47)

B. Substantive Facts.

Mr. Skaggs and Mother were divorced October 9, 2013. Included in the final divorce papers was a handwritten letter where

⁵ In January 9, 2014 court order, the court ruled the tribe was notified.

Mother wrote that she was “mentally and emotionally incapable of caring” for the children. (CP 700) Mr. Skaggs, as a result, was designated primary parent. It is unclear from the record to what extent Mr. Skaggs parented the children or whether the children were closely bonded with Mr. Skaggs before the divorce. Mother suffered from bipolar disorder and claimed she suffered post-traumatic stress as a result of Ms. Skaggs’ domestic violence. (CP 717-718)

Ms. Barr lived in Bellingham with her estranged husband Vernon Barr. Ms. Barr worked full time as a Certified Public Accountant. (CP 13-16)

Mr. Skaggs is diagnosed with Asperger’s disease. (CP 599) Mr. Skaggs has an extensive criminal background, including 2 assault misdemeanor convictions, 2 felony assault convictions, and 1 conviction for robbery 1. (CP 488) On the date Ms. Barr filed her Petition, Mr. Skaggs was facing assault 4 charges for allegedly biting a young child. (CP 698) Mr. Skaggs did not have a driver’s license. (CP 691)

Mr. Skaggs did not have reliable adequate housing when the police took the children into protective custody on October 29, 2013. (CP 195-197, 589). He relied upon others for a place to live. May 6,

2015, Mr. Skaggs was homeless. On October 30, 2013, he told the social worker he was in the process of moving to North Dakota with the children where he had a job and place to live. (CP 588).

On January 9, 2014, he told the court that he “ran into some rough life trying to get on my feet. (CP 440) In May 2015, Mr. Skaggs remained homeless and unemployed. He told the court investigator that wanted “90” days to get on his feet and obtain housing and then would like the children placed in his care.” (CP 698) Mother wrote in a sworn declaration December 6, 2010, that Mr. Skaggs shoved her, threw her into the wall, pushed her to the ground, and threatened her with knives. (CP716-719)

When the children were taken into custody by law enforcement October 29, 2013, Mr. Skaggs was living with an elderly adult (relative) in a small cluttered, dirty apartment. There was little food in the house. (CP 637)

The adult, with whom Mr. Skaggs and the children resided, allegedly suffered from dementia, claimed S.S. assaulted her and that Mr. Skaggs used his money for drugs, not to buy groceries. (CP 692)

Like his father, S.S. suffered from Asperger's-like symptoms, showing clinical signs according to S.S.'s teachers, as had developing behavioral issues. (Due to his violent tendencies, Ms. Barr had to drive S.S. to school to protect the safety of other children. (CP 395, 795) S. S. attended mental health counsel, occupational therapy, and wore compression therapy clothes to regulate his mood. (CP 386-387, 394-396)

Despite all of this, S.S.'s academic testing revealed S.S. had above-average cognitive abilities, functioning 2 grade levels above his peers. (CP 743)

James Marten, LMHC, S.S.'s counselor opined: "Stability, more than anything else is a most important factor in positive growth for S.S." (CP 795)

V. STANDARD REVIEW

The standard of review of a summary judgment ruling is de novo. The appellate court engages in the same inquiry as the trial court. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). *Keck v. Collins*, 184 Wn. 2d 358, 368-369, 374, 958 P.2d 301 (2015).

Construction of a statute is a question of law that is reviewed de novo. *State v. Amnions*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998).

VI. LEGAL ARGUMENT

A. Did Ms. Barr Establish a Genuine Issue of Material Fact, Precluding Summary Judgment under CR 56?

Answer: Yes

1. Summary Judgment Standards

Summary judgment under CR 56 is appropriate only when there is no genuine issue of material fact. CR 56. The movant has the burden of proving no genuine issue of material facts exists. CR 56. If the moving party satisfies the initial burden of proof, the non-moving party must set forth specific facts that create a genuine issue of material fact that support their claim. CR 56 (c)

A fact, for purposes of opposing a summary judgment motion may be an event, an occurrence, or something that exists in reality. *Grimwood v. University of Puget Sound*, 110 Wn.2d.355, 359,753

P.2d 517 (1988). The facts needed to survive summary judgment are evidentiary in nature and are not be based upon speculation. (Id.)

The appellate court must consider all facts in the record and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Like the trial court, the appellate court does not assess witness credibility nor weight the evidence. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn.App. 616, 624, 128 P.3d 633, *review denied*, 158 Wn.2d.1015 (2006).

2. Chapter 26.10 RCW – Nonparental Custody Act.

Under 26.10.032(2), the requisite standing to file a non-parental custody petition is as follows: the non-parent must allege that either the child is not in the physical custody of one of its parents *or* allege that neither parent is a suitable custodian. RCW 26.10.030.

Upon filing the petition, a non-parent, must file sworn affidavits to prove “adequate cause” exists to proceed on the petition. RCW 26.10.032(2); *In re Marriage of Kinnan*, 131 Wn.App. 738, 129 P.3d 807 (2006). Karl B. Tegland, 21 Washington Practice: Family and Community Property Law, §49.11. Without adequate cause, the case

will be dismissed and the minor children will be returned to the parents.⁶

Before the court will make a finding of adequate cause, the petitioner must satisfy a two-prong requirement by alleging facts that if proven true establish: (i) the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian, and (ii) the parent is unfit or that the child would suffer actual detriment (or actual harm) if placed with an otherwise fit parent. *In re Custody of R.R.B.*, 108 Wn.App. 602, 31 P.3d 1212 (2001); *In Re Marriage of Allen*, 28 Wn.App. 637, 626 P.2d 16 (1981).

3. CR 56 applied to Chapter 26.10. RCW.

In effort to harmonize CR 56 with Chapter 26.10 RCW, Ms. Barr submits the appropriate legal inquiry for the court in the instant case is whether Ms. Barr submitted sufficient factual allegations that if proved, established standing under RCW 26.10.030 and adequate cause under RCW 26.10.030, viewed in conjunction with evidentiary and burden of proof procedures outlined under CR 56 (c).

⁶ Often, a third party, in conjunction with the petition, will obtain an ex parte order placing the child(ren) in his/her custody for 14 days. For good cause, the court may renew the ex parte order in 14-day increments. RCW 26.10

4. In granting Mr. Skaggs summary judgment, the court erred by refusing to consider evidence, statutorily prescribed under Title 26, RCW. *Keck v. Collins*, 184 Wn. 2d 358, 368-369, 374, 958 P.2d 301 (2015).

Under Title 26, our Legislature enacted laws to assist trial courts in making heart-wrenching custody decisions that directly impact the health, safety, and well-being of minor children. The legislature wanted to ensure trial courts were well informed before making these tough decisions. (See Senate Bill Report HB1878, *Senate Committee On Children & Family Services & Corrections*, p. 1)

Family Law Proceedings, for lack of better description, are in a universe unto themselves, varying slightly from other civil proceedings. For example, RCW 26.10.130 specifically allows a trial court to consider a family court investigator's report as evidence. RCW 26.12.070 grants courts authority to order and rely upon investigative reports from probation officers. RCW 26.10.135 goes even further, mandating courts consult the judicial information system, if available, reports from DSHS, criminal records from the

Washington State Patrol criminal data, before any custody order is issued to a nonparent under Chapter 26.10. RCW.

Another example, RCW 26.18.220 grants the administrative office of the courts (“office of the courts”) authority to create standard forms for parties in actions under Chapters 26.09, 26.10, and 26.26. Two mandatory forms commonly used in family court proceedings are “Sealed Confidential Reports” and “Sealed Personal Healthcare Records”.⁷

Ms. Barr proffered various statutorily prescribed evidence (in addition to sworn affidavits), to oppose Mr. Skaggs’ motion: CPS reports, police reports, S.S.’s IEP, the Court Investigator’s report, and Mr. Skaggs’ WATCH report (hereinafter referred to as “confidential reports”).

The court, however, in its rigid application of CR 56, excluded this evidence, crucial to Ms. Barr’s case, ruling it was inadmissible

⁷ Sealed Confidential Reports contain detailed descriptions of material, or information gathered or reviewed; detailed descriptions of statements reviewed or taken; detailed descriptions of tests conducted or reviewed; analysis to support conclusions and recommendations. Sealed Personal Healthcare Records Confidential Reports relate to past, present, or future physical or mental health condition of an individual including past, present, or future payments for health care.

hearsay or that it was witness testimony from persons lacking personal knowledge. (RP at 42)

Under CR 56, courts can consider “other materials”, including pleadings, depositions, admissions, stipulations, and answers to interrogatories. Confidential reports fall within this category of evidence and should not be excluded before ruling on summary judgment in a family law proceeding. CR 56, RCW 26.18.220, and *Keck v. Collins*, 184 Wn. 2d 358, 368-369, 374, 958 P.2d 301 (2015).

Had the court considered Ms. Barr’s confidential reports, routinely filed in family law proceedings, as “pleadings” or other materials in conjunction with sworn affidavits in compliance with CR 56(e), the court would have denied Mr. Skaggs’ CR 56 motion. (See *argument below for legal authority*)

Ms. Barr, submits, unless the trial court is allowed to consider confidential reports, CR 56 cannot be reasonably under Chapter 26.50 RCW, without undermining the legislative intent behind RCW 26.10.032(2) and without creating absurd results. In the instant, the court refused to admit this type of evidence in ruling on summary judgment (not adequate cause). (CP 414)

The primary purpose of the threshold showing of adequate cause is to prevent a costly, useless hearing, and needlessly harassing nonmoving parties. *In re Custody of B.M.H.*, 165 Wn.App. 361, 267 P.3d 499 (2011). *In re Marriage of Adler*, 131 Wn.App. 717, 724, 129 P.3d293 (2006). The statutory provisions under Chapter 26.10 RCW allow courts to consider these kinds of reports (which typically include hearsay and the opinions of others) every day in family law proceedings to resolve disputes, including the existence of adequate cause. RCW 26.10.130, 135 and RCW 26.18.220.

It belies common sense that a court may rely on confidential report evidence every day to decide adequate cause under RCW 26.10.032, but may not consider these same reports in a motion for summary judgment like the court did in this case. RCW 26.10.032(2) seeks to balance an individual's constitutional right to parent one's child against the state's interest as *parens patriae* in protecting the safety and welfare of children. *In re Custody of Smith*, 157 Wn.2d.126 (2006).

It makes more sense to impose greater evidentiary scrutiny early in proceedings to protect individual rights, as the outset, and to

weed out cases as soon as possible, not towards the end of litigation, as in this case, 4 days before trial.

Not only that, but if evidence filed as confidential reports, like in the instant case, were considered when a court determined both hearings (adequate cause *and CR 56 motions*), the court would avoid ping-pong custody decisions, protecting the welfare of the child, which is paramount in all custody cases.

Moreover, allowing this evidence (confidential reports), is consistent with the purpose of summary judgment – “not cut litigants off from their right to trial, if they really have evidence that they will offer at trial.” *Keck v. Collins*, 181 Wn.App. 67, 87, 325 P.3d 306 (2014), quoting *Whitaker v. Coleman*, 115 f.2d. 305, 307 (5th Cir. 1940).

In *Keck, supra*, our Supreme Court reversed a trial court for excluding untimely filed expert affidavits, crucial to the plaintiff, opposing summary judgment in a medical malpractice case. Without this evidence, the trial court had no choice but to dismiss the plaintiff's claim. In *Keck at 369*, our Supreme Court ruled the trial court was wrong to exclude this evidence before ruling on summary judgment. Relying upon *Burnett*, 131 Wn.2d 484, 498, 933 P.2d
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1036 (1997), our Supreme Court rejected a rigid application of CR 56., reasoning, the purpose of civil rules is to obtain justice, “not cut litigants off from the right of trial by jury...” Id. At 369, quoting, *Whitaker v. Coleman*, 115 f.2d. 305, 307 (5th Cir. 1940).

Like in *Keck, supra*. the court erred by granting Mr. Skaggs’ motion. Ms. Barr submitted substantial evidence (which included confidential reports), creating a genuine issue of material fact to prove (a) she had standing under RCW 26.10.030; and (2) she established adequate cause under RCW 26.10.032.

Like in *Keck, supra*, the trial court should have considered all of Ms. Barr’s proffered evidence before ruling on CR 56.

5. Ms. Barr had standing to proceed with her petition.

The basis for Mr. Skaggs’ CR 56 summary judgment motion was two-fold: First, he claimed Ms. Barr did not have standing because she refused to return the children to him after he was released from jail; and second, Mr. Barr did not allege Mr. Skaggs was an unfit parent. (CP 314-327)

In his brief, Mr. Skaggs listed the following pertinent “undisputed facts”:

- i. “Both Barbara Barr and Vernon Barr’s declarations noted that the father was released from custody and could have had the children in his custody but for their refusal to return them. Instead, they withheld the children until they filed his Nonparental Custody Petition. Their refusal to return the children to my care does not allow them to claim that the children were not in my care or that my children were willfully abandoned.” (CP 253).
- ii. “In this case, on the face of the pleadings and the declarations in support of temporary custody, the Petitioner never alleges that I, the father, am unsuitable, and *she* acknowledges that the children were only in her care because even though the father was released, she had not returned the children to the father’s care.” (Id.)
- iii. “I was only briefly separated from the children when I was arrested on October 28, 2013 and was released on October 30, 2013 and was ready and able to take care of my children.” (CP 251).
- iv. “The children have been with the grandmother since approximately October 29, 2013.” (CP 253)

Mr. Skaggs “undisputed facts” are anything but undisputed.

Mr. Skaggs standing argument fails for two reasons: (1) the children were **not** in the physical custody of Mr. Skaggs when Ms. Barr filed her petition and (2) the facts clearly show that Ms. Barr acted in good faith and that Ms. Skaggs was an unfit parent.

Mr. Skaggs claims Ms. Barr refused to return his children. (CP) However, there are no facts whatsoever in any of Mr. Skaggs' declarations from friends, family, or neighbors that he (Mr. Skaggs) asked Ms. Barr to return the children after he was released from jail on October 30, 2015. Mr. Skaggs' argument was a smoke screen.

Nowhere in his own declaration filed January 6, 2014, or in his legal memoranda, does Mr. Skaggs ever state that he asked Ms. Barr to return the children on October 30, 2013 (the day he was released from jail) *or* on October 31, 2013, before Ms. Barr filed her petition, and that she (Ms. Barr) refused to do so. No other witness testified to this claim. (CP 195-97).

The CPS records show Mr. Barr (paternal grandfather) verified with Ms. Andrea V. Cantu, a CPS employee, whether it was still necessary to file the petition, after learning Mr. Skaggs was released from jail. (CP 587). CPS, through its agent Ms. Cantu,

urged Ms. Barr to move forward with the petition, knowing Mr. Skaggs had been released from jail. (Id.)

Even more compelling, there was nothing in the record for Mr. Skaggs or the court, to infer that Ms. Barr, had the authority to return the children to Ms. Skaggs, before she filed the petition. In fact, the opposite was true, only CPS had the authority to release the children to Mr. Skaggs, not Ms. Barr. RCW 26.44.050.

Mr. Skaggs intentionally omitted a material fact in his declaration, thereby misleading the court. Mr. Skaggs did not disclose to the court that he asked CPS to return his children, but they (CPS) refused to return the children to him. Appellant draws this court's attention to the sworn declaration filed by Ms. Bertha Price on December 2, 2013. (CP 39 – 40) Here, Ms. Price tells the court, that on October 30, 2013, at 9:30 a.m., after Mr. Skaggs got out of jail, she drove Mr. Skaggs to CPS to pick up his children on 16th St. on October 30, 2013. (Id) It is undisputed Mr. Skaggs left CPS that day *without his children.*

CPS waited to release the children to Ms. Barr on October 31, 2013, only after Ms. Barr showed CPS she had the nonparental custody order. Mr. Skaggs never disputed the fact the children spent

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the night in foster care on October 30, 2013. So, for Mr. Skaggs to allege Ms. Barr intentionally withheld the children to obtain standing, is simply false. (RP 38-40).

It is clear Ms. Skaggs intentionally misled the court to conclude, incorrectly, that Ms. Barr lacked standing to file her petition. Ms. Skaggs knew this, but intentionally omitted this pertinent fact from his pleadings to detract the court's attention from the undisputed fact that CPS determined Ms. Skaggs was unfit, and that CPS (not Ms. Barr) refused to return the children.

From these facts, it is clear that Mr. Skaggs, not Ms. Barr acted in bad faith.⁸

This leads to Ms. Barr's next point. Ms. Barr will now address Mr. Skaggs "undisputed fact" under (iv): that he was "ready and able to care of my children." (CP 251).

⁸ Ms. Barr should be awarded fees and found in contempt on appeal for filing an affidavit in bad faith. CR 56(g).

6. Ms. Barr also had standing to file her petition because Mr. Skaggs was an unfit parent.

A parent is unfit if unable to provide basic necessities, such as shelter and food. *In re custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013). Under Chapter 26.44, RCW, the legislature declared “in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety”, the state is justified in emergency intervention based upon verified information”. RCW 26.44.010.

Ms. Barr, in her petition alleged that Mr. Skaggs was “not in a position to care for the children” (CP 11) Mr. Skaggs claimed he was ready and able to care for the children. (CP 316). Mr. Skaggs evidence consisted of bald, unsupported assertions. He failed to submit any facts to support his claim.

A parent is unfit if he or she cannot meet a child’s basic needs. *In re Custody of B.M.H.* at 225.

Ms. Barr substantially disputed his claim. Ms. Barr’s evidence showed that CPS removed the children and refused to return them to Mr. Skaggs, because he was unable to provide the basic needs of

the children. (CP 588, 600) When taken into protective custody by police, the two children were living in cramped housing with one bed for two adults and two children. There was little food in the house. (CP 637) One of the adults, in the home, apparently suffering from dementia, claimed S.E. assaulted her, and that Mr. Skaggs used his money to buy drugs. (CP 637)

The undisputed fact that one of Mr. Skaggs' relatives could not take custody of the two children (CP 598), because that person was subject to federal drug probation, combined with Ms. Barr's other evidence, supports CPS's conclusion the children's physical safety and emotional well-being were at risk, whether that adult suffered from dementia or not.

CPS also knew that Mr. Skaggs had a grizzly criminal record, and had a pending charge for domestic violence 4th degree, involving a child-victim. (CP 588)

Based upon these facts, it is clear CPS determined Mr. Skaggs was an unfit parent, as they refused to release the children to Mr. Skaggs *even* after learning Mr. Skaggs was out of jail.

7. Ms. Barr filed sufficient facts to establish adequate cause under RCW 26.10.032(2).

Adequate cause requires the nonparty prove (1) the parent is unfit *or* (2) that placement with an otherwise fit parent will cause actual detriment to the child's growth and development. RCW 26.10.032(2)

Ms. Barr previously argued Mr. Skaggs was unfit. (See section E, above.) Ms. Barr will now address "actual detriment".

8. On Summary judgment, Ms. Barr alleged sufficient material facts for the court to reasonably infer that placement with Mr. Skaggs would result in "actual detriment to S.S.'s and L.S.'s growth and development. *In re Custody of R.R.B.*, 108 Wn.App. 602, 31 P.3d 1212 (2001); *In re Marriage of Allen*, 28 Wn.App. 637, 626 P.2d 16 (1981).

In opposition to summary judgment, Ms. Barr supplemented the record after the January 9, 2014 hearing with the following: (1) Family Court Investigator's Report; (2) S.S.'s school records and IEP; (3) Declaration of Ann Spitze, (4); Declaration of Barbara Barr; and CPS records.

These records, revealed S.S. had severe behavioral problems that required special attention from a very attentive, readily available parent.

A review of his school records, notably his IEP, dated January 22, 2015, showed that S.S. suffered extreme behavioral problems, needed to wear special compression clothes, had significant vision problems, was in need of emotional counseling and occupational therapy. (CP 742)

S.S. was physically aggressive toward others. He hit a girl, spit in another girl's hair and pushed, kicked, and swore at the bus driver. (CP 740) S.S. posed such a safety risk to other children, S.S. was barred from riding the school bus. Ms. Barr had to drive S.S. to school each day, to protect the safety of other children. (CP 394-395). S.S. even had to be physically restrained and removed from the classroom/hallway for being a risk to himself and others. School officials reported S.S. posed a threat to the adults around him. S.S. threatened to harm to staff members, when trying to "redirect [his] behaviors." (CP 742).

S.S. was described as "aggressive, defiant, resistant, fearful, anxious, depressed and disruptive". (CP 740) This evidence is
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consistent with the elderly adult's account to police that S.S. assaulted her, which led to the police removing the children in October 29, 2013. Ms. Ebert, a school official, wrote S.S. continues to demonstrate these currently under rather normal circumstances.”

(CP 734)

Mr. Skaggs had a violent criminal history, albeit, many years ago. Mother claimed she was physically abused by Mr. Skaggs. Both father and son had Asperger's and struggled with activities of daily living.

Ms. Barr testified that S.S. had special needs, that he attended counsel, occupational therapy, required a high protein diet, and regular optometrist visits. S.S. also need compression therapy. He wore “heavy blankets”, “vests”, and “under armor”. (CP 395).

Regarding L.S., S.S.'s younger sister, she was having potty training issues. (CP 395). The evidence suggested that L.S. may be developmentally delayed. L.S. asked the CPS social worker whether she (social worker) was her “mommy”. (CP 592)

This case is arguably similar to *In re Custody of R.R.B.*, 108 Wn.App. 602, 31 P.3d 1212 (2001) and *In re Marriage of Allen*, 28

Wn.App. 637, 626 P.2d 16 (1981). The special needs of S.S. and questionable delay of L.S., raises the question whether Mr. Skaggs had the resources, patience, stable income and housing, to provide the basic needs for both children. S.S.'s teacher expressed concern that S.S. would continually fall behind academically, if the adults in his life did not address his behavioral issues.

On June 25, 2015, there was no evidence as to where and with whom Mr. Skaggs was living, whether he had his own residence, and there was no evidence Mr. Skaggs had any income or insurance to provide food, clothing, and healthcare for the children. There was no proof Mr. Skaggs reinstated his driver's license to lawfully drive S.S. to school so S.S. would not fall behind in school. (CP31-51; 193-220).

Ms. Skaggs conceded he was also unemployed, looking for work, and depended on third parties for housing and did not have a driver's license. (CP 698) He conceded after the divorce (final decree entered October 9, 2013 (CP 329) Even his girlfriend Trina Galen gave the court reason to question father's fitness, who stated Mr. Skaggs' did "not have his cards in place." (CP 201)

evidence linking Mother to meth use. There were no fact in the record to suggest Mr. Skaggs was unemployable, to explain his lack of employment or income.

From these facts it can reasonably be inferred that S.S. would suffer actual detriment if placed with his father.

Lacking the basic necessities, viewing the facts in the light most favorable to Ms. Barr, it could reasonably be concluded that L.L. would suffer actual detriment if placed with Mr. Skaggs.

The court seemingly chose to believe Mr. Skaggs over Ms. Barr, which is prohibited in a CR 56 motion. First, the court accepted as true, Mr. Skaggs allegation that Ms. Barr intentionally withheld the children to gain standing. Second, the court accepted Mr. Skaggs' assertions that he was "ready and able to care for his children, despite Ms. Barr's outcries. Based on the record, the court assessed credibility between Ms. Barr and Mr. Skaggs.

As the moving party, Mr. Skaggs completely failed to satisfy his burden under CR 56, and therefore, failed to even shift the burden to Ms. Barr. Under CR 56, a party cannot rely upon bald, assertions without some facts to back it up. CR 56 (e). Mr. Skaggs had nothing.

10. The court erred by not deferring to the January 9, 2014 order as a finding of adequate cause.

Mr. Skaggs argued Ms. Barr did not obtain a finding of adequate cause as required under RCW 26.10.032(2) to allow Ms. Barr's trial to proceed on June 29, 2015. He claimed Ms. Barr did not use the correct forms (mandatory forms) and that the order dated January 9, 2014, did not contain the legal term "adequate cause". (CP 314-327).⁹

This argument failfor two reasons. First: RCW 26.18.220 prohibits courts from dismissing family law proceedings because a party fails to use mandatory forms or follow the format rules. (Id.)

Second, Washington applies the same canons of construction to court orders as it does statutes. The nature of an order is determined by "examining its substance, object, and purpose, not what a party or the court chooses to call it. *In re Marriage of Olsen*, 183 Wn.App. 546, 556, 333 P.3d 561 (2014), *citing*, *Seal v. Cameron*, 24 Wn.2d, 62, 64, 63 P.1103 (1901).

⁹ Mr. Skaggs also argued Ms. Barr violated the Indian Child Welfare Act (ICWA). (CP 315). Ms. Barr's legal argument detailed herein, also applies to Mr. Skaggs' ICWA claim.

Here, the court should have viewed the January 9, 2014 order from the standpoint of what it actually did: An ordinary reading of the order can be simply put: But for, the January 9 order, the court had no authority to continue custodial placement with Ms. Barr, appoint a Court Investigator, hold a settlement conference, or schedule the matter for 2 ½ day trial. RCW 26.10.032(2).

B. Does a Nonparent Petitioner Under Chapter 26.10 RCW Acquire A Substantive Right to a Hearing If the Petitioner Meets The Threshold Requirement of “Adequate Cause” Under RCW 26.10.032(2)?

Answer: Yes

Alternatively, Ms. Barr argues CR 56 should not have been applied to Ms. Barr’s petition, as she satisfied adequate cause under RCW 26.10.032(2), and therefore had a right to the 2 ½ day trial scheduled to resolve the dispute.

1. Civil Rules govern procedural matters; statutes govern substantive matters. Putman, v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 980, 216 P.3d 347 (2009).

Ms. Barr submits that CR 56 is procedural and RCW 26.10.032(2) is substantive. Accordingly, CR 56 does not authorize the court to summarily deny Ms. Barr her substantive right to a hearing on show cause under RCW 26.10.032(2).

2. RCW 26.10.032(2) is a substantive statute that creates a *right*¹⁰ for a nonparent to get a hearing regarding custody of another individual's child. See *In re Custody of Shields*, 157 Wn2d 126, 136 P.3d. 117 (2006), where our Supreme Court adopted a two-prong substantive analysis.

A parent has a constitutional right to the care and custody of their child. RCW 26.10.032(2) authorizes the state to intrude upon a parent's constitutional right to parent if, and only if, the nonparent satisfies adequate cause. It draws a line in the sand, using a legal conception known as "adequate cause". It is only adequate case that separates a parent from his child, legally speaking.

When the court makes a finding of adequate cause, a nonparent is granted a hearing that he/she would not have otherwise had. In other words, upon a showing of adequate cause, under RCW

¹⁰ A "right" is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right. *Department of Retirement Sys. v. Kralman*, 73 Wn.App. 25, 33, 867 P.2d 643 (1994).

26.10.032(2), the court divests a right belonging to one individual (parent who has constitutional right to raise their children) and bestows it upon another, where it otherwise did not exist.

3. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

RCW 26.10.032(2) reads as follows: The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted."

The plain meaning of RCW 26.10.032(2) means that once a nonparent shows adequate cause under the two prong analysis, the court shall set a date for hearing an order to show cause. The language is mandatory, not permissive. The statute's language is unambiguous.

For these reasons, the trial court erred when it denied Ms. Barr her trial on the merits scheduled June 25, 2015.

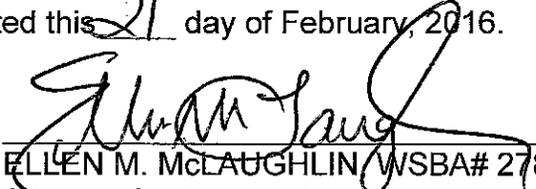
VII. CONCLUSION

Ms. Barr had legal standing and established adequate cause under the Chapter 26.10 RCW. The court erred as a matter of law when it summarily dismissed Ms. Barr's petition by its strict evidentiary application of CR 56, resulting in the exclusion of confidential reports and other materials statutorily recognized as otherwise reliable (subject to cross examination at a full evidentiary hearing) in Family Law Proceedings under Chapter 26.10 RCW.

Alternatively, Ms. Barr submits RCW 26.10.032(2) vests a substantive right to a hearing once a petitioner establishes adequate cause. That right was denied when the court applied CR 56 to summarily dismiss her case.

Ms. Barr requests the court reverse the trial court, order an expedited hearing that requires Mr. Skaggs show cause why the children should not remain in Ms. Barr's care and custody.

Respectfully submitted this 21st day of February, 2016.


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