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Division III
State of Washington
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No. 35055-0-III

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

In re C.S., Child

WAYNE JANKE AND DORIS STRAND
Appellants

and

RONALD SIMON AND TERESA SIMON
Respondents

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

OPENING BRIEF OF APPELLANTS

PATRICIA NOVOTNY
NANCY ZARAGOZA
ZARAGOZA NOVOTNY PLLC
Attorneys for Appellants
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR..... 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT..... 3

 A. THE STANDARD OF REVIEW..... 3

 B. THE STANDARD OF PROOF FOR DE FACTO PARENTAGE
 IS PREPONDERANCE OF THE EVIDENCE..... 4

C. THE REMEDY IS REMAND..... 5

V. CONCLUSION..... 5

TABLE OF AUTHORITIES

Washington Cases

Dix v. ICT Group, Inc., 160 Wn.2d 826, 161 P.3d 1016 (2007)..... 4

Home Builders Ass'n of Kitsap County v. City of Bainbridge Island, 137 Wn. App. 338, 345, 153 P.3d 231 (2007). 3

In re Custody of B.M.H., 179 Wn.2d 224, 315 P.3d 470 (2013) 4

In re Parentage of M.F., 168 Wn.2d 528, 228 P.3d (2010). 4

In re Custody of A.F.J., 179 Wn.2d 179, 183, 314 P.3d 373, 375 (2013) .. 4

State on Behalf of McMichael v. Fox, 132 Wn.2d 346, 352, 937 P.2d 1075, 1078 (1997)..... 4

Cases From Other Jurisdictions

Pitts v. Moore, 90 A.3d 1169 (Maine 2014)..... 5

Statutes

RCW 26.26.120(1)..... 5

RCW 26.26A.440 (2)(c). 5

I. INTRODUCTION

This case involves a child, now nearly adult, who has grown up in two households – his parents, the Simons, and the household of Doris Strand and Wayne Janke, formerly friends of the Simons. Strand and Janke here appeal the trial court’s order denying their petition for de facto parentage. However, C.S. is presently in their custody pursuant to an order granting their petition for nonparental custody, which the Simons have appealed (No. 35974-3-III).

The facts of C.S.’s upbringing are vigorously disputed and the procedural history of this case is long and complex. By contrast, this appeal raises one issue, an error of law. Specifically, when ruling on the petition for de facto parentage, the trial judge applied the incorrect standard of proof to the evidence – requiring clear and convincing evidence rather than proof by a preponderance. For this reason, Strand and Janke do not here engage in an analysis of the facts because it is first necessary for the court to evaluate them according to the correct legal standard. Accordingly, Strand and Janke ask this Court to remand the parentage action to the trial court for analysis under the correct legal standard.

II. ASSIGNMENT OF ERROR

The trial court abused its discretion by applying an incorrect legal standard, specifically, by requiring Strand and Janke to prove their de facto parentage petition by clear and convincing evidence, rather than by a preponderance, as our law provides.

Issues Pertaining to Assignments of Error

1. What is the correct standard of proof for the factors establishing de facto parentage, clear and convincing evidence or preponderance?

2. When a trial court applies the incorrect standard of proof, must the case be remanded for application of the correct standard?

III. STATEMENT OF THE CASE

After years of collaboration, the relationship between the Simons and Janke and Strand became strained, ending up in litigation concerning C.S. (DOB 09/24/2001). CP 635. After a trial on the de facto parent petition of Janke and Strand, the court denied the petition after reviewing whether the petitioners had proved the factors by “clear, cogent, and convincing evidence.” CP 644, 646, 647. The court compared the petitioners’ burden to “beyond a reasonable doubt ... the highest burden possible because you’re taking away somebody’s liberty.” RP 1356. The court viewed the “clear, cogent, and convincing” standard as “pretty

close” to “beyond a reasonable doubt.” RP 1357. See, also, RP 1375, 1378, 1379.

Janke and Strand timely appealed. CP 658-682. The appeal was continued and then stayed pending the unexpectedly long duration of the nonparental custody action, including another lengthy trial, which concluded finally with custody of C.S. being awarded to Doris Strand. (Wayne Janke had withdrawn from the litigation.) RP 1379 (court discussing the upcoming trial on the nonparental custody petition); CP 631-633 (Order on Adequate Cause). See No. 35974-3-III (Notice of Appeal, CP 974-988). The court found a “significant lack of parental ties between the child and the biological parents” and that the Simons caused “actual detriment to [C.S.]” by their conduct. *Id.*

C.S. will turn 17 next week.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

Whether the trial court applied the correct burden of proof and legal standard is a question of law this Court reviews *de novo*. *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 345, 153 P.3d 231 (2007). See, also, *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (“If the trial court's ruling is based on an erroneous view of the law or involves application of an

incorrect legal analysis it necessarily abuses its discretion”). Here, the trial court applied the incorrect standard of proof to the evidence before it.

B. THE STANDARD OF PROOF FOR DE FACTO PARENTAGE IS PREPONDERANCE OF THE EVIDENCE.

In Washington, a de facto parent petitioner must prove four (or five) factors. *In re Parentage of L.B.*, 155 Wn.2d 679, 684 n.2, 122 P.3d 161 (2005) (listing four factors and limiting the doctrine to adults who have “fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life”). In recognizing the de facto parent doctrine and in its subsequent decisions, the Supreme Court has never declared the standard of proof to be clear and convincing evidence. *See, e.g., Parentage of L.B., supra; In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d (2010); *In re Custody of B.M.H.*, 179 Wn.2d 224, 236-239, 315 P.3d 470 (2013); *In re Custody of A.F.J.*, 179 Wn.2d 179, 183, 314 P.3d 373, 375 (2013).

This makes sense because a de facto parentage action is a parentage action, i.e., a dispute between parties in parity. It is not, like nonparental custody, a dispute between a parent and a nonparent, who are positioned differently with respect to their rights. In other parentage actions, proof is by a preponderance. *See State on Behalf of McMichael v. Fox*, 132 Wn.2d 346, 352, 937 P.2d 1075, 1078 (1997) (“proceedings brought under the UPA are civil actions governed by the rules of civil

procedure [citing RCW 26.26.120(1) and the] appropriate burden of proof is a preponderance of the evidence”). Therefore, it is unsurprising the Legislature’s recent codification of the de facto parent doctrine specifies proof of the factors shall be by a preponderance. RCW 26.26A.440 (2)(c).¹

Yet, here, the trial court used a standard found in a Maine case, *Pitts v. Moore*, 90 A.3d 1169 (Maine 2014), as urged by the Simons. CP 644, 646, 647; RP 1325, 1355. This is a minority view among those states with similar equitable parentage doctrines; in fact, Maine’s de facto parent doctrine bears more resemblance to Washington’s nonparental custody action (e.g., Maine requires proof of harm to the child if de facto parent not recognized). In any case, it is not Washington’s view.

C. THE REMEDY IS REMAND.

The court viewed the evidence presented through a lens distorted by a misapprehension of the petitioners’ burden of proof. It required them to prove too much. The only remedy is for remand to the trial court for application of the correct standard.

V. CONCLUSION

For the foregoing reasons, Doris Strand and Wayne Janke respectfully asks this Court to vacate the order denying their de facto

¹ The law, passed in 2018, becomes effective January 1, 2019.

parentage petition and to remand for the court to analyze the evidence under the correct standard.

Respectfully submitted this 20th day of September 2018.

/s Patricia Novotny, WSBA #13604
/s Nancy Zaragoza, WSBA #23281
ZARAGOZA NOVOTNY PLLC
3418 NE 65th Street, Suite A
Seattle, WA 98115
Telephone: 206-525-0711
Fax: 206-525-4001
Email: patricia@novotnyappeals.com
nancy@novotnyappeals.com

ZARAGOZA NOVOTNY PLLC

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