FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 365816

COURT OF APPEALS, Division III
OF THE STATE OF WASHINGTON

In re the Custody of:

Children:
E.E. and M.W.

Appellants:
Brandi Smithers, Cheri and Peter Johnson, and
Jana Johnson

and

Respondents:
Sarina Farhner-Pirkey and Michael D. Pirkey

REPLY BRIEF OF APPELLANTS

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ARGUMENT

The Respondents' Brief fails to address and/or respond to the arguments made by the Appellants on appeal.

A. The factual allegations made by the Appellants have not been refuted by the Respondents.

The Respondents' Brief doesn't refute any of the factual allegations made by the Appellants, primarily because the Respondents didn't file any controverting declarations. The only declaration filed by the Respondents was a 2-page declaration by Sarina Pirkey, who thought that the Appellants' allegations were somehow funny. In her declaration, however, she did not claim that the Appellants' allegations were factually inaccurate. CP 158-159. Moreover, the references by the Respondents throughout their appeal brief to CP 153-157 is misleading. The referenced document, CP 153-157, is the Respondents' Legal Memorandum re: Adequate Cause. This document was written by the Respondents' attorney and doesn't contain any admissible facts. As such, the brief filed by the Respondents fails to comply with RAP 10.3(a)(5), which requires a reference to the record for each factual statement. In short, none of the factual allegations made by the Appellants have been refuted by the Respondents.

B. Dr. Dietzen's findings and conclusions are undisputed.

Dr. Dietzen is a licensed psychologist from Spokane and has worked with adults, children, and families for more than 40 years. She has been qualified as an expert and appointed by courts in Washington to provide opinions, assessments, and evaluations regarding the creation or modification of parenting plans. CP 40. In this case, Dr. Dietzen concluded: "I believe there are enough "red flags" in this case that the Court should intervene. Outside of cases involving children suffering from physical trauma, this is one of the most egregious cases that I have seen of children suffering from emotional trauma." CP 52. Because they did not file any controverting declarations, the Respondents only argument is that Dr. Dietzen's opinion should be disregarded because she never met with the Respondents or the children. This argument by the Respondents is without merit. First, at this stage of the proceedings, the Appellants are not required to prove their case by a preponderance of the evidence. This is a threshold hearing and the moving party is only required to put forward "something more than prima facie allegations which if proven, might permit inferences sufficient to establish grounds for a custody change."

In re Marriage of Mangiola, 46 Wn.App. 574, 577, 732 P.2d 163 (1987) (quoting *In re Marriage of Roorda*, 25 Wn.App. 840, 851, 611 P.2d 794 (1980)). Second, as Justice Sanders pointed out in his dissent in *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.2d 664 (2003), "RCW 26.09.270 does not permit a trial court to weigh facts or consider facts not set forth in the affidavits. It requires the trial court to determine whether "adequate cause for hearing the motion is established by the affidavits." RCW 26.09.270." Third, the Respondents did not offer any controverting declarations suggesting that the counseling notes or the other information relied upon by Dr. Dietzen were not credible or trustworthy. Further, Terri Greer, the counselor hired by the Respondents to see E.E. and M.W. did not file an affidavit or declaration disputing any of Dr. Dietzen's findings or conclusions. Dr. Dietzen's findings and conclusions are undisputed.

C. The Respondents' argument regarding the proper legal standard is disingenuous.

The Respondents first quote the applicable statute, RCW 26.09.260(1), but then they obfuscate the issue, making no attempt to explain how the trial court in this case was justified in excluding facts that were unknown to the court at the time of the prior

custody decree or plan. Under RCW 26.09.260(1), the trial court may modify a prior custody decree or parenting plan based on "facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan." The statute clearly does not give the trial court the authority to exclude facts that it believes "should have been known" to the court at the time of the prior custody decree or plan. To find otherwise would be to disregard the plain meaning of the statute. *See, Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

D. The Respondents' argument that the appellants should be precluded from seeking custody is disconnected and not supported by any authority.

It is undisputed that the Appellants, Cheri and Peter Johnson, were never parties to the Grant County cases involving E.E. and M.W. CP 135-136. Moreover, the Respondents seem to concede that the principle of res judicata does not apply to the facts of this case. Nevertheless, the Respondents still try to make the argument that the Johnsons should be precluded from seeking custody of E.E. and M.W. because they did not intervene in the prior custody cases filed in Grant County. The Respondents'

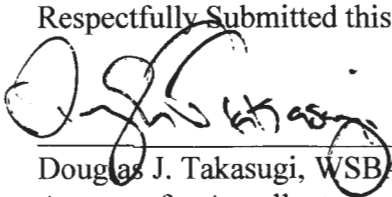
argument makes no sense since the principle of res judicate doesn't apply to the Johnsons. Further, the Respondents' fail to support their argument with any authority.

CONCLUSION

A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. A decision is manifestly unreasonable if the decision is outside the range of acceptable choices based on the facts and applicable legal standard. *In re Custody of Hollis*, 126 Wn.App. 599, 606, 109 P.3d 15 (2005). A decision is based on untenable grounds or is made for untenable reasons if the court applied the wrong legal standard or relied on unsupported facts. *State v. Rohrich,* 149 Wn.3d 647, 654, 71 P.3d 638 (2003).

Here, the trial court abused its discretion in reaching its decision regarding adequate cause by applying the wrong legal standard and by excluding relevant evidence, weighing undisputed evidence, and ignoring unrefuted evidence. Therefore, the trial court's decision regarding adequate cause should be reversed and the case remanded to the trial court for an evidentiary hearing on the petition for modification.

Respectfully Submitted this 5th day of July, 2019.



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 5th day of July, 2019, a copy of the Reply Brief of Appellants was taken to the United States Postal Service in Wenatchee, Washington, and mailed to Justin T. Collier, the Respondents' attorney, at the following address: 18 S. Mission Street, Suite 102, Wenatchee, Washington 98801-2203.

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