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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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LISA A HOMER AND TODD HOMER, Appellee

v

RHONDA M. HOMER, Appellant.

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Appellant's Reply Brief

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- D. Conclusion: The Trial Judge erred in finding Rhonda currently unfit to parent her child because no evidence overcame the presumption. She is a fit parent.

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### A. Appellee's Request for Oral Argument

During the current pandemic under Covid-19 and the need for safety precautions, oral argument could possibly not occur for quite some time. Appellant respectfully requests the court deny this request to ensure court provides their ruling as soon as possible.

In the alternative, if oral argument can be accomplished by Zoom or similar means, we have no issue with the request.

B. Attorney Fees on Appeal

Since an award of attorney fees is authorized in dissolution actions, see RCW 26.09.140, the issue is much more common than in most appellate cases. In awarding fees under RCW 26.09.140, an appellate court will consider, in addition to need and ability to pay, the arguable merit of the issues on appeal. *In re Marriage of Booth*, 114 Wn.2d 772, 791 P.2d 519 (1990); *In re Marriage of King*, 66 Wn. App. 134, 831 P.2d 1094 (1992). In addition to a statutory award (made on the basis of the need of one spouse and the other's ability to pay) attorney fees can be awarded pursuant to RAP 18.9 as an element of damages or an award of terms against the opposing party.

RAP 18.9 gives the appellate court authority to award attorney fees as damages against a party pursuing a frivolous appeal, e.g., *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510 (1987), or to award terms on a motion because of party's failure to comply with the appellate rules. This motion is not frivolous, and Appellant has complied with appellate rules.

Attorney fees may also be awarded even where there is some merit to the appeal if the appellate rules and procedures are repeatedly abused for purposes of harassment and delay. *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831 (1981).

C. Summary of Argument

Todd and Lisa incorrectly place the burden of proving a parent fit on Rhonda. Rhonda is not required to prove she is fit. The parent is presumed fit; she is presumed to be a fit mother that "natural bonds lead parents to act in the best interests of their children." *In re Custody of Shields*, 120 Wn. App. 108, 84 P.3d 905 (2004). Rhonda was demonstrating concerning behavior at the time adequate cause was granted but remedied the issue by the time of trial. Were the court to accept Todd and Lisa's arguments it would forestall any parent from regaining custody of their children after adequate cause is found.

Todd and Lisa focus on the perceived lack of evidence Rhonda provided in demonstrating she was fit. This same level of scrutiny is not placed on Todd and Lisa and the lack of evidence to meet their burden.

Todd and Lisa fail to acknowledge that all testimony provided was stale. They rely on four witnesses: Mr. Greene (Father of Mother's oldest child), Todd Homer

(maternal grandfather), Lisa Homer (maternal step-grandmother), and Stacey Andrews (Family Court Investigator). Again, Mr. Greene's testimony is nearly five years-old and prior to child, M.W., being born. Todd had the most recent interaction with Rhonda in January 2019 when she was requesting visitation and he denied her a visit with her son. Lisa had not had any interaction with Rhonda since summer of 2018. Stacey Andrews' last interaction with Rhonda was nearly three-years-ago.

Rhonda testified about the parenting courses she completed, completing anger management, continuing with counseling, and being engaged in drug treatment. This was not rebutted. Todd and Lisa are unable to overcome the presumption that Mother is fit.

#### D. Argument

No evidence was provided to show Rhonda is unfit at the time of trial. All information relied was information that had significantly aged. Todd and Lisa relied on significantly old Facebook posts and testimony from four individuals: Mr. Greene, Todd, Lisa, and Stacey Andrews (Family Court Investigator). No current evidence was provided. Mr. Greene last saw Rhonda nearly five years prior to trial. RP pg. 23, line 4-8; pg. 34 line 16-21. He had not had any interaction with Rhonda since the child was born. RP pg. 27, line 20-21. His testimony does not show Rhonda is currently unfit.

Stacey Andrews, the Family Court Investigator, had not interacted with Rhonda since spring 2016. RP pg. 98, line 22-25, pg. 99 line 1, pg. 100, line 17-19. Ms. Andrews was unable to provide any information to the court on Rhonda's current fitness as a parent.

1) Lisa testified to not interacting with Rhonda after summer 2018. She hasn't seen Rhonda's home since early 2016 when child lived with his mother. RP pg. 118 line 18-24. Lisa testified at length about old Facebook posts that ranged in dates from 2016 to early 2018. RP pg. 230 line 18-25, pg. 231 line 1-9. Lisa could not provide any information to dispute that Mother is currently fit.

Todd has not seen Rhonda parent since summer 2018. RP pg. 272 line 25, pg. 273 line 1-2. He is aware she has another child in her care, and he is not seeking that child. RP pg. 273 line 3-7. One child is fine in her care but not the other. The last time Todd was around Rhonda was January 2019 to discuss her seeing her son. RP pg. 274 line 7-9. And at that time Rhonda behaved appropriately considering Todd again refused her a

visit. Rhonda left frustrated yet controlled. RP pg. 276 line 19-21. Todd could not provide any information to dispute that Rhonda is currently fit.

2) According to Todd and Lisa, Rhonda's testimony is credible only insofar as it relates negatively toward her. Todd and Lisa advocate that Rhonda is unfit because she testified that while she was on her prescribed medication she reacted negatively and spent a week in a psychiatric facility after threatening suicide almost two years prior to trial. RP pg. 318 line 4-25; 319 line 2-25; pg. 320 line 1-9; pg. 359 line 5-24; pg. 360 line 1-25; pg. 361 line 1-19; pg. 362 line 1-4; pg. 397 line 15-25; pg. 398 1-3. This is not current proof that Rhonda is unfit. This is evidence is over two years ago. Additionally, Rhonda described the journey she has undergone to be a healthy person and parent.

Todd and Lisa fail to acknowledge that Rhonda was seen by a psychiatrist while she was in the hospital and continued care as directed by the medical professional. RP pg. 386 line 25; pg. 387 line 1-15. Rhonda attends counseling weekly. RP pg. 320 line 10-15. Rhonda testified to the several ways in which she has addressed and remedied the problems. Todd and Lisa attack her credibility when she describes the treatment she attended, the anger management, the counseling, and the parenting courses. However, when Rhonda confirms the past struggles, she experienced they laud her testimony as truth. This is inconsistent. Rhonda has struggled in the past and she has resolved the issues and presents as a fit mother capable of taking care of her child.

3) The record is clear; Rhonda has requested visitation numerous times and each time she has been rejected. To say that she has not seen the child since June 2016 is not only inaccurate but untrue.

Rhonda was ordered to have three supervised visits and thereafter visitation was up to Todd and Lisa. Rhonda exercised all the supervised visits. RP pg. 201 line 3-10. The visits took place after June 2016. RP pg. 233 line 25; pg. 234 line 1-4. Rhonda has not been able to have a visit since then despite repeatedly asking for visits because Todd and Lisa deny her requests. RP pg. 201 line 16-18; pg. 234 line 5-12; pg. 277 line 25; pg. 278 line 1-4. Rhonda has not had visits since summer of 2016 with her child only because all visitation has been refused by Todd and Lisa; not because Rhonda did not want to have visitation.

Regarding the statement by Todd and Lisa that Rhonda failed to cure issues from the May 26, 2016 Order. CP at 49. This was never raised as an issue in the trial. This Order adopts the FCI recommendations except for the modified visitation schedule as motioned by Grandparents. CP at 49. The FCI report from April 25, 2016 recommends the following as it pertains to Rhonda: Rhonda shall not use marijuana or other substances during visitation and at least 48 hours prior to visitation. Rhonda shall participate in recommended drug/alcohol treatment. Rhonda shall participate in counseling with a licensed therapist or counselor and supply that therapist with a copy of this report. CP at 49.

Rhonda was refused visitation, so the first recommendation is impossible to demonstrate as she never had an opportunity to show she was complying. Rhonda did comply with the recommendation of alcohol/drug treatment and counseling and she testified to that at trial. RP pg. 320 line 16-25; pg. 321 1-5. Rhonda completed intensive outpatient treatment. RP pg. 444 line 9-11. On top of this, Rhonda completed additional programs: anger management, children cope with divorce, and Stronger Families.

Neither of these issues raised are enough to support the trial court's ruling because neither demonstrate that Rhonda is currently unfit.

4) Several incorrect statements are made in Todd and Lisa's Response brief:

- History of Drug Abuse.
  - While Rhonda was in a relationship with Mr. Greene, she told him about using drugs in the past. RP pg. 23 line 21-25, pg. 24 line 1-25, pg. 25 line 1-14. He never observed her do these drugs that she mentioned, she was describing her past prior to her relationship with him. RP pg. 25 line 19-21. Mr. Greene observed Rhonda use cannabis daily while they were in a relationship. RP pg. 25 line 15-18. This all occurred prior to the child, M.W., being born. Mr. Greene has not seen Rhonda or seen her parent for five years. RP pg. 23, line 4-8; pg. 34 line 16-21; pg. 27, line 20-21. Mr. Greene has not seen Rhonda since before the child, M. W. was born. His testimony does not provide any information on Rhonda's present fitness or whether she is currently using drugs.

- The FCI met with Rhonda nearly three years ago from the date of trial. Transcript pg. 98, line 22-25, pg. 99 line 1, pg. 100, line 17-19. She describes Rhonda discussing past use of drugs and current (as of March 2016) use of marijuana. Rp pg. 54 line 24-25, pg. 55 line 1-5.
- No testimony was elicited from Todd, Lisa, or their witnesses of current drug consumption. Rhonda testified she hasn't used any other drugs besides marijuana in the past year, she stopped smoking marijuana and was in alcohol and drug treatment at the time of trial. RP pg. 342 line 12-22.
- Multiple failed alcohol and drug treatment experiences
  - No testimony at trial indicated any prior treatment program being a failure. This is a false statement not supported in the transcript from trial. Todd and Lisa fail to cite to anything to support this contention.
- Unemployment and Lack of Driver's license
  - An unemployed parent or a parent who does not have a driver's license does not make a parent unfit. Rhonda is a stay at home mother to her two-year-old son, W.R. RP pg. 399 line 21-25. A stay-at-home parent is a full-time role. A parent is unfit when a parent by fault or omission seriously affects "the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like ..." *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981).
- Child Neglect
  - Rhonda testified that Child Protective Services (CPS) investigated the allegation of neglect and maltreatment of child. The investigation concluded the allegation is unfounded. RP pg. 324 line 3-25, pg. 325 line 1.
- Criminal History
  - Rhonda's criminal history was briefly mentioned in trial. The FCI testified to reviewing Rhonda's criminal history and noted her

conviction for driving while license suspended in the third degree. RP pg. 93 line 17-18. This was the entire discussion on Rhonda's history. Furthermore, no criminal history was admitted into evidence.

5) Requiring Rhonda to provide witnesses to confirm Rhonda's testimony or some sort of document to confirm her testimony is shifting the burden from Todd and Lisa to Rhonda. Rhonda has the presumption that she is a fit parent. *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*447).

6) In regard to Todd and Lisa's claim that "Mother's anger outbursts" and that "she felt like she was in a fog" proves she is unfit, this occurred in 2016. RP pg. 318 line 4-25, pg. 319 line 1-25, pg. 320 1-15. Rhonda testified she was having that reaction of being in a fog and angry as a result of being on the medication prescribed by her doctor. She went off that medication in 2017 after speaking with her doctor. She began counseling and has continued to go once a week. This is not an ongoing issue as it was a side effect from prescribed medication and remedied three years prior to trial.

7) Counsel requests the court to distinguish *In re Custody of Z.C.*, 191 Wash. App. 674, 366 P.3d 439 (2015) because the facts in this case do not neatly fit in to the facts in *In re Custody of Z.C.* None of the other court cases are disputed by Grandparents. Court opinions give rules or tests to be applied to current cases and analyzed with the facts of the case.

*In re Z.C. (2015)*, the court held that as the mother sought to modify the final decree, she was presumed to be a fit parent and that the third party bore the burden of proving she is unfit. *Z.C.*, 191 Wash. App. 674, 366 P.3d 439, 441. (2015). In *Z.C.* the aunt and uncle of ten-month old Z.C. intervened out of concerns that the mother was doing drugs and leaving the child with aunt and uncle every weekend and friends during the week. The action began in 2006 and an agreement of the parties was made in 2007. The parenting plan was updated after mediation in 2011. A new court opinion came out and mother filed to modify the parenting plan but was denied and she filed an appeal.

In the analysis the court reaffirms the constitutional right to parent. *Id* at 447. Any interference with a parent's right to care for their child "is subject to strict scrutiny." *Id*. Finally, the court reaffirms *In re Custody of B.M.H.*, 179 Wash.2d 224, 234, 315 P.3d 470 (2013) holding that a parent is fit unless "the parent cannot meet the child's basic needs." *Id*.

In the present situation Todd and Lisa initiated this case with allegations of neglect. After an investigation by CPS, the allegations of neglect and maltreatment are unfounded. RP pg. 324, line 12-23. Additionally, Rhonda is a stay-at-home mother to her two-year-old son, W.R. Grandparents did not feel the need to bring an action to protect that child. RP pg. 278 line 3-7; pg. 345 line 6-13. There is no evidence that Rhonda is not capable of meeting M.W.'s basic needs and caring for child. It is undisputed that Rhonda's youngest child, two-year-old, is a healthy child and thriving in her care. If Rhonda is capable of raising her youngest child without issue, then she is able to raise M.W. in a loving, safe environment, while meeting his needs.

#### E. Conclusion

Rhonda is a fit parent. She never received that presumption at trial. The trial court erred in placing the burden on Rhonda. Rhonda demonstrated at trial she is a fit parent and Todd and Lisa were never able to demonstrate that Rhonda is not fit. Todd and Lisa did not show any current evidence to overcome the presumption of Rhonda being a fit parent.

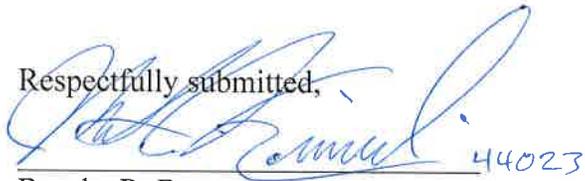
Additionally, Todd and Lisa do not dispute the case law, except for *In re Custody of Z.C.* Even then Todd and Lisa fail to provide compelling argument for why the case should not apply.

The trial court abused its discretion in granting Todd and Lisa's Petition for Third Party Custody because the evidence did not support their contention that Rhonda is unfit at the time of trial. Rhonda's testimony, the testimony of Rhonda's witness, and the evidence provided further supports that Rhonda is a fit parent. Rhonda was not given the presumption of fitness and Todd and Lisa never overcame the presumption.

The judgment of the trial court should be overturned, the petition for third party custody denied, and the child returned to his mother. Petitioner requests fees and costs for having to file this appeal.

May 21, 2020

Respectfully submitted,

A large, stylized handwritten signature in blue ink, appearing to read "Brooke R. Barnes".

for

Brooke R. Barnes  
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Marlene Kaminski

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