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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LISA A HOMER AND TODD HOMER, Respondents

v

RHONDA M. HOMER, Appellant

Appellant's Brief

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A. Assignments of error

Assignments of Error

No. 1: Insufficient evidence was adduced at trial to support the Court's Findings of Fact under Sections 8, 9, and 10.

No. 2: The Findings of Fact do not support the Trial Court's Conclusion under section 16.21, 16.23, 16.26, 16.27, 16.28, 16.30, 16.31.

No. 3: The trial court abused its discretion in this case in awarding custody to L. & T. Homer, because the court applied the incorrect standard. There was insufficient evidence presented at trial to support certain of the court's Conclusions of Law under sections 1 and 2.

Issues Pertaining to Assignments of Error

No. 1: Whether substantial evidence supports the trial court's Findings of Fact? (Assignment of Error (1)).

No. 2: Whether the Findings of Fact support the trial court's Conclusions of Law? (Assignment of Error (2)).

No. 3: Whether the trial court abused its discretion in this case? (Assignments of Error (3)).

B. Statement of the Case

The above-entitled action came before the trial court as the result of nonparental custody action under RCW 26.10 concerning the child, M.W. Clerk's Papers (CP) at 1-7. The action was brought by the child's maternal grandfather and step-grandmother, Todd and Lisa Homer (Grandparents). CP at 1. The biological parents of the child are Dwayne Winn and Rhonda Homer, (Mother). CP at 1.

M.W lived with his mother at the time the action began. On January 6, 2016, grandparents filed a petition for non-parental custody alleging "Mother continues to neglect the child and the health of the child, Mother is involved in drugs and interacts with drug dealers, Father is a registered sex offender, Father is released from custody and has been in trouble with the law on several occasions." CP at 6 and 7. They also filed a motion for temporary non-custody order. A hearing was set to determine the matter and to address adequate cause. In response to the allegations,

Mother retained an attorney. CP at 13. Mother responded by filing under seal statement by her counselor and a mental health evaluation. CP at 15. Mother's response to Petition denied all allegations. She stated she was not wealthy by any stretch of the imagination but was able to provide a safe and stable home for M.W and she admitted to occasional marijuana use while the child was not present. All other drug use was denied. Mother further denied allowing child to stay more than one night away from her and cited to concerns that the Grandparents raising these concerns had had a domestic violence incident previously. CP at 17, 18 and 20. Several more declarations were filed on behalf of Grandparents. CP at 24-29. The court found adequate cause and granted temporary custody to Grandparents on January 28, 2016. CP at 30.

The day before adequate cause hearing was held, Mother's sister filed for non-parental custody and Homer joined. The court set a hearing for both matters to be heard on February 3, 2016. CP at 30. Soon thereafter, Grandparents filed declarations stating that Mother's sister was also incapable of caring for child and was merely protecting Mother instead of looking out for the best interest of the child. CP 33 and 34. At this time, Ruby Waters, Mother's mother, maternal grandmother to child, wrote a declaration stating that Grandparents had alternative motives and were not trying to look out for the best interest of the child or helping

Mother. CP at 35. Two days before the hearing on both cases, Mother wrote a “Memorandum of Law” in support of the child being placed with the maternal aunt citing to his strong relationship with her and his cousins. CP at 36.

On February 4, 2016, the court placed the child with his maternal aunt; gave Mother and Grandparents visitation; and appointed the Family Court Investigator (FCI). CP at 37.

On April 25, 2019, the FCI filed her report and recommended the child be placed with Grandparents. CP at 42. On May 11, 2019, Grandparents filed a motion to grant Mother visitation with child. The visitation offered included the first three visits being supervised in the first month and additional visitation to be held at Grandparent’s sole discretion. CP at 44. On May 26, 2018 the court adopted the FCI recommendations and Grandparent’s requested visitation schedule. CP at 49.

While representing herself, Mother filed proof that she completed Children Cope with Divorce Certificate on March 21, 2016, a letter from Department of Social and Health Services dated February 1, 2016 stating that negligent treatment of child is unfounded, as well as text messages between Mother and Grandparents where she requests visitation with child and is denied. CP at 63.

On March 25, 2016, a two-day trial was held. CP at 72.

Grandparents had four witnesses testify: Jeremy Greene, Stacy Andrews the Family Court Investigator, Lisa Homer (Grandmother), and Todd Homer (Grandfather). Homer had two witnesses: Rhonda Homer (Mother), Amanda Stone (Mother's Sister). During the trial, no witnesses were brought to establish that the mother was currently unfit. Mother and Amanda Stone stated that she was currently fit. Grandparents continued through the trial to point to past behavior as the justification for the order. Rhonda Homer testified to her current situation, which was uncontested. The court made an oral ruling placing the child with the Grandparents and directing counsel for the Grandparents to prepare final orders. Final Orders were presented and entered May 31, 2019. CP at 78-81. At the time Final Orders were presented, Mother also presented a psychiatric evaluation and a certificate of completion for Intensive Outpatient Treatment from Triumph Treatment Services. Transcript pg. 445, line 23-25; pg. 446, line 1-11.

C. Argument

Mother is a fit parent and no actual detriment would come to child were he to be returned to his mother.

RCW 26.10.030(1) permits a non-parent to file a petition "seeking custody of the child in the county where the child is permanently resident

or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” Grandparents filed a petition in the county where M.W. resides and alleged that Mother is unfit to parent her child, M.W. The best interest of a child is properly applied between parents. *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981). However, “a more stringent balancing test is required to justify awarding custody to a nonparent.” *Allen* at 646. Accordingly, “great deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity.” *Id* at 647. Citing *In re Becker*, 87 Wash. 2d 470, 477, 553 P.2d 1339 (1976); *In re Luscier*, 84 Wash. 2d 135, 524 P.2d 906 (1974). Parental rights are not absolute and there are two ways in which a parent’s deference is outweighed by the needs of the child. *Id*. 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 ...” *Id*. Additionally, “the Legislature has defined parental unfitness, to some degree, in statutes relating to dependency, RCW 13.34.030, and abuse and neglect, RCW 26.44.030.” *Id* at 648. Summarily a parent is only unfit if the parent is unable to “meet the child’s basic needs.” *In re Custody of Z.C.*, 191 Wash.App. 674, 366 P.3d 439 (2015). The second

“circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.” *In re Marriage of Allen* at 648 (1981).

The law's concept of the family rests in part on a presumption that "natural bonds of affection lead parents to act in the best interests of their children," *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), and only under "'extraordinary circumstances'" does there exist a compelling state interest that justifies interference with the integrity of the family and with parental rights. *Shields*, 157 Wash.2d at 145, 136 P.3d 117 (quoting *In re Marriage of Allen*, 28 Wash. App. 637, 649, 626 P.2d 16 (1981)). To limit disruptions in family life, chapter 26.10 RCW places a high threshold burden on a petitioner seeking nonparental custody to allege specific facts that, if proved true, would meet this standard. *E.A.T.W.*, 168 Wash.2d at 338-39, 227 P.3d 1284.

The Supreme Court has noted cases when this heightened threshold of detriment to the child has been met: "... for example, when a deaf child needed a caregiver who could effectively communicate with the child and the father was unable to do so, see *Allen*, 28 Wash.App. at 640-41, 626 P.2d 16, when a suicidal child required extensive therapy and stability at a level the parents could not provide, see *In re Custody of*

R.R.B., 108 Wash.App. 602, 31 P.3d 1212 (2001), and when a child who had been physically and sexually abused required extensive therapy and stability at a level the parent could not provide, see *In re Custody of Stell*, 56 Wash. App. 356, 783 P.2d 615 (1989).” *In re Custody of BMH*, 315 P. 3d 470 - Wash: Supreme Court 2013. This court has consistently held that the interests of parents yield to state interests only where "parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumey*, 94 Wash.2d 757, 762, 621 P.2d 108 (1980) (citing *Parham*, 442 U.S. at 603, 99 S.Ct. 2493). *Id.*

The State has a responsibility to intervene and protect a child when a parents' decisions seriously endanger the mental or physical health of a child. *Matter of Custody of S.M.*, 9 Wash.App.2d 325, 336, 444 P.3d 637 (2019). However, the parent's fundamental right to parent is not diminished. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *In re Welfare of B.P.*, 188 Wash.App. 113, 165, 353 P.3d 224 (2015) (Fearing, J., dissenting) (citing **644 *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (plurality opinion)), reversed by *In re Parental Rights to B.P.*, 186 Wash.2d 292, 376 P.3d 350 (2016). The same is true where a parent has lost temporary custody to a family

member.” *S.M.* at 336 (2019).

Due to the persistent fundamental right of the natural parent, and the nature of a non-parental custody action to envision a return of custody to the natural parent, it stands to reason that there must be a showing that a parent is presently unfit rather than simply allegations of past unfitness. A parent may be unfit at the time adequate cause is granted and remedy the unfitness to a level of fitness at time of trial or during a modification. To hold otherwise, would prevent a parent from ever being able to modify a final parenting order which the court has found to violate due process. “[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Post v. City of Tacoma*, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009). Since RCW 26.10.190 clearly contemplates that a parent may seek to modify a *338 nonparental custody order, due process requires that he or she be given a meaningful opportunity to do so. The factual basis for a nonparental custody order is a finding that the parent is **645 unfit or a detriment to the child. A parent has no meaningful opportunity to regain custody of his or her child if that parent is precluded from showing there is no longer a factual basis for the order. *Id* at 338, 339. Furthermore, the Court “held the requirement of RCW 26.10.190 unconstitutional in that the modification be in the best interests of the child. The law presumes that a fit parent will act in the best

interest of his or her child. *Troxel*, 530 U.S. at 68-69, 120 S.Ct. 2054. Thus, just as *Shields* held that it is unconstitutional for a court to infringe on the parent-child relationship by making an initial custody determination based on a best interests analysis, it is similarly unconstitutional for a court to deny a modification on that basis.” *Id* at 338.

During trial Grandparents failed to show Mother is currently unfit. Grandparents relied on Mother’s Facebook posts dated from 2016 to sometime in 2017, Grandparent’s observation of Mother’s home from 2016, the child was constipated as an infant in 2016 while under Mother’s care, none of Grandparent’s witnesses or themselves had any observations of Mother’s ability to parent in over a year, and Mother attempted suicide in 2017. Grandparents did not have any current information or anything to refute Mother’s testimony or Amanda Stone’s (Mother’s sister) testimony.

Four individuals, including Grandparent’s testified, to support Grandparent’s endeavor of custody of M. W. Mr. Greene, the father of Mother’s oldest child, testified that he had no current knowledge of Mother’s ability to parent. He testified the last time he saw Mother was around four and a half years ago. Transcript pg. 23, line 4-8; pg. 34 line 16-21. Mr. Greene admitted that all information he had is regarding events that happened prior to M.W being born. Transcript pg. 27, line 20-21. Additionally, Mr. Greene didn’t have concerns about Mother’s mental

health, drugs, or neglect of her oldest daughter when he sought custody. Instead his he sought custody when he realized Mother was in a relationship with an individual who has criminal history and a requirement to register. Transcript pg. 33, line 4-12. Ms. Stacey Andrews the Family Court Investigator (FCI) testified she did not have current information on Mother. Transcript pg. 98, line 22-25, pg. 99 line 1, pg. 100, line 17-19. All of her testimony related to events prior to May 2016 when it was completed.

Grandmother at trial focused on her ability to provide a better home and life for M.W. than Mother can provide. Grandmother testified that M.W. has had the opportunity to travel while in her care. Transcript pg. 43 line 3-20; pg. 129, line 14-25; pg. 130 line 1-10. She testified that Mother had a dirty home around May 2016. Transcript pg. 118, line 18-25. She had not seen Mother's home since that time. Grandmother focused on Mother's Facebook posts from 2016 to 2017 where took several screenshots. Transcript pg. 133. None of the Facebook posts are current or occurred in the past twelve months. Transcript pg. 230. The only neglect Grandmother could describe is one time in 2015 the child had a very wet diaper. Transcript pg. 142, line 11-19. Grandmother doesn't believe Mother is unfit to parent her children. Grandmother acknowledges that Mother has a child in her care and doesn't have concerns. Transcript pg. 236, line 9-11, line 15-25. Grandmother doesn't want Mother to have a relationship with M.W.

She states Mother shouldn't have any contact with child until "she (Grandmother) sees a change in her (Mother)." Transcript pg. 9-15. Any discussion of visitation is never going to occur so long as Grandparents are in control because they don't intend to allow Mother to have visits. Mother was requesting visitation and all visits have been denied. Transcript pg. 234, line 4-12.

The Court stated they found Grandfather particularly credible in his testimony. Grandfather focused on the best interest of the child, despite this not being the standard in a nonparental custody action. Transcript pg. 265, line 6-12. Grandfather and other witnesses for the petitioners did not have current knowledge of Mother's ability to parent. The last time Grandfather was around Mother, and her youngest child was in July 2018. Transcript pg. 272, line 25; pg. 273, line 1. He is also aware that Mother has her youngest child in her care, and he has not sought to remove that child from her care. Transcript pg. 273, line 3-10. Even if Mother completed all conditions the Court has set forth, Grandfather still does not intend to return child to Mother without having control of the child. Transcript pg. 280, line 6-18. Grandfather admitted Mother requested visitation with child several times and was denied. Transcript pg. 274-278. The most recent request was January 2019. Mother agreed to meet with Grandfather to discuss visitation. Transcript pg. 259, line 9-20. Ultimately Grandfather denied Mother a visit

and Mother left the meeting upset but controlled. Transcript pg. 288, line 10-13. The only concerns Grandfather has towards Mother's ability to parent is her anger, particularly towards Grandparents, her usage of marijuana while parenting, and vaguely concerns over her general mental health. However, Grandfather admits not spending enough time with Mother to assess her mental health. Transcript pg. 261, line 3-25; pg. 262, line 1-5.

Grandparents had no current information on Mother's ability to meet the child's basic needs. All information relied upon dated from 2015 to July 2018. With the bulk of information being relied upon was from Facebook posts that Grandmother was screenshotting were from 2015 until early 2017. Transcript pg. 344, line 4-14. Nor could Grandparents point to any actual detriment to child if he were to be returned to his mother.

A mental health diagnosis alone does not indicate a parent is unfit. Mother acknowledged during her testimony that she has been diagnosed with anxiety, PTSD, and depression. Transcript pg. 318, line 4-6. Her treatment plan consists of medication and therapy. Transcript 318, line 12-16. Mother complied with the medical providers treatment plan. However, the medication had an adverse effect and Mother felt like she was in a fog. She would have angry outbursts and felt scared. Transcript pg. 319, line 2-19. In early 2017, Mother threatened to commit suicide and was

hospitalized. At no time since this time has, she thought, threatened, or attempted to commit suicide. Transcript pg. 359, line 5-19; pg. 360, line 16-25; pg. 361, line 1-25; pg. 362 line 1-4. Mother also engaged in counseling and continues to go weekly. Transcript pg. 319, line 20-25; Transcript pg. 320, line 1-15. As a result of the reaction to the medication, and at the time Mother became pregnant with her youngest child in 2017, she consulted with her medical providers and it was recommended she cease taking the prescribed medication in but remain in counseling. Transcript pg. 319, line 24-25; pg. 320, line 1-13.

Mother acknowledged the concerning Facebook posts that Grandmother discussed at length. Transcript pg. 344, 1-19. Mother discussed making considerable changes in her life since that time. She matured considerably and has improved with the assistance of her parenting classes and anger management. Transcript pg. 344, line 24-25; pg. 345, line 1-5. During Amanda Stone's testimony, she concurred that she too has seen significant changes in Mother during the past couple of years. Transcript pg. 294, line 13-21; pg. 295, line 25; pg. 296, line 1-8.

Mother has also been proactive in completing or engaging in additional courses to improve not only herself but also improve as a parent. Mother completed the course Children Coping with Divorce in March 2016 and found it to be beneficial. Transcript pg. 322, line 2-14.

Mother also completed Stronger Families Parenting classes July 2018 and found those to advantageous in her pursuit to be a better parent. Transcript pg. 323, line 17-25; pg. 324, line 1-2. Additionally, Mother completed an Anger Management course in March 2019 and learned positive ways to cope with her emotions. Transcript pg. 322, line 18-25; pg. 323, line 1-4. At the time of trial Mother was engaged in alcohol and drug treatment through Triumph Treatment services. She attended treatment four days a week. Transcript pg. 320, line 16-20; pg. 343, line 23-25; pg. 344, line 1-4. Additionally, she attended AA meetings. Transcript pg. 320, line 22.

Since Mother was accused of neglectful treatment and maltreatment of M.W., Child Protective Services (CPS) became involved and investigated the allegations against Mother. Transcript pg. 324, line 3-5. Mother fully cooperated with the CPS investigation. Transcript pg. 324, line 6-11. After a thorough investigation, CPS concluded that the report was unfounded. Transcript pg. 324, line 12-23.

During the four months M.W. was in Mother's care, she, as well as Grandparents, had concerns with the child's constipation. It is unrefuted that Mother sought medical care for the child. Transcript pg. 103, line 13-15; pg. 104, line 1-4; pg. 325, line 13-24; pg. 325, line 25; pg. 326, line 1. Mother and child had a loving and strong bond that was willfully severed by Grandparents action. Transcript pg. 326, line 7-18. Mother testified

extensively of the numerous times she requested some type of visitation with her child. Transcript pg. 326, line 19-24; pg. 325-333; 334, line 1-5. Mother testified about her day to day as a stay-at-home-mom that is filled with caring for her son. Transcript pg. 343, line 5-13; pg. 399, line 21-25. Mother described her stable, loving home and large yard. Transcript pg. 345, line 14-25; pg. 346, line 1-4. Amanda Stone testified that Mother's home is clean and safe. Transcript pg. 296, line 17-25; pg. 297 line 1-3. Mother described attending regular medical visits for her two-year-old son, W.R. Transcript pg. 346, line 5-11. During Amanda Stone's testimony she stated that Mother is a good parent and she has no concerns of her ability to parent. Transcript pg. 294, line 6-12; pg 297, line 8-15. This is a Mother who loves her children and wants to be a positive part of her child's life. Transcript pg. 346, line 14-17.

Grandparents have the "high burden to show extraordinary circumstances that justify interference with a parent's constitutional rights." *In re Custody of B.M.H.*, 179 Wash.2d 224, 234, 315 P.3d 470 (2013). They have not met their burden. The initial allegations do not show that Mother is unable to meet the child's basic needs. When a parent is able to meet the child's basic needs the parent is a fit parent. *In re Custody of Z.C.*, 191 Wash.App. 674, 366 P.3d 439 (2015). The standard is not who is a better parent. *E.A.T.W.*, 168 Wn.2d at 346-47. Grandparent's

“capacity to provide a superior home environment to that which a parent can offer is not enough to establish actual detriment.” *C.C.M.*, 149 Wn. App. at 204. Whether Mother prohibits a relationship between child and Grandparents is not considered actual detriment to the child.” *In re Custody of J.E.*, 189 Wn. App. 175, 356 P.3d 233, 238, 239 (2015).

CPS investigated Grandparent’s concerns and concluded the investigation by finding that neglectful treatment and maltreatment are unfounded. Mother testified she is currently in counseling, she is in alcohol and drug treatment, she has completed multiple parenting courses: Children Cope with Divorce and Stronger Families, she completed Anger Management. The Grandparent’s know she has another child in her care, whom she spends all day with as a stay-at-home mother, and yet they are not concerned enough to seek a third-party action to remove that child. If the one child in her care is able to remain in her care, then M.W. is also able to be with his Mother and have his physical and mental needs met.

While it was uncontested by the mother that at the time this matter was filed, there was a genuine question about her fitness as a parent, this fails to address the current reality that she has addressed any concerns and is presently a fit parent. The Court erred when it weighed that the grandparents, particularly the grandfather, would be a better choice for the child over the mother as it applied a best interest of the child standard. In

reality the court should have weighed whether the mother was *currently* unfit to meet the needs of the child, a heightened standard which the caselaw has only allowed in situations such as “nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents’ and ‘where a child is deprived of his or her right to conditions of minimal nurture, health, and safety.’ (quoting RCW 26.44.010.)” *In re Custody of Z.C.*,191 Wash.App. 674, 692, 366 P.3d439 (2015).

E. Conclusion

Grandparent’s Petition for Third Party Custody should be denied, and the child returned to his mother because the allegations have not shown to be rise to the level to prove Mother is presently unfit. Any concerns alleged had been remedied by Mother by the time of trial. We ask that this matter be remanded to the trial court with instructions to deny the petition and dismiss the matter.

DATED this ^{Feb 25} ~~January 31~~, 2020.

Respectfully submitted,


for Brooke R. Barnes WSBA 47291
not corrected margins.

YAKIMA LAW, PLLC

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