

No. 92897-5

Court of Appeals No. 72938-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re the Custody of:

LMS,

FAUALUGA SIUFANUA and
BILLIE SIUFANUA, Appellants,

and

TONY SAMOA FUGA and
LISA LYNNETT SIUFANUA, Respondents.

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State of Washington

REPLY BRIEF OF APPELLANT

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Introduction

This is a case in which a child has been raised by the same people since she was a baby. Mr. Fuga seeks to remove this child from the only stable home she has ever known where she has been raised by the only parents she has ever known - her grandparents.

Mr. Fuga contends via self-serving declarations that he is a fit and loving parent despite his eight year absence and history of domestic violence. By denying adequate cause and dismissing the petition, there was no opportunity to look further into Mr. Fuga's history - a history that speaks very clearly for itself. Mr. Fuga argues that history does not matter, but if a history of abandonment or domestic violence had no bearing on a parent's current fitness, then our Legislature would not have thought to create restrictions and limitations on visitation per RCW 26.10.160 and RCW 26.09.191 for parents who have such histories. The grandparents provided solid, un rebutted proof that Mr. Fuga had an extensive history of domestic violence and abandonment, and that he was not being honest about those histories with the court at the present time - a fact that does not indicate recovery from a negative history, but rather, ongoing attempts at manipulation regardless of the truth and the child's best interests. In light of these facts as well as the fact that both parties had agreed to the appointment of a guardian ad litem and that the child

was facing an upheaval of her entire life, the evidence presented by the grandparents should have been sufficient to pass the adequate cause threshold so that a full investigation could be conducted and the child would not be negatively impacted by such a massive life change.

Supplemental Statement of the Case

The Statement of the Case in the Siufanua's opening brief is thorough and is to be incorporated herein by reference. Mr. Fuga contends that he is a stable and nurturing parent. However, his only support for this position are Mr. Fuga's own self-serving declarations (see CP 197-323; 247-54; 255-62) as well as a declaration submitted by his wife. CP 233-37. Mr. Fuga also contends that he continued to support LMS, despite a lack of any other evidence in the record. Further, Mr. Fuga diminishes his past domestic violence charge as being from nine years prior despite the fact Ms. Siufuanua was pregnant with LMS at the time. Mr. Fuga also claims that he was somewhat involved in LMS's life despite his own 2011 Facebook post which clearly states otherwise. Mr. Fuga provides no explanation for these inconsistencies.

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Argument

A. It was error for the court to deny adequate cause when Mr. Fuga abandoned LMS and engaged in acts of domestic violence.

Parents have a constitutionally protected right to parent their children, but those rights are outweighed when they conflict with a child's welfare. *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981). "Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference, they are not absolute and must yield to fundamental rights of the child or important interests of the State." *Id.* (quoting *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260). "When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346 n.4, 227 P.3d 1284 (2010). "If the parents' actions threaten the child's welfare, the state's interest takes precedence." *In re Marriage of Allen*, 28 Wn. App. at 646. "Just as parents' constitutional rights are long established, it is also true that children have rights regarding their well-being that are important factors properly guiding courts' custody decisions. Recognition of these rights is not offensive to the constitution." *In re Custody of E.A.T.W.*, 168 Wn.2d at 346. "[W]here 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*, 28 Wn. App. at 647 (citations omitted).

Adequate cause for hearing the petition means "a showing 'sufficient to support a finding on each fact that the movant must prove in order to modify; otherwise, a movant could harass a nonmovant by obtaining a **useless hearing**.'" *In re Custody of E.A.T.W.*, 168 Wn.2d at 347 (citing *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004)) (emphasis added). In fact, the primary purpose of the adequate cause requirement is to prevent a useless hearing. *Id.* at 348. To establish adequate cause, the petitioner must allege not only that the child is not in either parent's custody or that neither parent is a suitable custodian, but also the basis for the nonparental custody order itself. *Id.* at 342. However, as part of setting forth facts in support of the nonparental custody order, the nonparent must "set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent." *Id.* at 339. Actual detriment has been defined as "something greater than the comparative and balancing analyses of the 'best interests of the child' test. Precisely what might outweigh parental rights must be determined on a case-by-case

basis.” *In re Custody of Anderson*, 77 Wn. App. 261, 264, 890 P.2d 525 (1995). It is a middle ground, “requiring something more than a showing of best interests, but less than parental unfitness.” *In re Marriage of Allen*, 28 Wn. App. at 649. The focus of the actual detriment is on the impact to the “child’s growth and development.” *In re Custody of E.A.T.W.*, 168 Wn.2d at 339. What will result in actual detriment to a child’s growth and development is determined on a case-by-case basis, *In re Custody of Anderson*, 77 Wn. App. at 264, but neither the parties nor the court are required to predict and prove the unknown future without reference to past actions, *In re Custody of B.M.H.*, 179 Wn.2d 224, 238, 315 P.3d 470 (2013). The court is allowed and encouraged to “speculate about future possibilities in making determinations about domestic relations. Concern about future action is not necessarily impermissibly speculative for findings of actual detriment.” *Id.* The petitioners bear the burden of proving their case by clear and convincing evidence as is also required in dependency or termination cases. *In re Custody of C.C.M.*, 149 Wn. App. 184, 205-06, 202 P.3d 971 (2009).

Even if a parent is currently “fit,” continuing damage from past unfitness and the child’s present needs can still be a basis for a finding of actual detriment. For example, in *Mahaney*, two children resided with their paternal grandmother by agreement of the parents due to the parents’

use of alcohol and illegal drugs. *In re Mahaney*, 146 Wn.2d 878, 882, 51 P.3d 776 (2002). At the time of the case, however, the mother claimed to be sober, married, an active member in her community, and had plans to open a new restaurant. *Id.* at 883. At trial, there was no finding of present unfitness, and the trial court awarded custody to the nonparental custodians. *Id.* at 885. On appeal, the mother argued that nonparental custody was improper considering she was “presently fit,” but our Supreme Court noted that:

Even where there is no showing of present parental unfitness, in determining the best interests of the child the court may take into consideration emotional and psychological damage from prior unfitness of a parent and the child’s current special needs for treatment and care. Moreover . . . the court is entitled to examine the lack of a bond to the parent and the presence of a bond to the children’s grandmother, who has been their parent figure for most of their lives.

Id. at 894.

In the present case, Mr. Fuga has made similar claims of being presently fit - almost identical to those made in *Mahaney*, but that does not mean there are no after-effects of his past actions. Mr. Fuga was arrested for domestic violence while Ms. Siufanua was pregnant with LMS. CP 5, 27-37, 198. Mr. Fuga also decided to move to California when LMS was only one year old, completely abandoning her and making no effort to locate her. CP 3, 27. Mr. Fuga’s 2011 Facebook post further supports his

lack of involvement in LMS's life. CP 39. Mr. Fuga's disregard for LMS's wellbeing should be considered by the Court in determining whether or not there is adequate cause to proceed to trial. Mr. Fuga's only support for his position are his own self-serving declarations in which he provides no explanation for the inconsistencies outlined in Appellants' opening brief. These actions should be considered by the Court in determining both Mr. Fuga's fitness as a parent and the detriment this move will cause LMS.

In addition to looking at the effects of the biological parents' past behavior, the Court can also look at whether the nonparent has become a psychological parent or closely bonded to the child. For example, in *Custody of Shields*, the child at issue's parents were divorced, and the father was given custody of the child, with the mother to have liberal visitation, although she did not exercise most of the visitation available to her. *In re Custody of Shields*, 157 Wn.2d 126, 129, 136 P.3d 117 (2006).

Similarly, the court may also "take into consideration emotional and psychological damage from prior unfitness of a parent and the child's current special needs for treatment and care." *In re Mahaney*, 146 Wn.2d at 894. In this case, LMS is clearly bonded to her grandparents who have cared for her since she was a baby. CP 5, 27. She has spent no substantial time with Mr. Fuga or his wife and is settled here in Washington. Moving

to California with Mr. Fuga and his wife will essentially separate LMS from the only parental figures she has ever known.

Mr. Fuga contends that his past actions including abandonment and domestic violence as well as LMS's bond with her grandparents do not support a finding of actual detriment. They rely upon cases where no finding of detriment was made. However, this case is distinguishable from those wherein there was no finding of detriment to the child.

First and foremost, if the primary purpose of the adequate cause threshold is to avoid a useless hearing, then that evil has arguably been avoided here, as the grandparents' efforts to maintain a custody relationship they have had for eight years as well as ensure the safety and well being of that child do not have the indicia of a "useless" hearing or of efforts to simply harass Mr. Fuga.

Second, the grandparents have not asked the Court to make a simple "best interests of the child" comparative analysis between their home and Mr. Fuga's home as was denounced in *Custody of S.C.D-L* and *Custody of Anderson*. In both of those cases, the courts held that the finding of detriment or unfitness was unsupported because the trial court had simply determined that the nonparent could be a better parent or provide a better home, which was not enough to satisfy the requirements of a nonparental custody petition. In this case, however, the grandparents

have not alleged that they could provide better opportunities than Mr. Fuga or that they are better parents, *per se*, but rather that it would be detrimental to remove LMS from their custody and place her with her father because of her attachment to the grandparents as well as Mr. Fuga's history.

B. It was error for the court to deny the appointment of a GAL when the parties have minimal information and no formal investigation had been made.

The focus of an adequate cause hearing is whether the petitioners have set forth allegations, which *if proven*, would support a finding of parental unfitness or actual detriment to the child. A guardian ad litem or parenting investigator is helpful in terms of gathering that additional information so that the court can make a fully informed decision. Also as part of the nonparental custody proceeding, the court can appoint an attorney to represent the interests of the child "with respect to custody, support, and visitation," RCW 26.10.070, and the court can also order "an investigation and report concerning custodian arrangements for the child, or may appoint a guardian ad litem pursuant to RCW 26.12.175. . . . In preparing the report concerning a child, the investigator may consult any person who may have information about the child and potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis." RCW 26.10.130.

In this case, the refusal to appoint a guardian ad litem, especially in light of the fact that the parties all agreed to the appointment, was error. Mr. Fuga contends he did not agree, but that is not accurate. Mr. Fuga appeared suddenly after his eight-year absence, and the adequate cause hearing was scheduled in less than 20 days after he was served with the paperwork. The parties did not have the opportunity to conduct discovery or depositions, nor did they have the benefit of an investigation into Mr. Fuga's current life and situation in California. The allegations raised by the grandparents indicate that Mr. Fuga has had a long history of problems with domestic violence and minimizing his behavior - behavior that was demonstrated most recently with his behavior in front of the child as well as his denials of his past behavior before the court.

A guardian ad litem would have been incredibly beneficial to informing the court about the case, and before entirely disrupting a child's life and placing her in a strange home with strange people, taking time to have an expert look into the situation seems most appropriate.

C. The Court should deny Mr. Fuga's request for attorney's fees and grant Petitioner's request for attorney's fees due to the necessity of bringing this appeal.

Pursuant to RAP 18.1, the Appellants/grandparents request attorney fees for the necessity of filing this appeal. Further, RCW 26.10.080 specifically provides that "[u]pon any appeal, the appellate

court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.10.080.

Due to the necessity of filing this appeal, Appellants dispute Mr. Fuga's contention that he be awarded fees pursuant to RCW 26.10.080. The grandparents do not have the ability to pay Mr. Fuga's fees, and moreover, they have incurred substantial costs already not only by fighting to care for their grandchild (whom Mr. Fuga did not support for many years) and had no choice but to file this appeal in order to prevent the life of their grandchild from total upheaval.

Conclusion

Petitioners respectfully request the Court find the trial court's denial of adequate cause be reversed due to the sufficiency of information to support a finding of both unfitness and actual detriment.

RESPECTFULLY SUBMITTED this 8th day of September, 2015.



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