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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Court of Appeals No. 32367-6-III

In re the Custody of S.F.T.C.,

Child,

Janet Carey, Nick Carey, Laura Carey,

Respondents,

and

Jasmine Rose Carey, Mother,
Kyle Carey, Father, Deceased

Appellant.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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INTRODUCTION

Jasmine Carey made some serious mistakes in her young life. She started taking meth at age 12 (about the same time that her father started beating her); she was seriously dating at age 13, and married her drug-taking, abusive boyfriend at age 16; she had her first child (S – whose custody is at issue here) at age 18; her second child (B) four years later. She also faced serious and painful health issues that overwhelmed her. She lost custody of S and B.

When she had her third child (J) taken at birth into the dependency process, she finally hit bottom. She started working very hard at the court-ordered services; she found the strength (and the support) to kick the drugs; she got her life together and beat the dependency, retaining custody of J. And even though her abusive ex-husband committed suicide, and she faced many health and legal problems, she stayed the course. The trial court found that Jasmine is now a fit parent who is able to care for her children.

But the trial court left S with an aunt and uncle. Jasmine successfully fought them for increasing visitation during the custody battle. She successfully fought on appeal for her constitutional right as a fit parent to take care and custody of S. She just wants to raise her children in peace. This Court should quickly deny review.

RESTATEMENT OF ISSUES

1. Did the Court of Appeals properly protect a fit mother's fundamental right to care and custody of her child by carefully following this Court's decisions in *In re Custody of A.F.J.*, 179 Wn.2d 179, 183-84, 314 P.3d 373 (2013); *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013); *In re Custody of Shields*, 157 Wn.2d 126, 128, 136 P.3d 117 (2006); *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998), *aff'd on narrower grounds sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); and *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) as well as controlling Court of Appeals decisions like *In re Custody of J.E.*, 189 Wn. App. 175, 356 P.3d 233 (2015), *In re Custody of R.R.B.*, 108 Wn. App. 602, 621 P.3d 1212 (2001); *In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989); and *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981)?
2. Does an unpublished decision closely following these precedents to protect a fit parent's fundamental rights raise an important issue that this Court should decide – yet again?
3. Should this Court quickly deny review so that this child promptly can be further reintegrated into her fit mother's home?

STATEMENT OF THE CASE

The facts are correctly set forth in the Unpublished Opinion at 2-4, and detailed in the Brief of Appellant at 4-14. They are summarized here.

A. Jasmine Carey was married at age 16, had a daughter (S) at age 18, and divorced the father at age 21, largely due to domestic violence and abuse.

Jasmine Carey was born on January 1, 1986. 1RP¹ 76. Her daughter S was born on October 8, 2004. RP 1280. Jasmine² was then 18 years old. RP 668. She had married the child's father, Kyle Carey, 18 days after her 16th birthday. *Id.* Their relationship began when he was 18, and she was 13. RP 667.

Their relationship was stormy. *See, e.g.*, RP 668-70. On various occasions Kyle punched her, slapped her, and threw a butcher knife at her, the latter two while she was holding S. RP 669. Kyle also stabbed Jasmine in the stomach with a fork. *Id.*

After about a year they separated. RP 670-71. Aside from the abuse, this was partly precipitated by Jasmine finding Kyle in bed with another woman. *Id.* But it did not help that Kyle's best friend, William Higgins, had come to live with them, together with Higgins'

¹ The 1/30 a.m. RP is numbered separately. We cite it 1RP __.

² First names are used to avoid confusion, intending no disrespect.

daughter, whom Kyle kept asking to "sleep" with. RP 670-72. Jasmine went to stay with her sister. RP 671.

It also did not help that Kyle and Jasmine took drugs together, including methamphetamine. RP 674-75. Jasmine had started using meth at age 12. CP 210. This was around the same time that her father started beating her. CP 214-15.

Despite various efforts to save the relationship, Jasmine and Kyle were divorced in March 2007. RP 684. Despite testing positive for meth during the dissolution proceedings, Jasmine was awarded custody of S. *Id.*; RP 577; Ex 51 (Parenting Plan at 5).

B. Jasmine had serious health issues that caused her a great deal of pain and debilitated her, and her failures to properly clean her home ultimately resulted in her loss of custody of her daughters in 2009.

Beginning in 2006, Jasmine began suffering from endometriosis, ovarian cysts, and interstitial cystitis. RP 1172-73. These painful conditions required numerous painful surgeries. RP 1174-76. This lasted into 2009 and beyond, and was debilitating to her, leaving her unable to cope. CP 246; RP 1176-78.

During this difficult time, Jasmine became pregnant with her second daughter (B) who was born on February 4, 2008. RP 1174. Due to her illnesses, Jasmine was on morphine, Dilaudid, Xanax,

Amitryptiline, Hydroxyzine, and perhaps other drugs. CP 210, 221-22. B was born with prescription drugs in her system. CP 269-70.

Also during this difficult time, S disclosed to Jasmine on January 31, 2008 that Kyle's friend Higgins had sexually assaulted her. 1RP 46; RP 1181-82; Ex 97. Jasmine sought and obtained temporary and permanent protection orders for S in February and March 2008. Ex 97. She initiated and cooperated with the investigation, and was concerned for S's safety. 1RP 61-62. Higgins was convicted. CP 160.

On December 20, 2008, the police received a report that led them to investigate Jasmine's apartment, which they found to be in disarray. 1RP 51, 53. The officer filed a report with CPS. 1RP 55-56. The children were eventually placed in protective custody. RP 89-90. The court eventually gave Kyle custody of S, and Jasmine substantially failed to visit or support her for several years. CP 190.

C. Jasmine began to turn her life around in 2012, successfully engaging in many services, developing a nurturing relationship with J, and succeeding in having J's dependency proceeding dismissed.

Jasmine's daughter J was born on January 4, 2012, and a dependency was filed immediately. This was Jasmine's turning point.

RP 1206-07. She began to work very hard at the services the court ordered her to attend. RP 1206-07.

Each of the counselors from the various agencies supported Jasmine's strong recovery. See, e.g., CP 338 (F/F 2.7B.4); RP 695, 786-87, 789, 803, 810-11, 819, 830-31, 869-70, 872, 876-77, 880, 901-02, 917-18, 1091-92. Specifically, Stephanie Mooney is a group counselor with whom Jasmine did very well, and was even considered a leader looked-up-to by other patients. RP 691-93, 695. Her drug tests were all clean. RP 695-96. She was very motivated, developed insight into her problems, and is dedicated to doing whatever is necessary to prevent a relapse. RP 697-98. She successfully completed her treatment, is a low risk for relapse, and has the tools and support system to maintain her new, clean and stable lifestyle. RP 699-700.

Tamara Tanninen was a private counselor for Jasmine in 2012. RP 1087-89. She was in Jasmine's home 21 times over five-months, and it was always clean, safe, and appropriate. RP 1090. This did not change after J was returned to the home: Jasmine was attentive to J's needs and Tanninen had no concerns about her parenting. RP 1091-92. Jasmine is a good mom; J is very bonded to her. RP 1092-93.

Julie Chacon works with Safe Baby, Safe Mom. RP 812. Jasmine enrolled in the program in January 2012, and Chacon began working with her in January 2012. RP 815, 820. Chacon has no concerns about J's development or well-being in her mother's "very nurturing" care. RP 816-17, 819, 828-29.

Julie Wilde is a licensed mental health counselor at Catholic Family & Child Services. RP 863-64. Jasmine was initially assessed as having (among other things) social phobia and amphetamine dependence in remission. RP 866. In counseling, Jasmine acknowledged her relapses during her pregnancy and expressed remorse. RP 913. Throughout her treatment and services from February 2012 to February 2013, Wilde saw improvements as Jasmine's anxiety reduced. RP 872. She is focused on improving her life and that of her family. RP 917. Wilde saw Jasmine for an assessment in February 2013, but saw no further trouble with social phobia, and recommended no further counseling. RP 880.

Petra Day was a Guardian ad Litem for the Family Drug Court in Benton/Franklin County. RP 783. Day saw Jasmine in her home six or seven times over six months, which was always clean and neat and appropriate for the baby. RP 786. Day never had any concerns that Jasmine could not meet J's needs. RP 787. Jasmine accepted

and acknowledged her past and how it related to her future behavior. RP 803. Day recommended that the dependency be dismissed, and it was. RP 789, 791.

Jasmine confirmed all of her providers' observations. See, e.g., 1222-28. She has learned from her mistakes. *Id.* As further discussed *infra*, the trial court found her a fit parent. CP 338.

D. Kyle committed suicide in March 2012, but Jasmine did not relapse and gained custody of J, and has obtained steadily increasing visitation with S over petitioners' objections.

Kyle had committed suicide in March 2012. CP 81, 261-62. Kyle's mother, Janet Carey, and his brother Nick Carey, and Nick's wife Laura Carey (collectively, petitioners) brought this action on March 15, 2012. CP 1-7. Despite Kyle's suicide, ongoing dependencies, illnesses and surgeries, and other ongoing stresses like this action, Jasmine stayed the course, completed her services, and maintained custody of J and her sobriety, as discussed above.

Despite her progress, petitioners steadfastly refused to allow visitation with S until February 2013. RP 1199-1200; CP 4, 27 (¶ 1.9), 173. Jasmine brought a series of motions in this action increasing her visitation, over petitioners' objections. CP 74-79. Jasmine and S are bonded, and S thinks of Jasmine as her mom. BR 4.

E. The trial court found Jasmine a fit parent who is able to parent her child – a child who is doing remarkably well despite her past traumas – but nonetheless gave custody to the aunt and uncle.

The case went to trial in March 2013, but that was a mistrial. Jasmine twice moved to dismiss because she is a fit parent and there is and can be no legally adequate showing of actual detriment to S from being placed with her now. CP 29-35, 68-72. The case went to trial again in late September 2013, lasting eight court days. CP 300-20. The court heard from roughly 40 witnesses. *Id.*

The trial court found Jasmine a fit parent – by any standard. CP 338. It found that “Ms. Carey has made great strides in dealing with those [past] issues” and is now “able to safely provide for her children.” *Id.* It also found that S is “doing amazingly well for everything that she has gone through” CP 340 (F/F 18). Yet it found that removing S from her aunt and uncle’s primary care would cause actual detriment, based primarily on the testimony of Susan Holden, a school counselor, and Michele Leifheit and Lyn Lang, child counselors. See CP 339-41.

F. The Court of Appeals found no extraordinary circumstances justifying depriving a fit parent of her constitutional right to parent her child.

The Court of Appeals carefully followed this Court’s controlling precedents. Unpub. Op. at 6-8 (citing, *inter alia*, **B.M.H.**, **Shields**,

Smith, Sumey). It also reviewed and followed the relevant Court of Appeals decisions. *Id.* (citing, *inter alia*, **J.E.**, **R.R.B.**, **Stell**, and **Allen**). Petitioners' claims to the contrary are transparently false.

Similarly transparent are petitioners' claims that the Court of Appeals either disregarded the facts, or engaged in appellate factfinding. To the contrary, because it does "not reweigh evidence or witness credibility, [the Court focused] on the trial court's findings and the evidence it found credible." Unpub. Op. at 10-14. It thus addressed the testimony of the three witnesses upon whom the trial court expressly relied (CP 339-40). Unpub. Op. at 10-14.

The Court noted that Holden acknowledged she had not seen or spoken to the child since 2012. *Id.* at 10 (see RP 277-78). It also noted that Leifheit said only that removing the child from the petitioners' care *could* be detrimental, and *could* exacerbate the impact of prior traumas; but Leifheit spent only a few hours with the petitioners, and no time at all with Jasmine. *Id.* at 11. As for Lang, she spoke to the cumulative effect of trauma, but did not say that placing the child with her fit mother could cause actual detriment. *Id.* at 12-14. Lang noted that the child was enjoying visitations with her mother, that she (Lang) never inquired about the mother's current stability, and that the child is doing "amazingly well" despite the

traumas she has experienced. *Id.* The trial court itself found that Lang lacked “objectivity” regarding “some of her opinions and positions in her actions in regard to this case.” CP 340.

Based on the testimony that the trial court credited in its findings, and “even under the deferential standard of review,” the appellate court held that the findings were insufficient to deprive a fit parent of her fundamental right to custody of her child under the “controlling” decisions, *B.M.H.* and *J.E.* Unpub. Op. at 14-19.

Continuing their fight to keep Jasmine from her daughter, petitioners seek discretionary review here.

ARGUMENT

A. The Unpublished Opinion scrupulously follows this Court’s and its own relevant precedents.

While acknowledging that both decisions came down after the trial court ruled, the Court of Appeals correctly held that this Court’s “decision in *B.M.H.* and our own recent decision in *J.E.* are controlling.” Unpub. Op. at 14 & n.2. In *B.M.H.*, this Court reversed a trial court’s determination – based on a GAL’s opinion³ – that because separating a child from the long-time care of his stepfather

³ Arguably, a GAL’s testimony is stronger than that of the counselors relied upon here, as a GAL directly represents the child’s interests. The evidence here is thus weaker than that rejected in both *B.M.H.* and *J.E.*, and there was no GAL in this case.

"would cause actual detriment to the minor child's growth and development," he could take custody away from the biological mother. 179 Wn.2d at 239. This Court held that these circumstances – substantially similar to the facts and trial court decision in this case – are "not the kind of substantial and extraordinary circumstances that justify state intervention with parental rights." *Id.* Simply put, unlike in *Allen* or *Stell*, where (as here) the child has no special needs that the mother cannot meet, her fundamental right to parent is paramount to an alleged need for stability in maintaining existing relationships.⁴ While *S* may face difficulties in the future due to the traumas she has experienced, there is no evidence in the record that Jasmine is not capable of helping her deal with them if they arise.

The Court of Appeals also correctly noted that "*J.E.* is even more clearly on point." Unpub. Op. at 16. There, the child lived with his aunt and uncle from age two to age 11, while his mother struggled with mental illness, and his natural parents were dealing with his sister's difficult terminal illness. *Id.* at 16. Similarly to this case, the trial court determined that the biological parents were fit, but again relied on GAL testimony that separating the child from the aunt and

⁴ Although the Court of Appeals did not mention it, the companion case to *B.M.H.*, *A.F.J.*, is also quite instructive here. See BA 17-18; Reply 6, 12.

uncle would cause him actual detriment. *J.E.*, 189 Wn. App. at 181. As here, the trial court had effectively “applied the too-low standard of the ‘best interests’ of J.E.” Unpub. Op. at 17; *see also* CP 338 (using an improper “best interests” finding to erroneously deprive Jasmine of her fundamental rights). As here, nothing showed that the fit biological parents were incapable of caring for the child’s needs, which were not extraordinary. *Id.*

Correctly synthesizing *B.M.H.* and *J.E.*, the Court of Appeals (Siddoway, J., writing) held that the trial court’s focus on the nonparents’ “bond” with S is misplaced (*Id.* at 17):

Together, *B.M.H.* and *J.E.* establish that any focus on a bond between a child and the petitioner for nonparental custody misses the mark. Such evidence is only relevant to “best interests,” which is not the standard that applies. The proper focus in analyzing whether “actual detriment to growth and development” applies is whether there are extraordinary circumstances such that, despite the parent’s fitness, his or her custody will seriously conflict with the child’s physical or mental health. [189 Wn. App.] at 190. A showing of “[s]pecific facts” is required. *Id.*

This is a correct statement of Washington law. Notwithstanding petitioners’ hyperbole (*e.g.*, Pet. at 9, “the trial court acted to preserve the child’s sanity” – with no cite to or evidence in the recored) this Court should deny discretionary review.

B. The Unpublished Opinion scrupulously follows relevant decisions from the Court of Appeals.

The Court of Appeals also quoted *B.M.H.*'s explanation of why that case, like this one, differs from the appellate decisions in *Allen* or *Stell*, which involved extraordinary circumstances:

Although the importance of preserving fundamental psychological relationships and family units was part of the court's analysis in *Allen* and *Stell*, there were more extreme and unusual circumstances that contributed to the finding of actual detriment. In each case, the child had significant special needs that would not be met if the child were in the custody of the parent. Continuity of psychological relationships and family units was particularly important where a child had these special needs. Here, additional circumstances have not been alleged. 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."

Unpub. Op. at 16 (quoting 179 Wn.2d at 239, citations omitted).

It is thus difficult to imagine how the petitioners can assert that the appellate court "ignores" *Allen* and *Stell*. Petition at 6. The entire analysis in the Unpublished Opinion revolves around reconciling those cases' extraordinary circumstances with the less than extraordinary circumstances presented here. Simply put, there is no evidence in this record that Jasmine is less capable than the aunt and uncle to deal with any future problems S may suffer due to past traumas she has endured. Since the trial court expressly found her fit and able to parent her child, her fundamental rights must prevail.

C. Reaffirming a mother's fundamental right to the care and custody of her daughter does not give rise to an important issue that this Court should determine.

Consistent with all of this Court's precedents, and with all relevant appellate court precedents, the Court of Appeals has once again reaffirmed a natural parent's fundamental right to parent her child, notwithstanding an existing relationship with nonparents. Jasmine has consistently recognized the importance of the relationship between S and her aunt and uncle, and has consistently stated that she will endeavor to maintain those family ties. There is nothing new here. Review is not necessary.

The petitioners raise issues about whether a trial court is "allowed" to consider testimony from "experts," and "evidence" of the relationship between the nonparents and the child, in this type of case. Pet. at 1-2. Of course it is. The Unpublished Opinion nowhere says otherwise. These issues are not presented by this case.

The petitioners also argue that the Court of Appeals engaged in "appellate factfinding." Pet. at 14-16. This assertion is false. The Court of Appeals simply followed the analysis in cases like *B.M.H.*, fulfilling its responsibility to ensure that a fit parent's fundamental rights are not denied in our courts. The Court of Appeals made no different findings or credibility determinations, but rather applied the

constitutional law recognized by this Court to the facts found by the trial court. Consistent with this Court's (and its own) precedents, the Court of Appeals held that the mere fact that lessening the aunt and uncle's control over S is a change in her circumstances does not justify depriving this fit parent of her fundamental right to the care and custody of her child.

There is no evidence in this record that Jasmine's care and custody will harm her child. On the contrary, there is a great deal of evidence that Jasmine's care will nurture and support S. Jasmine has fought valiantly to regain custody of her child. This Court should promptly deny review.

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 16th day of May, 2016.

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CERTIFICATE OF SERVICE

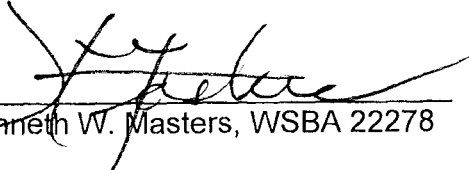
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Attached, for filing, please find Appellant's Answer to Petition for Review:

Case Name: In re the Custody of S.F.-T.C.
Supreme Court Case No. 93046-5
COA Case No. 32367-6-III

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