

FILED
E APR 26 2016
WASHINGTON STATE
SUPREME COURT

FILED
Apr 13, 2016
Court of Appeals
Division III
State of Washington

No. 93046-5
No. 32367-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of

S.F.-T.C., Child

JASMINE CAREY
Appellant

and

JANET CAREY, NICK CAREY, LAURA CAREY
Respondents

PETITION FOR REVIEW

PATRICIA NOVOTNY
ATTORNEY FOR RESPONDENTS
3814 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711
patricia@novotnyappeals.com

TABLE OF CONTENTS

A. IDENTITY OF PETITIONERS..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 5

 1. WHAT “EXTRAORDINARY CIRCUMSTANCES” JUSTIFY
 CUSTODY IN THIRD PARTIES? 7

 2. WHAT ROLE DOES SPECULATION PLAY IN EVALUATING
 POTENTIAL HARMS TO CHILDREN AND IN THE COURT’S
 DUTY TO ACT TO PREVENT SUCH HARM? 9

 3. IS EVIDENCE OF A CHILD’S RELATIONSHIP TO
 NONPARENTAL CAREGIVERS ALWAYS IRRELEVANT TO A
 TRIAL COURT’S DETERMINATION OF THE BASES FOR
 NONPARENTAL CUSTODY? 12

 4. DIVISION THREE ENGAGED IN APPELLATE FACT
 FINDING..... 14

F. CONCLUSION..... 16

TABLE OF AUTHORITIES

Washington Cases

In re Custody of B.M.H., 179 Wn.2d 224, 315 P.3d 470 (2013).....
..... *passim*

In re Custody of E.A.T.W., 168 Wn.2d 335, 227 P.3d 1284 (2010)..... 9

In re Custody of J.E., 189 Wn. App. 175, 179, 356 P.3d 233, 240 (2015),
as amended (Aug. 6, 2015), 4, 12, 14

In re Custody of R.R.B., 108 Wn. App. 602, 31 P.3d 1212, 1218 (2001)
..... 8, 13, 14

In re Custody of Shields, 157 Wn.2d 126, 136 P.2d 117 (2006) 8, 9, 14

In re Dependency of K.D.S., 176 Wn.2d 644, 294 P.3d 695 (2013)..... 7

In re Dependency of T.L.G., 139 Wn. App. 1, 156 P.3d 222 (2007)..... 10

In re Mahaney, 146 Wn.2d 878, 51 P.3d 776 (2002). 8, 14

In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981)
..... 6, 8, 9, 13, 14, 16

In re Marriage of Landry, 103 Wn.2d 807, 699 P.2d 214 (1985) 15

In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003)..... 15

In re Stell, 56 Wn. App. 356, 783 P.2d 615 (1989) 6, 8, 9, 13, 14, 16

Katаре v. Katаре, 175 Wn.2d 23, 283 P.3d 546, 552 (2012)..... 12

Statutes, Rules, & Other Authorities

RAP 13.4(b)(1) 6, 7

RAP 13.4(b)(2).	6, 7
RAP 13.4(b)(4).	6
RCW 26.10.100.	8
RCW 70.305.005.	10
RCWA 70.305.010.....	7

A. IDENTITY OF PETITIONERS

Laura and Nick Carey, Respondents below, ask this Court to accept review of the Court of Appeals' decision terminating review. See Part B.

B. COURT OF APPEALS DECISION

Petitioners Laura and Nick Carey, seek review of the Court of Appeals' decision entered on February 9, 2016, amended by an order denying reconsideration entered on March 15, 2016, by which the court reversed the Benton County Superior Court's order granting custody of the minor child, S.F.-T.C., to her aunt and uncle, Laura and Nick Carey. A copy of the decision and the order on reconsideration are attached.

C. ISSUES PRESENTED FOR REVIEW

1. Where a child has experienced multiple traumas while in the care of her parents, such that her need for stability and security are heightened, does the nonparental custody statute authorize a trial court to maintain custody with third parties in order to protect against the grave harms to which a change of custody exposes the child?

2. Where a child's welfare is at stake, may a trial court rely on the testimony of experts and others regarding the risk of future harm, and may the trial court act to limit that risk by granting custody to nonparents?

3. Where a child's traumatic past make stability and security especially critical to her well-being and where her relationship to nonparental caregivers provide that stability and security, may the trial court properly consider evidence of those relationships?

4. Did the appellate court here apply the correct standard of review of the trial court's extensive findings, entered after a lengthy and highly fact-specific inquiry, or did it engage in appellate fact-finding?

D. STATEMENT OF THE CASE

S.F.-T.C., who will turn twelve in October (D.O.B. 10/08/04: RP 569), has lived with her aunt and uncle since 2012, the year her father committed suicide. She had been in her father's exclusive care since January 2009, when Child Protective Services removed S.F.-T.C. from her mother's care, based on neglect and abuse. Her mother made no effort to see S.F.-T.C. until after the father's death. At that time, the mother was engaging in services offered by the state in a dependency proceeding involving an infant, her third child. Another, older child of the mother's is in the primary care of that child's father, though the mother has visitation.

In her short life, S.F.-T.C. has endured multiple traumatic events, in the trial court's words, an excess of trauma "we would hope no one would experience in the course of their entire lifetime ..." CP 339 (C.4). In addition to neglect and abuse, this history has as a consistent theme the

disruption of a primary caregiving relationship: her mother and father separated, then divorced; the state removed the child from the mother; the child prospered in the care of her father and his fiancé, before they ended their relationship, separating S.F.-T.C. from her “stepmother” and half-brother; then the father committed suicide. In medical terms, per her longtime counselor, Lyn Lang, S.F.-T.C. presents with complex trauma: multiple traumas and caregivers. RP 437-438; see, also, CP 339-340; RP 438-441 (itemizing the traumas).¹ This history of trauma puts S.F.-T.C.’s mental and emotional well-being at risk and heightens her need for stability and security. See, e.g., CP 392; RP 273-277, 350-351, 358-359, 367-368, 469-470, 539-541, 562, 1141-1142.

For the past four years (since March 2012), as well as during much of the father’s last year of life, S.F.-T.C. has found a haven with her paternal uncle and aunt, their children, and her grandmother, Janet. S.F.-T.C. considers this to be her primary family unit. RP 365-366, 368. The details of S.F.-T.C.’s history, the trauma and the recent years in which she’s thrived, were fully presented and examined by the trial court and are summarized at Br. Respondent, 3-21; see, also, CP 339-340.

The trial court also had the benefit of a G.A.L. report, the testimony of S.F.T.-C’s counselor, with expertise in trauma, as well as

¹ Lang has counseled S.F.-T.C. since she was sexually molested in 2008. RP 445.

testimony of two other mental health professionals and involved laypersons. After an eight-day trial, the court issued an extensive ruling, finding by “clear, cogent and convincing evidence that removing [S.F.-T.C.] from her current home at this time would cause actual detriment to her stability, well-being, growth and development.” CP 340 (emphasis added). Specifically, the court found “it is important to [S.F.-T.C.’s] emotional and psychological well-being for her to remain where she is and that to remove her, considering all of the traumas that she has undergone to this point in her life, would be an actual detriment to her.” CP 340. Though S.F.-T.C. is doing “amazingly well for everything that she has gone through,” her present stability and security “are very important to her continued well-being,” such that “to remove her from the home that she is in at this time would detrimentally affect that security and safety and her well-being.” CP 340.

Division Three reversed this decision, misreading the trial court’s decision as merely concerned with preserving, for its own sake, the relationship between S.F.-T.C. and her uncle and aunt. Slip Op., at 14-18, citing *In re Custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013) and *In re Custody of J.E.*, 189 Wn. App. 175, 179, 356 P.3d 233, 240 (2015), as amended (Aug. 6, 2015). Moreover, Division Three erroneously rejected the extensive evidence of potential harm to the child

as “speculative,” asserting that “[i]mplicit in *B.M.H.*'s discussion of speculation is the fact that even where speculation is permitted, it often will provide an insufficient basis for finding actual detriment.” Slip Op., at 19 n.3. Finally, Division Three ruled the evidence of the child’s relationship with her custodians to be irrelevant to an analysis of detriment, claiming instead such evidence could only bear on a “best interests” analysis. Slip Op., at 17 (“any focus on a bond between a child and the petitioner for nonparental custody misses the mark”). Because each of these holdings contravenes Washington law in a way that places vulnerable children, including S.F.-T.C., at risk, the Careys seek review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The nonparental custody statute is one mechanism by which the state seeks to fulfill its duty to protect children. Where justified by “extraordinary circumstances,” the statute authorizes the court to grant custody of a child to nonparents. As our cases explicitly instruct, such an order is justified where the child presents with particular needs a parent cannot meet, no matter the parent’s fitness. That is the case here, where what the child needs is continuity in caregiver relationship and protection against risk for any additional trauma, as the trial court correctly recognized, completely consistent with this Court’s instruction that

“continuity of psychological relationships and family units [is] particularly important” where children present with these special needs. *B.M.H.*, 179 Wn. 2d at 238. The appellate court’s reversal of that order flatly ignores the relevant precedent, including *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981) and *In re Stell*, 56 Wn. App. 356, 366, 783 P.2d 615, 620-21 (1989), cases this Court recently endorsed. *B.M.H.*, 179 Wn.2d at 236. This conflict with established law justifies review under both RAP 13.4(b)(1) and RAP 13.4(b)(2).

Moreover, this substantial departure from precedent in the subject of nonparental custody can only create confusion among the trial courts and the bar over Division Three’s new doctrinal approach to nonparental custody, which utterly frustrates the Legislative intent to provide another backstop of protection for some of the state’s most vulnerable children. For this reason, this case also presents an issue of substantial public import. RAP 13.4(b)(4).

The appellate court also ignored precedent on the role speculation necessarily plays in the fact-finding process. Here, the assessment of risk includes speculation, because its subject is what harm might happen in the future; but the speculation extrapolates from the child’s history, the child’s recent history, during which she has thrived, and the plentiful scientific evidence on how adverse child experiences pose particular risks to

children, evidence our Legislature has in fact codified. RCWA 70.305.010. This Court expressly endorsed this method of proof in *B.M.H.*, noting that “[c]oncern about future action is not necessarily impermissibly speculative for findings of actual detriment.” 179 Wn.2d at 239. Again, RAP 13.4(b)(1) and RAP 13.4(b)(2) apply.

Finally, Division Three failed to extend any deference to the trial court’s factual findings, a failure that conflicts with established law on the standard of review. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695, 699-700 (2013) (appellate court generally upholds a trial court’s factual findings “if they are supported by substantial evidence”). In particular, for example, the trial court, taking together all the evidence regarding risk of harm to the child, concluded custodial disruption would cause S.F.-T.C. actual detriment. The Court of Appeals reweighed this evidence to conclude otherwise, contrary to established law on the standard of review. RAP 13.4(b)(1) and RAP 13.4(b)(2). For these reasons, the Careys respectfully ask this Court for review.

1. WHAT “EXTRAORDINARY CIRCUMSTANCES”
JUSTIFY CUSTODY IN THIRD PARTIES?

The Legislature intended the nonparental custody statute to be a powerful mechanism for beneficial interventions in the lives of children. The statute would permit third-party custody where the child’s “best

interests” require. RCW 26.10.100. However, this Court, in respect of parents’ constitutional rights, has read into this standard a requirement to prove a parent’s unfitness or detriment to the child’s growth or development. See *In re Custody of R.R.B.*, 108 Wn. App. 602, 613, 31 P.3d 1212, 1218 (2001) (noting history). Within that heightened standard, the statute remains a vital force for achieving the legislative purpose, as can be seen in numerous cases. See, e.g., *In re Mahaney*, 146 Wn.2d 878, 894, 51 P.3d 776 (2002); *Allen, supra*; *Stell, supra*; *R.R.B., supra*. See, also, *In re Custody of Shields*, 157 Wn.2d 126, 150, 136 P.2d 117 (2006) (remanding for trial on the stepmother’s nonparental custody petition under proper legal standard of detriment and allowing for possibility that stepmother should continue in primary caregiver role despite fit mother).

Yet Division Three appears to read this Court’s recent pronouncement in *B.M.H.* as a further narrowing of the statute’s scope, concluding the statute does not apply even where, as here, the facts map precisely the “extraordinary circumstances” of our precedent, and requiring instead that the child presently demonstrate a “disability” or “behavioral problems” beyond the parent’s ability to manage. Slip Op., at 18-19. This misreads our law, which simply does not circumscribe the detriment standard to one set of facts, but, rather, recognizes detriment

“must be determined on a case-by-case basis.” *B.M.H.*, 179 Wn.2d at 235 (citing *Shields*, 157 Wn.2d at 143 (quoting *Allen*, 28 Wn. App. at 649)).

Moreover, Division Three’s constricted reading defies common sense. After all, it is the law’s goal to prevent harm to the child. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346, 227 P.3d 1284 (2010) (“[c]hildren must be protected”). Here, the trial court acted to preserve the child’s sanity – to spare her one more disruption and to protect against the risks posed by a change of custody, and thereby prevent harm to her. In short, with great care and clear understanding of the law, the trial court used the statute for its beneficial purpose. CP 339. By contrast, Division Three reads into the statute a standard that all our precedent would fail, thus completely frustrating the Legislature’s intent.

2. WHAT ROLE DOES SPECULATION PLAY IN EVALUATING POTENTIAL HARMS TO CHILDREN AND IN THE COURT’S DUTY TO ACT TO PREVENT SUCH HARM?

In these difficult cases, trial courts properly rely on neutral experts and other witnesses “to help ... reach an objective, rather than subjective, evaluation of the issue.” *Stell*, 56 Wn. App. at 368. Often, as is the case here, the relationship between the child and one or more of these experts is close and ongoing. These professionals helped the court understand not merely the facts of the multiple traumas experienced by S.F.-T.C., but the

significance of them to her well-being and her future and the related significance of stability and security in her placement. CP 339-340. Yet, Division Three rejected this evidence, faulting the trial court for relying on “speculation.” Slip Op., at 19 n.3. Despite the opinions of experts, the guardian ad litem, and other witnesses that returning S.F.-T.C. to her mother’s custody posed actual risks to S.F.-T.C.’s welfare, the appellate court found instead a lack of “specific facts” for the trial court’s actual detriment finding. Slip Op. at 17. Dismissing or discounting the bulk of the evidence, the appellate court compared this case to one where a detriment finding was based on one incident that occurred five years earlier (Slip Op., at 19 n.3), citing *In re Dependency of T.L.G.*, 139 Wn. App. 1, 156 P.3d 222 (2007), which this Court has distinguished from our precedent by that very fact. *B.M.H.*, 179 Wn.2d at 238.

This holding by Division Three could not be more wrong or dangerous. Notably, the testimony of these witnesses tracks precisely findings made by our Legislature that adverse childhood experiences are “a powerful common determinant of a child's ability to be successful at school and, as an adult, to be successful at work, to avoid behavioral and chronic physical health conditions, and to build healthy relationships.” RCW 70.305.005. Tragically, S.F.-T.C. has endured nearly all the adverse experiences identified in the statute: child sexual abuse; child emotional

abuse; child emotional or physical neglect; alcohol or other substance abuse in the home, mental illness; depression, or suicidal behaviors in the home; witnessing intimate partner violence; and parental divorce or separation. RCWA 70.305.010. The Legislature found these experiences to be “indicators of severe childhood stressors and family dysfunction that, when experienced in the first eighteen years of life and taken together, are proven by public health research to be powerful determinants of physical, mental, social, and behavior health across the lifespan.” *Id.*

This is science, not speculation, and it guided the experts here when they concluded S.F.-T.C. is at risk of long-term consequences should she suffer another caregiver disruption. See, e.g., RP 1141-1142; see, also, RP 539 (guardian ad litem concluding change of custody “would cause detriment” to S.F.-T.C.).

Likewise, this Court understands the relevance and probative value of evidence “about future possibilities,” which may be “necessary ... in making determinations about domestic relations.” *B.M.H.*, 179 Wn. 2d at 238 (emphasis added). Concern for future harm is not impermissibly speculative. *Id.*, at 239. Rather, respect for well-grounded predictions reflects the court’s concern for prevention of harm. Thankfully, the “trial court need not wait for actual harm to accrue” before it can act to protect against that harm.” *Katara v. Katara*, 175 Wn.2d 23, 36, 283 P.3d 546,

552 (2012). “Rather, the required showing is that a danger of ... damage exists.” *Id.*, citing *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002) (“evidence of actual damage is not required”). Division Three ignored these teachings, to this child’s peril.

Here, the extraordinary history of trauma experienced by S.F.-T.C. while in the custody of her parents, put her at actual risk of future harm, as the evidence established and as our Legislature expressly declares to be true. Indeed, these facts distinguish this case from the cases relied upon by Division Three, including *Custody of J.E.*, *supra*, where the child benefitted from an early placement in a stable environment. Here, quite unlike J.E., S.F.-T.C. endured one trauma after another before finding safety and stability in the home of her aunt and uncle. The experts concluded that disrupting this placement jeopardizes her welfare, a conclusion expressly endorsed by the Washington Legislature and well within the trial court’s fact-finding authority.

3. IS EVIDENCE OF A CHILD’S RELATIONSHIP TO
NONPARENTAL CAREGIVERS ALWAYS
IRRELEVANT TO A TRIAL COURT’S
DETERMINATION OF THE BASES FOR
NONPARENTAL CUSTODY?

Division Three rejected as irrelevant the evidence of S.F.-T.C.’s relationship with her aunt, uncle, grandmother, and step-siblings. Slip Op., at 17. Washington law does not agree. For example, in the first

nonparental custody case, *Marriage of Allen, supra*, the court found it would be detrimental to remove the child from the stepparent, who provided important development opportunities, even though the legal parents were fit. Similarly, in *Stell, supra*, the trial court erred when it failed to consider evidence that disruption of the child's relationship with his aunt, who had been his primary, consistent caretaker, would be detrimental, though the father was fit. In other words, it was the "change of custody" the expert predicted would be detrimental. 56 Wn. App. at 370. Likewise, in *R.R.B., supra*, the child's history of trauma, mental health issues, and stabilization in the care of custodians supported the trial court's decision not to change custody.

Here, similarly, because of the child's traumatic history, disrupting the stability of her current life poses a risk of further serious harm to her, and the stability of her current life pivots on the strength of her relationship with the Careys. The risk to S.F.-T.C. inheres in disrupting that relationship, just as the trial court found: "there would be actual detriment to [S.F.-T.C.]'s growth and development if removed from Nick and Laura Carey..." CP 339. In other words, the "special need" S.F.-T.C. presents (see Slip Op., at 18) is the need to remain in the certain and stable environment where she feels and is safe and secure.

As discussed above, this is the same kind of “extraordinary circumstance” compelling the results in *Stell* and *Allen, R.R.B.* and *Mahaney*. In protecting a child in these circumstances, the trial court does not merely indulge a preference for one environment over another under a “best interests” analysis, as in *Custody of J.E.*, 189 Wn. App. at 188. Rather, the custodial environment is essential to preventing harm to the child. Completely consistent with Washington law, the trial court focused on the potential for harm to the child arising from destabilizing her life, which substantial evidence proved a change of custody would do. Based upon substantial evidence, evaluated under the correct burden of proof, the trial court acted within its authority and discretion to prevent that harm, thus fulfilling the purpose served by the nonparental custody statute.

4. DIVISION THREE ENGAGED IN APPELLATE FACT FINDING.

Decisions about the custody of children pose especially difficult challenges to trial courts, a difficulty equal to the importance of such decisions. The trial court must intensely scrutinize the unique facts of each case to determine, within the legal framework, the best outcome for the child. Or, as this Court has noted, “[w]hether placement with a parent will result in actual detriment to a child's growth and development is a highly fact-specific inquiry ...” *B.M.H.*, 179 Wn.2d at 235 (citing *Shields*,

157 Wn.2d at 143 (quoting *Allen*, 28 Wn. App. at 649)). For these reasons, such decisions are accorded great deference on review. *In re Marriage of Landry*, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985).

In this case, Division Three not only reads too narrowly the substantive test for nonparental custody, as discussed above, it second guesses the trial court's fact-finding. The appellate court's role, as this Court again recently reiterated, is "to review the findings supporting the conclusion the trial court did reach, not to look for evidence supporting an alternate conclusion the court could have reached." *Mueller v. Wells*, 185 Wn.2d 1 (2016) (§ 27).

Here, the trial court found persuasive the extensive evidence from the guardian ad litem (Scraper), the counselor (Lang), the school counselor (Holden), the mental health investigator (Leifhelt), and the other witnesses. CP 339. Division Three favored other evidence. See, e.g., Slip Op., at 13-19. But this is precisely the wrong approach, since "trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence." *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). Here, the trial court's extensive findings with respect to the child's early adverse experiences and the associated risk to the child from disrupting her current stable home were mostly undisputed. The child's history and her ongoing and heightened

need for stability were amply proven, and they remain true regardless of the mother's fitness (just as in *Allen, Stell*, etc.). For example, the appellate court discounted the testimony of the school counselor as outdated. Slip Op., at 10, 19. The trial court acknowledged the timing issue, no doubt also aware of its reason (an earlier mistrial).² But, the trial court inferred that the counselor's testimony regarding the child's need for stability remained "very important for [S.F.-T.C.] and her development and healing, ..." CP 339. This is a fair inference, since nothing had erased S.F.-T.C.'s history of multiple, complex traumas. Moreover, this is precisely the kind of inference the court is entitled to draw. *Rideout*, 150 Wn.2d at 352.

Under the proper standard of review, in this fact-intensive inquiry, the trial court's findings are owed deference. Here, instead, Division Three engaged in fact-finding of its own.

F. CONCLUSION

For these reasons, in particular, the significant departure from settled Washington law and policy and the undermining of the nonparental

² Holden, with a Masters in Education and 23 years of counseling experience, worked with S.F.-T.C. during the 2011-2012 school year. The trial in this case began eight months later in February, but resulted in a mistrial, with the second trial occurring October 2013. See CP 853-858. Presumably for the same reason, much of the mother's evidence was also based on dated contacts. See, e.g., RP 775 (no contact by couples counselor since 07/2012); 876 (counseling ended 10/2012); 1109 (no contact with family preservation counselor since 08/2012).

custody statute, not to mention the very real dangers facing this child and her future, the Careys respectfully request this Court take review, reverse the Court of Appeals, and uphold the superior court's order granting custody to the Careys.

Dated this 13th day of April 2016.

RESPECTFULLY SUBMITTED,

/s/ Patricia Novotny

PATRICIA NOVOTNY

WSBA #13604

3418 NE 65th Street, Suite A

Seattle, WA 98115

206-525-0711

patricia@novotnyappeals.com

Attorney for Petitioner

FILED
MARCH 15, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Custody of)	No. 32367-6-III
S.F.-T.C.,)	
A Minor Child,)	
)	
Janet Carey,)	ORDER DENYING MOTION
Nick Carey,)	FOR RECONSIDERATION
Laura Carey,)	AND AMENDING OPINION
)	
Respondents,)	
)	
v.)	
)	
Jasmine Rose Carey, Mother,)	
Kyle Carey, Father, Deceased,)	
)	
Appellant.)	

THE COURT has considered respondents' motion for reconsideration, and is of the opinion the motion should be denied and its opinion of February 9, 2016, should be amended to include a footnote, numbered "3," following the language "in 2012 and 2013." on line 14, page 19 of the slip opinion, to read as follows:

In a motion for reconsideration, the Careys point out that a trial court is not *prohibited* from speculating under Washington case law, citing *B.M.H.*, 179 Wn.2d at 238. But the court in *B.M.H.* pointed out that the trial court did not *impermissibly* speculate in that case since there were multiple instances of past conduct on which it based its concern. It stated that "this court will, *if necessary*, speculate about future possibilities in making determinations about domestic relations." *Id.* (emphasis added). The court in *B.M.H.* still concluded that the possibly warranted speculation that the mother would interfere with the nonparent's relationship with B.M.H. was insufficient to show actual detriment.

Implicit in *B.M.H.*'s discussion of speculation is the fact that even where speculation is permitted, it often will provide an insufficient basis for

finding actual detriment. *Cf., Dependency of T.L.G.*, 139 Wn. App. 1, 17, 156 P.3d 222 (2007) (When the State denies a parent's visitation with a child, "[t]he legislatively-mandated risk of harm must be an actual risk, not speculation"). Speculation provides an insufficient basis here.

Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 9, 2016, is hereby denied and the opinion is amended as set forth above.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:


LAUREL H. SIDDOWAY, Chief Judge

FILED
FEBRUARY 9, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Custody of)	
S.F.-T.C.,)	No. 32367-6-III
)	
A Minor Child.)	
)	
Janet Carey,)	UNPUBLISHED OPINION
Nick Carey,)	
Laura Carey,)	
Respondents,)	
)	
v.)	
)	
Jasmine Rose Carey, Mother,)	
Kyle Carey, Father, Deceased,)	
)	
Appellant.)	

SIDDOWAY, C.J. — Following an eight-day trial that took place in September 2013, the superior court for Benton County awarded nonparental custody of Jasmine C.’s then nine-year-old daughter, S., to her paternal uncle and aunt. The trial court’s findings of fact included its finding that the petitioning uncle and aunt had not “established by clear and convincing evidence, nor even by a preponderance of the evidence, that [Jasmine] is an unfit parent.” Clerk’s Papers (CP) at 338. But relying on the opinions of

No. 32367-6-III
In re the Custody of S.F.-T.C.

three witnesses that S. had suffered an unusual and risk-presenting amount of trauma during the first seven-and-a-half years of her life, the court concluded that there would be actual detriment to S.'s future growth and development if she were returned to her mother's care.

In nonparental custody cases, when properly applied, the nonparent will meet the actual detriment standard solely in "extraordinary circumstances." *In re Custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013) (quoting *In re Custody of Shields*, 157 Wn.2d 126, 145, 136 P.3d 117 (2006)). The nonparent must show that the child has significant special needs that would not or could not be met in her parent's custody, or some serious diagnosed emotional instability that will be exacerbated by the placement. *In re Custody of J.E.*, 189 Wn. App. 175, 189-90, 356 P.3d 233, (2015). The actual detriment standard is not met by showing that nonparental custody is in the child's best interests.

The superior court's findings in this case do not reflect extraordinary circumstances, nor was the evidence at trial sufficient to support findings that would, in turn, support a conclusion that placement would result in actual detriment to S.'s future growth and development. Accordingly, we reverse the custody decree.

FACTS AND PROCEDURAL BACKGROUND

Jasmine C. married S.'s father, Kyle, 18 days after her 16th birthday. She gave birth to S. when she was 18 years old. Kyle and Jasmine took drugs together, including

No. 32367-6-III

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

methamphetamine, and they had a stormy relationship. They divorced in March 2007, when S. was two-and-a-half years old. Despite testing positive for methamphetamine during the dissolution proceedings, Jasmine was awarded custody of S.

In January 2008, Jasmine learned from three-and-a-half-year-old S. that Will Higgins, a friend of Kyle's who had lived in the past in the couple's household and was living in Jasmine's home at the time, had sexually assaulted S. Jasmine sought and obtained protection orders for S. and initiated and cooperated with a police investigation that led to Higgins' conviction. Jasmine also began taking S. to Lyn Lang, a mental health counselor, to address emotional fallout from the assault.

In December 2008, police received a report that led them to visit Jasmine's apartment, which they found to be unsanitary and in disarray. The investigating officer told Jasmine he would file a report with Child Protective Services. When a follow-up visit in January 2009 revealed unchanged conditions, S. and a younger stepsister—B., Jasmine's child with another man—were placed in protective custody. Kyle thereafter sought to modify the parenting plan for S., and in June 2009 he was granted full custody. The parenting plan entered at that time provided that Jasmine would initially be permitted one four-hour visit with S. each week, but visits were required to be supervised by a licensed and approved provider and Jasmine was required to "pay all costs associated with this supervision." CP at 17.

No. 32367-6-III

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

Jasmine, who presented evidence of chronic medical problems, was prescribed medications and continued to use and abuse drugs for the next several years. She did not see S. during the three years that Kyle had custody.

In early January 2012, Jasmine gave birth to a third daughter, J. A dependency was filed before Jasmine could take J. home from the hospital. The Department of Social and Health Service's offer of services during the dependency was the beginning of a process through which Jasmine began addressing her parental deficiencies. After successfully participating in the services, Jasmine regained custody of J. on May 17, 2012, and the dependency was dismissed.

On March 1, 2012, while the dependency proceeding dealing with J. was ongoing, Kyle committed suicide. Two weeks later, Nick and Laura Carey, Kyle's brother and sister-in-law, filed a nonparental custody petition seeking custody of S. Janet Carey, Kyle's mother, joined the petition. We sometimes refer to the petitioners hereafter as "the Careys."

Jasmine opposed the petition and sought to have the court return custody of S. to her. The court granted temporary custody of S. to Nick and Laura Carey.

After filing the petition for nonparental custody, Janet Carey contacted Ms. Lang, and arranged to renew counseling for S. with Ms. Lang. In response to Jasmine's early requests for visitation with S., the superior court entered an order on April 19, 2012, indicating it would rely on Ms. Lang for a "time frame and parameters & all details re:

No. 32367-6-III

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

reintroduction & reunification of Jasmine w/ [S.]” CP at 545. Janet Carey was opposed to S. having *any* visitation with Jasmine, and even Ms. Lang favored no visitation.

Although Ms. Lang was notified by Jasmine’s lawyer of the court’s request for a reunification plan on April 24, 2012, and spoke with both parties’ attorneys about the court’s order on May 3, 2012, Ms. Lang failed to make any recommendation.

Jasmine sought to be reintroduced to S. for at least 10 months before the reintroduction occurred. While it is not clear from our record on appeal how Jasmine was finally able to secure visitation beginning in early February 2013, she may have acted on the 2009 parenting plan, because she began visitation at Kids at Heart, a supervised visitation provider. Between then and the time of trial, the court twice increased her visitation, removing any requirement for supervision and ordering that Jasmine’s other children could occasionally be included in her visitation with S.

Trial of the petition for nonparental custody took place over eight days in late September 2013 and early October 2013. Dozens of witnesses were called. While the trial court concluded in its decision that Jasmine was a fit parent, it entered one-and-a-half pages of findings in support of its conclusion that there would be actual detriment to S.’s growth and development if she were placed in her mother’s care. Its findings placed primary reliance on the testimony of Susan Holden, a school counselor and Michele Leifheit, who had been engaged to prepare an assessment of S.’s bonding with the Careys. The court’s findings also placed some reliance on the testimony of Lyn Lang,

No. 32367-6-III
In re the Custody of S.F.-T.C.

while at the same time stating that “it did appear that Ms. Lang did, perhaps at times lack some objectivity in regards to some of her opinions and positions in her actions in regard to this case.” CP at 340.

Based on its conclusion of actual detriment, the court granted the Careys’ nonparental custody petition. The parenting plan granted Jasmine visitation with S. for three hours on Mondays, five hours on Wednesdays, and one weekend a month. Jasmine appeals.¹

ANALYSIS

Circumstances under which a nonparent can be awarded custody

A parent has a fundamental liberty interest in raising his or her children without state interference. *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff’d sub nom., Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

“Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.” *Smith*, 137 Wn.2d at 15 (citing *Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)).

In Washington, chapter 26.10 RCW permits a third-party nonparent to petition a court for custody of a child. Because such a request necessarily implicates the parent’s

¹ Nick and Laura filed a cross appeal, but this court dismissed it upon their request.

No. 32367-6-III

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

fundamental right, this court affords a parent considerable deference when balancing the parent's rights against both the interests of third parties and children's rights. *J.E.*, 189 Wn. App. at 183-84. A court will only grant the third-party's petition when the nonparent establishes by clear and convincing evidence that "either the parent is unfit or custody with the parent would result in 'actual detriment to the child's growth and development.'" *Id.* at 184 (internal quotation marks omitted) (quoting *B.M.H.*, 179 Wn.2d at 234); *In re Custody of C.C.M.*, 149 Wn. App. 184, 206, 202 P.3d 971 (2009) (appropriate standard of proof is clear and convincing evidence).

A parent's rights may be outweighed when he or she is unfit. *In re Custody of Shields*, 157 Wn.2d 126, 142, 136 P.3d 117 (2006). Examples of unfitness include "the fault or omission by the parent seriously affecting the welfare of a child, preserving of the child's right to freedom from physical harm, illness or death, or the child's right to an education." *Id.* at 142-43. "If a parent's actions threaten the child's welfare, the State's interest in protecting children takes precedence" and as a result "the State is justified in removing the child from the home and, in certain cases, permanently terminating parental rights." *Id.* at 142.

"[P]arental rights may also be outweighed in custody determinations when actual detriment to the child's growth and development would result from placement with an otherwise fit parent." *Id.* at 143. There is a "presumption that a fit parent will act in the best interest of his or her child." *Id.* at 144 (citing *Troxel*, 530 U.S. at 69). "[T]he

No. 32367-6-III

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

interests of parents yield to state interests only where ‘parental actions or decisions seriously conflict with the physical or mental health of the child.’” *B.M.H.*, 179 Wn.2d at 239 (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)).

Whether placement with a parent will result in actual detriment to a child’s growth and development “is a highly fact-specific inquiry” and must be determined on a “‘case-by-case basis.’” *Id.* (internal quotation marks omitted) (quoting *Shields*, 157 Wn.2d at 143).

The requisite showing on the part of the nonparent is “‘substantial.’” *Shields*, 157 Wn.2d at 145 (quoting *In re Custody of Shields*, 120 Wn. App. 108, 123, 84 P.3d 905 (2004)). Further, a nonparent will only be able to show actual detriment in “‘extraordinary circumstances.’” *Id.* (quoting *In re Marriage of Allen*, 28 Wn. App. 637, 649, 626 P.2d 16 (1981)). Merely demonstrating that nonparental custody is in “the best interests of the child” is insufficient to show actual detriment. *J.E.*, 189 Wn. App. at 185.

In *B.M.H.*, our Supreme Court offered as examples of where the actual detriment standard has been met,

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 Wn. App. at 640-41, [626 P.2d 16, (1981),] 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 Wn. 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 Wn. App. 356, 783 P.2d 615 (1989).

179 Wn.2d at 236.

No. 32367-6-III
In re the Custody of S.F.-T.C.

Standard of evidence and evidence relied on in this case

“Appellate courts are generally reluctant to disturb a child custody disposition because of the trial court’s unique opportunity to personally observe the parties.” *In re Custody of Stell*, 56 Wn. App. 356, 366, 783 P.2d 615 (1989). For this reason, “a trial court’s custody disposition is not disturbed on appeal absent a manifest abuse of discretion.” *J.E.*, 189 Wn. App. at 182. A court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds. *In re Dependency of H.S.*, 188 Wn. App. 654, 663, 356 P.3d 202 (2015). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached using the wrong legal standard.” *Id.*

This court upholds a trial court’s finding of fact if it is supported by substantial evidence. *J.E.*, 189 Wn. App. at 183. “The determination of whether the findings of fact are supported by substantial evidence ‘must be made in light of the degree of proof required.’” *In re Dependency of A.M.M.*, 182 Wn. App. 776, 785-86, 332 P.3d 500 (2014) (quoting *In re Dependency of P.D.*, 58 Wn. App. 18, 25, 792 P.2d 159 (1990)). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

Whether the facts amount to actual detriment is a conclusion of law we review de novo.

No. 32367-6-III

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

Because we do not reweigh evidence or witness credibility, we focus on the trial court's findings and the evidence it found credible. The trial court's conclusion of actual detriment was based on findings that were themselves based on the testimony of three counseling professionals: Susan Holden, Michele Leifheit, and Lyn Lang. We have carefully reviewed the testimony of each witness.

Ms. Holden is a school counselor at Washington Elementary School in Kennewick, where S. attended first grade in the 2001-2002 school year. *Ms. Holden* testified at trial that she got to know S. during the year and was aware that S. had been disappointed when her father's girlfriend moved away to Prosser and when a pet parrot died. She knew that later in the year, S. suffered the trauma of losing her father to suicide. *Ms. Holden* was also aware that S. had been the victim of sexual assault earlier in her life, and learned from S. during the school year that S. was not allowed to see her mother. At the fall 2013 trial, *Ms. Holden* acknowledged that she had not seen or spoken to S. since June 2012.

Asked by the Careys' lawyer whether she had an opinion whether it would be detrimental to S. to be returned to her mother, *Ms. Holden* expressed her opinion that

at that stage in her life and from all the experiences that [S.] had experienced that year that it was really important for her to know stability and to have some continuity in her life. And since she had not been with her mother for quite some time, *I did not think it would be wise* to move her to a brand-new living situation when she was dealing with grief over her father's loss and the removal of her brother from her home.

No. 32367-6-III

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

Report of Proceedings (RP) at 275-76 (emphasis added). Ms. Holden was clear that her opinion was with respect to “that point in [S.’s] life,” namely, the spring of 2012. RP at 277.

Michele Leifheit, a licensed mental health counselor, testified to an assessment of the bond between S. and the Careys that she was retained to prepare in June 2013. In order to prepare the assessment, she spent about two hours in the Careys’ home, observing S.’s interaction with her uncle and aunt, and about 1½ - 2 hours in her office, speaking with S. and observing her interaction with her grandmother. Ms. Leifheit had not been asked to assess whether Jasmine had a bond with S. or observe any interaction between S. and Jasmine. She did not meet or speak with Jasmine in the course of her work.

Ms. Leifheit expressed the opinion that S. and the Careys were “clearly bonded” and, when asked if she had an opinion as to how S. would be affected if she were removed from the Careys’ care, she testified

I think that it *could* be detrimental to [S.], to her definitely emotional, psychological, maybe possibly even physical well-being because of the attachment that I believe exists if that were disrupted and removed from her that it could be very detrimental to her. And again because she has a history of losses in her life so that *could* exacerbate . . . the impact of that.

RP at 368 (emphasis added). When cross-examined, Ms. Leifheit acknowledged that the fact that a child has an attachment with one individual does not rule out that an attachment exists between the child and another individual.

No. 32367-6-III

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

Finally, *Ms. Lang*, also a licensed mental health counselor, testified to her counseling of S. off and on for several years beginning in 2008, when Jasmine sought counseling after learning of Higgins' sexual assault; resuming in 2009, when Kyle renewed counseling after S. was taken from Jasmine's custody; and beginning again in 2012, when Janet Carey made contact with *Ms. Lang* following Kyle's suicide and commencement of the nonparental custody dispute.

In direct examination, *Ms. Lang* was asked whether, if S.'s bond with the Careys were broken and she were removed from their care, "[would] that cause a trauma to [S.]," in response to which she answered "I'm afraid it would." RP at 469. The Careys' lawyer had reviewed with *Ms. Lang* the loss, third party molestation and disappointment to which [S.] had been subjected in her young life, and *Ms. Lang* testified:

That kind of cumulative trauma can really cause a lot of problems for a person in their life, even physical problems, and definitely mental health problems. Multiple grief causes depression quite often. So I guess that would be my biggest concern for [S.].

RP at 469-70. She later testified to a study that had been done by Kaiser Permanente about "adverse childhood experience" and the long-term effect it can have into adulthood, which she "keep[s] in mind" when counseling children. RP at 1141-42.

While she had never actually performed the analysis as to S., she testified, "I think she's

No. 32367-6-III

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

at risk for long-term consequences.” RP at 1142. In addition to the consequences she had identified earlier (physical and mental health problems) she added, “[a]lcoholism, drug abuse, early pregnancies [and] promiscuity.” *Id.*

Ms. Lang testified that the reason she had continually recommended against S. having visitation with Jasmine during the custody proceeding was because she “wanted to make . . . sure [S.] didn’t start seeing Jasmine if Jasmine was still using drugs and was still having a lot of instability in her life because I didn’t want anything to start and then fall apart for [S.]” RP at 454-55. When cross-examined, she admitted that she never made any attempt to contact Jasmine to find out firsthand how she was doing, and had never asked for proof of her sobriety or blood tests; she agreed she had made “no attempts to find out whether or not there was stability for Jasmine.” RP at 1123.

Ms. Lang acknowledged that since visitation between S. and Jasmine resumed despite Ms. Lang’s opposition, S. had “reported positive things about her visits with her mom.” RP at 1169. In S.’s first counseling session with Ms. Lang after visitation with her mother resumed, S. told Ms. Lang that the visitation “went well.” RP at 1124. She later told Ms. Lang that “she enjoyed the visits” and she “was having a good time.” RP at 461, 1127. Ms. Lang acknowledged that on the first Mother’s Day after visitation resumed, S. made a card for Jasmine that said, “Happy Mommy Day. I miss you, Mommy. Did you get a job? Yes, no. I love you, Mommy.” RP at 1116. Ms. Lang

also testified to a report she had received from Janet Carey that in a conversation with S. about losing her daddy, S. had said, “It’s good because now I can see Jasmine, bad because I can’t see dad.” RP at 1125. She admitted that in one of S.’s counseling sessions before overnight visits with Jasmine were ordered, S. told Ms. Lang that she wanted to spend the night with her mom.

At the time of trial, Ms. Lang testified that, generally, S. was doing “amazingly well” in dealing with her father’s suicide. RP at 441. She testified that the last time she had seen S., “she was looking very happy.” RP at 467.

The trial court’s findings do not support an “actual detriment” conclusion

Even under the deferential standard of review, the evidence relied on by the trial court was insufficient to establish findings that would in turn support the conclusion that reunification would cause actual detriment to S.’s growth and development in the future. Our Supreme Court’s decision in *B.M.H.* and our own recent decision in *J.E.* are controlling.²

In *B.M.H.* the nonparent seeking custody was Michael Holt, B.M.H.’s onetime stepfather. B.M.H.’s natural father died early in his mother’s pregnancy and Mr. Holt was in B.M.H.’s life from his birth—initially as a close friend and moral support for

² We recognize that both decisions were filed following the trial court’s decision in this case.

No. 32367-6-III

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

B.M.H.'s mother and, following the couple's marriage, as B.M.H.'s stepfather. While the couple divorced only two years into the marriage, B.M.H.'s mother allowed Mr. Holt visitation by agreement and even changed B.M.H.'s last name from the biological father's last name to Mr. Holt's last name following the divorce. When B.M.H. was eight years old, there were discussions about Mr. Holt adopting B.M.H., but it did not happen because of adverse effects it would have on B.M.H.'s survivor benefits received as a result of his biological father's death.

When Mr. Holt learned that B.M.H.'s mother intended to move out of state, he petitioned for nonparental custody. "The [guardian ad litem] submitted a report stating that B.M.H. viewed Mr. Holt as a father and that it would be detrimental for B.M.H. to terminate contact with Mr. Holt." *B.M.H.*, 179 Wn.2d at 233. The court found adequate cause to proceed to a hearing on the basis that "if the Respondent/mother denies contact between Petitioner and minor child it would cause actual detriment to the minor child's growth and development if the relationship between the minor child and the Petitioner is not protected." *Id.*

Notwithstanding the conclusions of the guardian ad litem and the superior court that a disruption in B.M.H.'s lifelong relationship with his onetime stepfather would result in actual detriment to his growth and development, the Supreme Court concluded that "[t]hese are not the kind of substantial and extraordinary circumstances that justify

state intervention with parental rights.” *Id.* at 239.

Although the importance of preserving fundamental psychological relationships and family units was part of the court’s analysis in [the Supreme Court’s earlier decisions 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. . . . 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.”

Id. (quoting *Sumey*, 94 Wn.2d at 762).

J.E. is even more clearly on point. *J.E.* began living with his aunt and uncle when he was just two years old and continued to reside with them for nine years, while his mother struggled with mental illness and his natural parents remained unable to deal with the difficult terminal illness of *J.E.*’s sister. While *J.E.* was living with his aunt and uncle, his sister, with whom he was extremely close, suffered a traumatic death and *J.E.* became bonded to his cousins. Eventually, the Eatons, *J.E.*’s biological parents, determined that they were again capable of caring for *J.E.* and decided that they no longer wanted him to live with his aunt and uncle. In response, the Culvers, *J.E.*’s aunt and uncle, petitioned for nonparental custody.

The trial court determined that the Eatons were fit parents but concluded that it would not be in *J.E.*’s best interest for him to be returned to their full custody. Relying

No. 32367-6-III

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

on testimony from the guardian ad litem, the trial court concluded that J.E. would suffer actual detriment if he was removed from the "Culvers' family unit." *J.E.*, 189 Wn. App. at 181.

This court reversed the decree of custody, concluding that while the court's findings and conclusions included a recital of actual detriment, the court had, in substance, applied the too-low standard of the "best interests" of J.E. *Id.* at 189. The trial court record did not demonstrate that "J.E. has significant special needs that would not or could not be met if he were in the Eatons' physical custody." *Id.* Applying the appropriate standard, the Culvers' evidence of the traumas J.E. had endured and his close bond developed over nine years did not meet their burden of establishing actual detriment to his growth and development if returned to the custody of his parents.

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. *Id.* at 190. A showing of "[s]pecific facts" is required. *Id.*

In awarding custody to Nick and Laura Carey, the trial court concluded that the

No. 32367-6-III

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

evidence established by clear, cogent and convincing evidence that “[S.] would suffer actual detriment to her stability, well-being, growth and development” if removed from their custody. CP at 341. The supporting findings were findings of an asserted need for stability because of the traumas suffered so far in S.’s life. There was no identification in the findings of a special need on S.’s part that could not be met by her mother.

Properly analyzed, the question is whether there is evidence of extraordinary circumstances such that Jasmine is incapable of responding to her daughter’s needs. As earlier noted, the law presumes that fit parents will act in the best interests of their children.

Based on Jasmine’s evidence, the trial court found her to be a fit parent, and that she “would be able to safely provide for her children.” CP at 338. Unlike *Stell*, where an actual detriment standard was based on a child’s serious behavioral problems beyond his father’s ability to handle, there is no evidence suggesting that S. has any behavioral problems, let alone behavioral problems that Jasmine will be unable to handle. Unlike *R.R.B.*, where there was testimony detailing multiple disorders from which the child suffered and concern for the child’s safety, there was no testimony that S. is suicidal or that she suffers from disorders. In fact, the court found that “[S.] is doing amazingly well

No. 32367-6-III

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

for everything that she has been through.” CP at 340. Finally, unlike *Allen*, there was no testimony that S. has a disability that Jasmine is unable to care for.

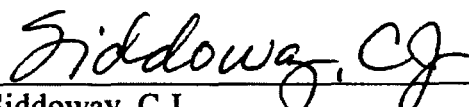
Instead, in this case, the trial court relied on speculation: the speculation of Ms. Leifheit that removing S. from the Careys’ custody “could” be detrimental and “could” exacerbate S.’s earlier traumas, RP at 368; the testimony of Ms. Lang that she was “afraid” removal from the Careys would “cause a trauma,” that cumulative trauma “can” cause problems, and that S. was “at risk” of consequences should the transfer of her custody prove traumatic; RP at 469-70, 1142; and the opinion of Ms. Holden arrived at fifteen months earlier, shortly after Kyle’s suicide, that “[she] did not think it would [have been] wise” to move S. into her mother’s home at that time. RP at 276. None of the witnesses spoke at all to any limitations or shortcomings in Jasmine’s ability to be a good mother to S. None had any foundation from which they *could* speak to the actual detriment issue, since none ever sought information or input about or Jasmine’s situation in 2012 and 2013.

For these reasons, the trial court erred in concluding that returning S. to Jasmine’s custody would result in actual detriment to S.’s future growth and development. The trial court erred in granting custody to Nick and Laura Carey.

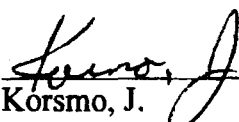
We reverse the decree of nonparental custody and remand with directions for the trial court to enter orders transitioning S. back to the custody of her mother.

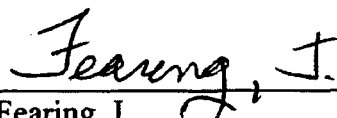
No. 32367-6-III
In re the Custody of S.F.-T.C.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, C.J.

WE CONCUR:


Korsmo, J.


Fearing, J.

ZARAGOZA NOVOTNY PLLC

April 13, 2016 - 2:49 PM
Transmittal Letter

FILED
Apr 13, 2016
Court of Appeals
Division III
State of Washington

Document Uploaded: 323676-Carey P4R Final.pdf

Case Name: Custody of S.F.-T.C.

Court of Appeals Case Number: 32367-6

Party Respresented: Respondents Careys

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re the Custody of:

S.F.T.C.,

Child

and

JASMINE CAREY,

Appellant

JANET CAREY

NICK CAREY

LAURA CAREY

Respondents

No. 32367-6-III

DECLARATION
OF SERVICE

Jayne Hibbing certifies as follows:

On March 13, 2016, I served upon the following true and correct copies of the Petition for Review, and this Declaration, by:

depositing same with the United States Postal Service, postage paid

Ken Masters
Masters Law Group
241 Madison Avenue No.
Bainbridge Island, WA 98110

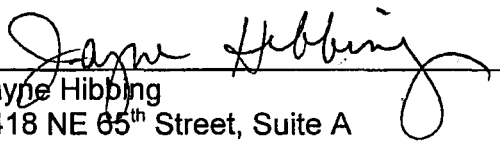
DECLARATION OF SERVICE

Page 1 of 2

Kari Hayles-Davenport
KARI HAYLES-DAVENPORT PLLC
8927 W. Tucannon Ave., Suite A108
Kennewick, WA 99336

Jackie Shea Brown
719 Jadwin Avenue
Richland, WA 99352

I certify under penalty of perjury that the foregoing is true and correct.


Jayne Hibbing
3418 NE 65th Street, Suite A
Seattle, WA 98115
206-682-1771

No Comments were entered.

Sender Name: Patricia Novotny - Email: patricia@novotnyappeals.com

FILED

Apr 13, 2016
Court of Appeals
Division III
State of Washington

ZARAGOZA NOVOTNY PLLC

April 13, 2016 - 2:49 PM

Transmittal Letter

Document Uploaded: 323676-2016-04-13 Carey_Dec of Serv_Petition for Review.pdf

Case Name: Custody of S.F.-T.C.

Court of Appeals Case Number: 32367-6

Party Respresented: Respondents Careys

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

Proof of Service on Trial Counsel

Sender Name: Patricia Novotny - Email: patricia@novotnyappeals.com