

FILED
SUPREME COURT
STATE OF WASHINGTON
8/6/2021 3:49 PM
BY ERIN L. LENNON
CLERK

No. 99980-5

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:

S.A.-M., Child,

GABRIEL PINON,

Respondent,

and

JOSE LUIS ALVAREZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent

TABLE OF CONTENTS

A. Relief Requested.1

B. Restatement of the Facts.1

C. Court of Appeals’ Decision. 5

D. Grounds for Denying Review. 8

 1. Neither party challenges the Court of Appeals’ interpretation of the de facto parentage statute, and it does not raise an issue of substantial public interest. 8

 2. That a de facto parent stands in parity with a child’s natural parent has long been the law, and does not raise an issue of substantial public interest.10

 3. The Court of Appeals’ affirmance of the trial court’s finding that petitioner is unfit and establishing the residential schedule as supported by substantial evidence does not conflict with any of this Court’s decisions.12

E. Conclusion.13

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Custody of A.F.J.</i> , 179 Wn.2d 179, 314 P.3d 373 (2013)	10
<i>Custody of B.M.H.</i> , 179 Wn.2d 224, 315 P.3d 470 (2013)	11
<i>Matter of J.D.W.</i> , 14 Wn. App.2d 388, 471 P.3d 228 (2020)	10
<i>McDaniels v. Carlson</i> , 108 Wn.2d 299, 738 P.2d 254 (1987)	10
<i>Parentage of L.B.</i> , 155 Wn.2d 679, 122 P.3d 161 (2005), <i>cert. denied</i> , 547 U.S. 1143 (2006).....	10, 11
<i>Pub. Hosp. Dist. No. 1 of King Cnty. v.</i> <i>Univ. of Wash.</i> , 182 Wn. App. 34, 327 P.3d 1281, <i>rev. denied</i> , 181 Wn.2d 1019 (2014).....	11
<i>Ridgeview Properties v. Starbuck</i> , 96 Wn.2d 716, 638 P.2d 1231 (1982)	12
STATUTES	
RCW 26.09.187	4, 8
RCW 26.09.191	1, 5, 6
RCW 26.26A.110	3
RCW 26.26A.440	3-4, 8, 9
RULES AND REGULATIONS	
RAP 13.4.....	8-13

A. Relief Requested.

Respondent Gabriel Pinon asks this Court to deny review of the Court of Appeals decision affirming the trial court's order 1) establishing respondent as a de facto parent of SA-M, the biological daughter of petitioner Jose Luis Alvarez, 2) designating respondent as SA-M's primary residential parent, and 3) imposing RCW 26.09.191 limitations on petitioner's residential time and decision-making.

B. Restatement of the Facts.

SA-M was born in September 2010 to Karina Morales-Rodriguez; her biological father is petitioner Jose Luis Alvarez. Mr. Alvarez moved from Washington State after SA-M's birth. In April 2012, when SA-M was 18 months old, she and her mother Karina began living with respondent Gabriel Pinon, with whom Karina had SA-M's half-brother M in May 2015, and Mr. Pinon's two daughters from a previous relationship. (7/8 RP 18-19, 27)

Mr. Pinon and Karina were engaged to be married when Karina was murdered at work on March 26, 2016. (7/8 RP 37) Mr. Pinon "was the only father [SA-M] knew before her mother was murdered." (Unchallenged Findings of Fact 8, CP 851) Mr. Alvarez, who was living in Oklahoma when Karina was killed (CP 9), had only

seen SA-M once between 2012 and 2016, sometime in 2014. (7/8 RP 42)

On March 30, 2016, Mr. Pinon commenced this action for third party custody under RCW ch. 26.10, as SA-M's "non-biological father," pro se and with civil filing fees waived. (CP 4) After being served with Mr. Pinon's petition for custody, Mr. Alvarez sought an order placing SA-M with him. (CP 482) In April 2017, SA-M was temporarily placed with Mr. Alvarez pending trial, based on the recommendation of the GAL, whose understanding of the law at the time was that under the third party custody statute, RCW ch. 26.10, he was compelled to recommend that a child's biological father be given custody unless he was unfit. (7/10 RP 50) The GAL testified that the recommendation was "gut-wrenching;" "it was very difficult; it was very stressful;" it was the GAL's "recurrent thought" that he "in essence [was] taking her away from her other parent." (7/10 RP 50)

After SA-M was temporarily placed with Mr. Alvarez, her well-being deteriorated. SA-M's grades plummeted. Mr. Alvarez did not continue SA-M's therapy with the counselor Mr. Pinon had engaged to help her with her grief over her mother's passing. (7/10 RP 45-46) SA-M's school made a mandatory CPS report when SA-M showed up at school with bruises; Mr. Alvarez admitted hitting her with a belt.

(7/10 RP 21, 46-47) Based on that report, SA-M was placed in counseling, but with a different counselor, but Mr. Alvarez soon ended that therapy as well. SA-M began running away from Mr. Alvarez's home. On one occasion in July 2018, when she was seven years old, SA-M ran away after Mr. Alvarez hit her with a fishing pole at a sporting goods store. She was picked up and taken by the police to the hospital after 11 p.m. (7/10 RP 44-49, Ex 4) A second CPS report was made then. (Ex 4, 7/10 RP 22)

The therapist SA-M had most recently seen before trial diagnosed her with major depressive disorder, anxiety disorder, and acute stress disorder. (7/10 RP 9) The GAL testified that when SA-M left Mr. Pinon's care in 2017 she was not "clinically depressed," whereas by the time of trial she was. (7/10 RP 64-65)

The Uniform Parentage Act, enacted effective January 1, 2019, established statutory factors for determination of de facto parent status. An individual seeking de facto parent status must demonstrate seven factors by a preponderance of the evidence. RCW 26.26A.440(4)(a)-(g). The statute expressly provides that a de facto parent shall have the same rights and responsibilities as a biological parent, RCW 26.26A.110, consistent with previous case law. In May 2019, Mr. Pinon, now represented by counsel, was allowed to amend

his petition to seek de facto parent status under RCW ch. 26.26A, rather than third party custody under RCW ch. 26.10.

The case went to trial in July 2019. The trial court found that Mr. Pinon proved each of the seven factors to establish himself as a de facto parent under RCW 26.26A.440. (CP 850-52) On appeal, Mr. Alvarez did not challenge the trial court's findings on any of these factors, save one. In finding that it was in SA-M's best interests for her relationship with Mr. Pinon to continue, under RCW 26.26A.440(4)(g), the trial court found it was in SA-M's best interest that Mr. Pinon "be her primary parent because of his shown parenting abilities and the close bond [SA-M] has with him and because [Mr. Alvarez] is not a fit parent." (FF 10, CP 852)

After finding Mr. Pinon was SA-M's de facto parent, the trial court considered the factors under RCW 26.09.187 to establish a residential schedule in SA-M's best interests. In determining that SA-M should be placed primarily with Mr. Pinon, the trial court found SA-M's "strength, nature and stability of relationship is stronger with Gabriel Pinon than [Mr. Alvarez] and she is more closely bonded to Gabriel . . . and views Gabriel as her father. Gabriel has done the majority of parenting factors on a daily basis for the

majority of the child's life and taken greater responsibility to perform the role of a parent" than Mr. Alvarez. (FF 20, CP 853)

The trial court found that Mr. Alvarez's residential time with SA-M was subject to RCW 26.09.191 limiting factors, and should be with non-professional supervision. (FF 20, CP 853) The trial court found that Mr. Alvarez "abused or threatened to abuse a child. The abuse was: physical repeated emotional abuse." (CP 855) The trial court also found that Mr. Alvarez "uses conflict in a way that endangers or damages the psychological development of the child." (CP 856)

C. Court of Appeals' Decision.

Mr. Alvarez appealed the trial court's decision to Division Three of the Court of Appeals. In the Court of Appeals, Mr. Alvarez did not challenge the trial court's determination that Mr. Pinon was SA-M's de facto parent, but only that the trial court designated Mr. Pinon as primary residential parent after finding him to be a de facto parent. (See App. Br. 1; Assignment of Error 1: "In granting the de facto parentage petition, the court erred by determining Gabriel Pinon should be the primary parent as it was in the child's best interests."; Op. 13: "Mr. Alvarez's primary challenge on appeal seems to be trial court's determination of custody, not parentage.")

Although not challenging the findings themselves, Mr. Alvarez also challenged the trial court's imposition of limitations on his residential time and decision-making for SA-M based on its RCW 26.09.191 findings.

Division Three affirmed the trial court's decision on June 15, 2021. (Petition, Appendix: (Op.)) Division Three ruled that "[t]o the extent that Mr. Alvarez is contesting the court's finding that Mr. Pinon is a de facto parent, we reject his argument" (Op. 11), having treated Mr. Alvarez's argument that when both men are "equally capable parents . . . Mr. Alvarez's biological connection gives him an advantage over Mr. Pinon in determining custody" as one challenging Mr. Pinon's de facto parentage status and not custody. (Op. 11) In rejecting any challenge to the de facto parentage determination, the Court held "[i]n finding that it is in SA-M's best interest to continue a relationship with Mr. Pinon, the court does not have to find that Mr. Pinon is a better parent than Mr. Alvarez or that Mr. Alvarez is unfit. Instead, the focus is on the relationship between SA-M and Mr. Pinon." (Op. 11)

Division Three held that to the extent the trial court appeared to be considering "custody" in making its finding that it would be in SA-M's best interests to continue her relationship with Mr. Pinon by

referencing him as “primary parent,” and thus conflating the “findings for a de facto parent with the findings necessary for custody, [] any error was harmless.” (Op. 12) The Court noted that it was clear the trial court’s determination that it was in SA-M’s best interests to continue her relationship with Mr. Pinon was based on its findings of her “close bond” with him, and “his shown parenting abilities.” (Op. 12; *See* FF 10, CP 852) As for Mr. Alvarez’s “primary challenge on appeal” to custody, Division Three held that upon establishing Mr. Pinon as a de facto parent, the trial court’s decision to designate him as primary residential parent was well within its discretion and supported by substantial evidence. (Op. 13-14)

In particular, the Court held there was evidence “that Mr. Alvarez was physically and emotionally abusive and that he employed an abusive use of conflict in a way that damaged SA-M’s development. . . . Mr. Alvarez had a history of abandoning both of his children. Prior to the death of Ms. Morales, Mr. Alvarez had visited his daughter SA-M one time in four years. Testimony at trial indicated that he was making no attempt to be involved in his youngest daughter’s life.” (Op. 16)

Finally, the Court of Appeals rejected Mr. Alvarez’s argument that designating Mr. Pinon as primary residential parent “interferes

with his fundamental rights as a natural parent” because “[o]nce the court properly declared Mr. Pinon to be a de facto parent, he stood in parity with Mr. Alvarez for purposes of residential time and decision-making.” (Op. 14)

D. Grounds for Denying Review.

- 1. Neither party challenges the Court of Appeals’ interpretation of the de facto parentage statute, and it does not raise an issue of substantial public interest.**

The Court of Appeals’ decision does not raise an issue of substantial public interest warranting review under RAP 13.4(b)(4) simply because its decision “involved the newly enacted de facto parentage statute.” (Petition 8) Neither petitioner nor respondent challenges the Court’s decision that the de facto parentage statute requires that a trial court first determine whether the individual seeking residential time has proven to be a de facto parent by establishing, among six other factors, that “continuing the relationship between the individual and the child is in the best interest of the child” under RCW 26.26A.440 before it determines what residential schedule is in the best interests of the child under RCW 26.09.187. (Op. 10-11)

Petitioner’s challenge to the Court of Appeals’ decision is not that it was wrong in holding that under RCW 26.26A.440 there is “separate best interest considerations” for establishment of de facto parentage and a residential schedule. Instead, petitioner complains that the Court did not agree with him that the trial court’s finding that it was in SA-M’s “best interest that [Mr. Pinon] be her primary parent because of his shown parenting abilities and the close bond [SA-M] has with him and because [Mr. Alvarez] is not a fit parent” was insufficient to support a determination that it was in SA-M’s best interest for her relationship with Mr. Pinon to continue, as required under RCW 26.26A.440. (Petition 11)

Affirmance of this fact-specific determination is not grounds for further review. The Court of Appeals held that the trial court “found that it was in SA-M’s best interest to continue her relationship with Mr. Pinon. . . . [T]his finding is supported by evidence that SA-M and Mr. Pinon had a strong bond and Mr. Pinon had demonstrated parenting abilities. The additional finding—that it is in SA-M’s best interest for Mr. Pinon to be her primary parent—implicitly recognizes that their relationship should continue.” (Op. 12) There are no grounds under RAP 13.4(b) to warrant review of this decision.

“The criteria for determining the best interests of the child are varied and highly dependent on the facts and circumstances of the case at hand.” *Matter of J.D.W.*, 14 Wn. App.2d 388, 411, ¶ 31, 471 P.3d 228 (2020) (quoting *McDaniels v. Carlson*, 108 Wn.2d 299, 312, 738 P.2d 254 (1987)). The Court of Appeals’ decision holding that the trial court’s findings in this individual case, based on its particular facts, supports its determination that it was in the child’s best interests to continue a relationship with respondent does not raise an issue of substantial public interest warranting review under RAP 13.4(b)(4).

2. That a de facto parent stands in parity with a child’s natural parent has long been the law, and does not raise an issue of substantial public interest.

The Court of Appeals’ decision holding that the trial court’s decision awarding residential time to respondent, who has been adjudicated as SA-M’s de facto parent, did not interfere with petitioner’s fundamental rights as a natural parent also does not raise an issue of substantial public interest under RAP 13.4(b)(4). (Pet. 12-13) This principle has long been well-established by this Court, in *Parentage of L.B.*, 155 Wn.2d 679, 710, ¶ 45, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006); *Custody of A.F.J.*, 179 Wn.2d 179,

190, ¶ 17, 314 P.3d 373 (2013); *Custody of B.M.H.*, 179 Wn.2d 224, 241, ¶ 33, 315 P.3d 470 (2013), even before it was codified in the de facto parentage statute.

When an individual's status as de facto parent has been established, that individual is placed "in parity with biological and adoptive parents in our state." *L.B.*, 155 Wn.2d at 710, ¶ 45. Thus, in affirming the trial court's decision, the Court of Appeals properly held that "the rights and responsibilities that attach to de facto parents 'do not infringe on the fundamental liberty interests of the other legal parent in the family unit.'" (Op. 15, citing *L.B.*, 155 Wn.2d at 712) Review of that decision is not warranted under RAP 13.4(b)(4).

Petitioner does not purport to seek review of the Court of Appeals' decision under RAP 13.4(b)(3) based on any claim that the decision raises a "significant question of law under the Constitution." But even if he had, review would not be warranted. "Naked castings into the constitutional seas are not sufficient to command judicial consideration and discussion." *Pub. Hosp. Dist. No. 1 of King Cnty. v. Univ. of Wash.*, 182 Wn. App. 34, 49, ¶ 43, 327 P.3d 1281 (quoted source omitted), *rev. denied*, 181 Wn.2d 1019 (2014).

3. The Court of Appeals' affirmance of the trial court's finding that petitioner is unfit and establishing the residential schedule as supported by substantial evidence does not conflict with any of this Court's decisions.

The Court of Appeals affirmed the trial court's residential schedule because "substantial evidence supports the trial court's finding that Mr. Alvarez is an unfit parent and should have limitations on his residential time." (Op. 16) Review of the Court's decision is not warranted under RAP 13.4(b)(1) because it does not conflict with this Court's decision in *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982) (Petition 13-14).

Ridgeview Properties stands for the unremarkable proposition that appellate review "is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." 96 Wn.2d at 719. The Court of Appeals' decision is wholly consistent with that standard: after setting out the substantial evidence on which the trial court relied in making its findings, the Court affirmed because "there is substantial evidence to support the trial court's findings and conclusions that Mr. Pinon is SA-M's de facto parent, that primary residential time should be granted to Mr. Pinon, with limitations placed on Mr. Alvarez's residential time."

(Op. 16-18) The Court's decision does not warrant review under RAP 13.4(b)(1).

E. Conclusion.

This Court should deny review.

Dated this 6th day of August, 2021.

SMITH GOODFRIEND, P.S.

By: 

Catherine W. Smith

WSBA No. 9542

Valerie A. Villacin

WSBA No. 34515

Attorneys for Respondent

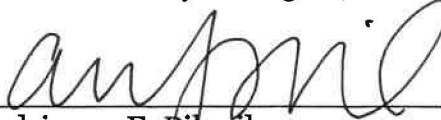
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 6, 2021, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Emily Schwab Hazel & Schwab 1420 Summitview Ave Yakima WA 98902-2941 emily@davidhazel.com dianar@davidhazel.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kenneth Kato 1020 N Washington St Spokane, WA 99201-2237 khkato@comcast.net	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 6th day of August, 2021.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

August 06, 2021 - 3:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99980-5
Appellate Court Case Title: In re the Custody of: S.A.-M.
Superior Court Case Number: 16-3-00354-3

The following documents have been uploaded:

- 999805_Answer_Reply_20210806154858SC481641_4984.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was 2021 08 06 Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dianar@davidhazel.com
- emily@hazelschwab.com
- khkato@comcast.net
- valerie@washingtonappeals.com

Comments:

Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20210806154858SC481641