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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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No. 69757-9-I

COURT OF APPEALS, DIVISION 1
OF THE
STATE OF WASHINGTON

IN RE THE CUSTODY OF:

A.V.X.M and T.M.X.,

Children,

PHET XAYKOSY,

Appellant,

And

ADAM MARTIN,
JERRI LYNN MARTIN,
TAE SAVON XAYKOSY,

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contentsi

Table of Authoritiesii

Introduction.....1

Assignments of Error.....3

Statement of the Case.....3

Arguments5

I. RCW 26.10.160(3) and RCW 26.09.240 were found unconstitutional, rendering no explicit statutory authority for a third-party to request visitation from a fit parent.....6

a. RCW 26.10.160(3) and RCW 26.09.240 both provide statutory authority for a third-party to request visitation.....6

b. Both statutes have been found unconstitutional because the standard they provide is insufficient to serve as a compelling state interest to overrule a parent's fundamental rights.....6

c. The constitutionally protected fundamental right applies to parents (biological, stepparents, foster parents, de facto parents), not to Jerri Martin, who only have custody rights.....8

II. Absent statutory authority, Washington Courts have held that a third-party may request visitation under equity principles.....9

III. This case shall be remanded to the trial court for it to determine a visitation schedule with Phet Xaykosy that is for the best interest of the children.....12

Conclusion13

TABLE OF AUTHORITIES

Cases

<i>E.N.O. v. L.M.M.</i> , 429 Mass. 824, 711 N.E.2d 886 (1999).....	11
<i>In the Matter of the Parentage of J.A.B.</i> , 146 Wn.App.417, 191 P.3d 71 (2008).....	9
<i>In re Custody of H.S.H-K.</i> , 193 Wis.2d 649, 533 N.W.2d 419 (1995)	11
<i>In re Custody of Sara Skyanne Smith</i> , 137 Wn.2d 1, 969 P.2d 21 (1998).....	6, 7, 8
<i>In re Marriage of Jeffrey E. Anderson</i> , 134 Wn.App 506, 141 P.3d 80 (2006).....	5, 10
<i>In re Parentage of C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005).....	8, 10
<i>In re Parentage of L.B.</i> , 155 Wash.2d 679, 122 P.3d 161 (2005).....	8, 10
<i>Koelle v. Zwiren</i> , 284 Ill.App.3d 778, 672 N.E.2d 868 (1996).	10, 11
<i>Multicare Med. Ctr. v. Department of Social & Health Servs.</i> , 114 Wash.2d 572, 790 P.2d 124 (1990).....	6
<i>Troxel v. Granville</i> , 530 U.S. 57, 120 S.Ct. 2054 (2000).....	7, 8

Statutes

RCW 26.09.240.....	6
RCW 26.10.160.....	4, 6, 8, 9

Rules

Rules of Appellate Procedure 14.213

Rules of Appellate Procedure 14.313

INTRODUCTION

This appeal stems from a grandparent's request for visitation of her grandchildren (hereinafter "the children") when the children are placed in the custody of another grandparent after the children's parents are found unfit under a non-parental custody petition.

The children, A.V.X.M. and T.M.X. were in the custody of their parents, Tae Xaykosy and Adam Martin, before Tae Xaykosy was incarcerated for assaulting Adam Martin. While Tae was incarcerated, the children were cared for by Phet Xaykosy, the children's maternal grandmother, Adam, and the children's two adult biological half-sisters, Alynda Xaykosy and Alyssa Xaykosy. Phet Xaykosy historically cared for the children. While Tae was incarcerated, Phet Xaykosy cared for the children and was the only person to maintain the children's connection to their Laotian heritage, tradition, culture, food, language, and religion.

Jerri Martin eventually took temporary custody of the children when she petitioned for nonparental custody against their parents, Adam and Tae. Tae was incarcerated and was not able to meaningfully defend the petition. Adam eventually gave in to Jerri Martin and moved in to live with her. Phet Xaykosy eventually intervened in Jerri Martin's petition so that she can request to see the children. Under a temporary order, Phet Xaykosy was awarded visitation. Phet Xaykosy subsequently filed a

petition for nonparental custody of the children. The two cases were consolidated. Tae is still incarcerated.

In her trial brief, Phet Xaykosal asked the court to grant her custody of the children. Phet Xaykosal also asked the court that, in the event that her request for custody is denied, she is allowed visitation. On the first day of trial, in a motion in limine, Jerri Martin requested the court to preclude the issue of visitation from trial on the basis that our State's third-party custody statute was declared unconstitutional. Over the objection of Phet Xaykosal, the trial court agreed with Jerri Martin and precluded Phet Xaykosal from requesting visitation at trial.

After a five-day trial, the court found the parents unfit. The court found that it was for the best interest of the children to grant custody of the children to Jerri Martin, not Phet Xaykosal. Because the issue of grandparent's visitation was precluded from trial, the trial court did not make any finding regarding such visitation.

This appeal followed. Phet Xaykosal is not appealing the trial court's finding that it is for the best interest of the children that Jerri Martin has custody, which was within the trial court's fact finding discretion. The issue presented for this court is to decide, as a matter of law in the State of Washington, whether third-party request for visitation

is allowed, and the trial court erred when it precluded Phet Xaykosal from requesting visitation.

ASSIGNMENTS OF ERROR

First Assignment of Error: The trial court erred when it ruled that visitation request by third-party was not allowed per statute, therefore, precluding Phet Xaykosal from requesting visitation at trial.

Issue: Did the court err when it found that request for third-party visitation was not allowed per statute?

Second Assignment of Error: The trial court erred when it ruled that Phet Xaykosal did not have standing to seek for visitation and provided her no terms for visitation or contact with the children.

Issue: Absent express statutory authority, does a third-party have standing to seek visitation in custody proceeding?

STATEMENT OF THE CASE

On the eve of trial, in a motion in limine, Jerri Martin moved the court to dismiss Phet Xaykosal's petition for non-parental custody. Clerk's Papers (CP) at 8. At motion's oral argument, Jerri Martin requested the court to preclude the issue of visitation from trial. Report of Proceedings (RP) at 12.

Phet Xaykosal requested at trial to grant her petition for custody of the children. RP at 12. In the event that her petition was denied and

custody of the children given to Jerri Martin, she requested the court to allow her visitations of the children because she was allowed to intervene in Jerri Martin's petition for non-parental custody. RP at 13.

The trial court dismissed Phet Xaykosy's request for visitation within the third-party custody action. RP at 17. Specifically, the trial court found that: (1) Phet Xaykosy had no standing to seek visitation with the children based on a Petition for Non-Parental Custody; and (2) the issue at trial would be limited to custody and not visitation as between Jerri Martin and Phet Xaykosy. CP at 78. The trial court specifically ordered that: (1) visitations by third-party is not allowed per statute; and (2) Phet Xaykosy shall not be entitled to seek visitation in this trial. *Id.*

Because of the order to preclude Phet Xaykosy's request for visitation, Phet Xaykosy did not present any arguments or request for visitation at trial. In the Findings of Fact and Conclusions of Law, the trial court found that it was in the best interest of the children to be placed in the custody of Jerri Martin. CP at 103. The court further found that "providing [Phet Xaykosy] residential time with the children is not in their best interest. Further, a demand pursuant to RCW 26.10.060(3) is unconstitutional. Phet Xaykosy's demand for custody is hereby denied. No terms for visitation or contact with the children shall be provided in any Residential Schedule." CP at 105.

The trial court, however, found that “the law is not settled on exactly what happens to grandmother on the maternal side and any rights that she might have. It seems to me that if Tae is able to get herself in a position to have unsupervised visits, then she would be able to orchestrate visits with the children with Grandma. And I’m hopeful that’s the way this is going to go because even if there’s a rift between these two sides of the family, the children have a family on the other side, too, that has to be recognized, acknowledged, and somehow incorporated into their lives, so I hope that’s able to happen.” Respondent’s Report of Proceedings at 12.

ARGUMENTS

This Court should find that the trial court erred when it found that Phet Xaykosy had no standing to request for visitation and precluded her from requesting visitation at trial. CP at 78. Despite the unconstitutionality of the non-parental visitation statute, courts in Washington have allowed third-party standing to request visitation in custody proceeding. *See In re Marriage of Jeffrey E. Anderson*, 134 Wn.App 506, 141 P.3d 80 at 84 (2006). Accordingly, the trial court erred when it found that Phet Xaykosy, as a third-party, had no standing to request visitation and precluded her from requesting visitation at trial. This case should be remanded for the trial court to determine a visitation schedule that is for the best interest of the children.

The issue in this appeal is a question and law. Appellate court reviews questions of law *de novo*. See *Multicare Med. Ctr. v. Department of Social & Health Servs.*, 114 Wash.2d 572, 582 n. 15, 790 P.2d 124 (1990). Hence, the standard of review for the issues in this appeal is *de novo*.

- I. **RCW 26.10.160(3) and RCW 26.09.240 were found unconstitutional, rendering no explicit statutory authority for a third-party to request visitation from a fit parent.**
 - a. RCW 26.10.160(3) and RCW 26.09.240 both provide statutory authority for a third-party to request visitation.

RCW 26.10.160(3), for example, provides that “any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”

- b. Both statutes have been found unconstitutional because the standard they provide is insufficient to serve as a compelling state interest to overrule a parent's fundamental rights.

RCW 26.10.160(3) has been found unconstitutional facially or as applied, for failing to accord deference to a parent's decisions. See *In re the Custody of Sara Skyanne Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998). In *Smith*, our Supreme Court found RCW 26.10.160(3) and former 26.09.240 (prior to its 1996 amendment) to be facially unconstitutional; both

provided that any nonparent could petition the court for visitation rights at any time and that a court could order visitation when visitation may serve the best interest of the child. *Id.* at 7. The court concluded the petitioners had standing but, as written, the statutes violated the parents' constitutionally protected interests. *Id.* at 5. The court in *Smith* held that the State may constitutionally interfere with the right of parents to rear their children only to prevent harm or potential harm to a child, a standard not imposed by the challenged statutes. *Id.* at 20. The United States Supreme Court, which granted certiorari in a companion case, *Troxel*, affirmed on more narrow grounds, holding that where a fit parent's decision to deny third-party visitation is subject to judicial review, the court must accord at least some special weight to the parent's own determination. *Troxel v. Granville*, 530 U.S. 57, 70, 120 S.Ct. 2054 (2000). Several years after *Smith* and *Troxel*, our Supreme Court held in *C.A.M.A.*, that even after Washington's visitation statute, RCW 26.09.240, was amended in 1996 to presume that a grandparent's visitation was in a child's best interest only if a substantial grandparent-grandchild relationship was shown, the statute remained unconstitutional because it allowed a court to order visitation over the objection of a parent without a showing that denying visitation would harm the child. "Short of preventing harm to the child, the standard of best interest of the child is

insufficient to serve as a compelling state interest overruling a parent's fundamental rights.” *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, at 61, 64, 109 P.3d 405 (2005) (quoting *Smith*, 137 Wn.2d at 20).

- c. The constitutionally protected fundamental right applies to parents (biological, stepparents, foster parents, de facto parents), not to Jerri Martin, who only have custody rights.

The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized in the United States Supreme Court. *Troxel*, 530 U.S. at 65, 120 S. Ct. 2054. A parent’s fundamental rights, which invoke the stricter scrutiny standard, extends only to natural parents, adopted parents, stepparents, or de facto parents. *See Id.*; *In re Parentage of L.B.*, 155 Wash.2d 679, 122 P.3d 161 (2005). Because Jerri Martin is not the children’s natural parents, adopted parents, stepparents, or de facto parents, she does not stand in the same legal parity with an otherwise legal parent. Because Jerri Martin does not stand in the same legal parity with a legal parent, the constitutionally protected fundamental right applies to parents does not apply to her.

The statute specifically states that “a parent's child” means that parent's natural child, adopted child, or stepchild. *RCW* 26.10.160(5)(a). An individual who acquires nonparental custody over a child does not

acquire the same legal rights as a parent. *In the Matter of the Parentage of J.A.B.*, 146 Wn.App.417, 191 P.3d 71 (2008). In *J.A.B.*, this Court has previously distinguished parenthood and third-party custody. This Court specifically explained: residential placement is not equivalent to parental status. A nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child. Parenthood comprises much more than mere custody. A parent has a fundamental liberty interest in the care, custody, and control of his or her child. *Id at* 426 to 427.

Jerri Martin does not have the fundamental liberty interest of parentage. She merely has the custody right of the children for the present time. Accordingly, the rationale that held RCW 26.10.160(3) and RCW 26.09.240 unconstitutional because the standard these statutes provide is insufficient to serve as a compelling state interest to overrule a parent's fundamental rights does not fit within the realm of Phet Xaykosy's request for visitation under Jerri Martin's petition for non-parental custody.

II. **Absent statutory authority, Washington Courts have held that a third-party may request visitation under equity principles.**

Equity principles provide an alternative ground for enforcing a third party's visitation rights. *In re Marriage of Jeffrey E. Anderson*, 134 Wn.App 506, 141 P.3d 80 at 84 (2006). Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities, in spite of legislative enactments that may have spoken to the area of law, but did so incompletely. *Id.* While there is no statutory scheme allowing third party visitation after C.A.M.A, it is well recognized, both in Washington and nationally, that child custody and visitation orders may be established by reliance on courts' equity powers and the common law. *Id.*, *see also L.B.*, 155 Wash.2d at 698. "The equitable power of the courts to adjudicate relationships between children and families is well recognized, and our legislature has evinced no intent to preclude the application of an equitable remedy." *Id.*

In recent years, courts in sister states have awarded visitation rights to third parties despite the absence of any statutory basis. For instance, in *Koelle v. Zwiren*, the defendant deceived the plaintiff into believing that he was the father of her child. 284 Ill.App.3d 778, 220 Ill.Dec. 51, 672 N.E.2d 868, 870-71 (1996). After learning the truth eight years later, the plaintiff asked an Illinois court to grant him, among other things, equitable

relief to include visitation rights with the child. *Id.* at 871. The defendant responded that the plaintiff was not entitled to visitation because he was not a natural or an adoptive parent. *Id.* at 871. The trial court dismissed the plaintiff's equitable claim for visitation. *Id.* at 871.

The Illinois appellate court reversed, holding, "while it is true that these statutes do not provide the grounds for plaintiff's claim for visitation privileges in this case, Illinois case law and general principles of equity support the claim." *Id.* at 872. The court remanded the case to the trial court with instructions to grant the plaintiff visitation rights if doing so would be in the child's best interests. *Id.* at 873.

Similarly, other jurisdictions recognize the courts' equitable power to grant visitation to third parties outside any statutory scheme. *See, e.g., In re Custody of H.S.H-K.*, 193 Wis.2d 649, 533 N.W.2d 419, 431 (1995) "It is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes."; *see also E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886, 890, 893 (1999) (holding that the "equity jurisdiction" of the probate and family court allowed the court to grant, despite a lack of statutory authority, the

biological mother's former partner visitation with a child she had parented until the child was over three years old).

All these courts awarded visitation to third parties based on equity principles in the absence of express statutory authority. Similarly, the trial court should have allowed Phet Xaykosy's request for visitation.

III. This case shall be remanded to the trial court for it to determine a visitation schedule with Phet Xaykosy that is for the best interest of the children.

The trial court's erroneous decision has deprived the children from any opportunity to have visitation from their maternal grandmother, Phet Xaykosy, and their half-sisters, Alynda and Alyssa. These individuals maintained a significant relationship with the children. After Jerri Martin secured custody of the children, all ties were severed with the children's maternal side of the family. This is cruel to the children, who may want and need a relationship with Phet Xaykosy and their sisters, relatives, and others, many of whom are the children's blood relatives.

This Court should remand this case and order the trial court to craft a visitation schedule for Phet Xaykosy. The trial court has found that despite the rift between the two sides of the family, the children have family on the other (Phet Xaykosy's) side that has to be recognized,

acknowledged, and somehow incorporated into their lives. Respondent's Report of Proceedings at 12.

REQUEST FOR COSTS AND ATTORNEY'S FEES

Pursuant to Rules of Appellate Procedure 14.2 and 14.3, Phet Xaykosal requests this Court award statutory attorney's fees and costs for this appeal if the Court finds that she substantially prevails on this appeal.

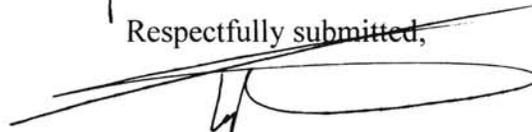
CONCLUSION

The appellant, Phet Xaykosal, respectfully request that this Court:

1. Reverse the trial court's finding that Phet Xaykosal does not have standing to ask for visitation and precluded her from requesting visitation under the non-parental custody trial.
2. Remand to the trial court for it to craft a residential schedule allowing Phet Xaykosal's visitation with the children.
3. Award Phet Xaykosal attorney's fees and costs.

Dated this 7th day of May, 2013

Respectfully submitted,



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