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STATE OF WASHINGTON  
By \_\_\_\_\_

NO: 32431-1-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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In re the Custody of Z.C., Child,

MELISSA ENGLAND  
Appellant,

and

DALEENA AND RICHARD VAUGHN,

Respondents.

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REPLY BRIEF OF RESPONDENTS TO *AMICI CURIAE* BRIEF  
OF NORTHWEST JUSTICE PROJECT AND LEGAL VOICE

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REPLY BRIEF OF RESPONDENTS  
TO *AMICI CURIAE* BRIEF OF NORTHWEST  
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## I. INTRODUCTION

This case is not a case of a parent in crisis, who is facing barriers due to support and help that the parent needed as the *Amici* brief argues. *Amici* argues that the mother in this case had drug addiction problems that she received help with, and aligns mother's problems with other parents who have mental health issues, have lost their jobs, or are escaping domestic violence. Drug addictions are not comparable to the other categories of issues, and these arguments about disparities between types of people and how the laws affect them are better suited for the legislature. See Carlson v. City of Bellevue, 73 Wn.2d 41, 47, 435 P.2d 957 (1968), holding that except in cases of manifest abuse of legislative discretion, courts should not seek to substitute their judgment for that of the legislative body; and Bostain v. Food Exp., Inc., 159 Wn.2d 700, 726-727, 153 P.3d 846 (2007), holding the court's purpose when interpreting statutes is to discern and implement the intent of the legislature.

The mother in this case, was an addict who exposed her child to methamphetamine. Luckily, the respondents were suitable persons to care for the child in his time of need and the child did not have to be exposed to foster

care at the State's expense. Instead, the non-parental custody case ensued. The respondents took mother's child in as their own and have raised that child as their own for the last nine years. Mother does not argue that she didn't get the services she needed, since she was in drug rehab, but argues her case should have been a dependency, so that she could eventually reunify with her child and so that she could have court appointed counsel. However, there is no evidence to support how a dependency would have gone; to wit if mother would have been able to have her child placed with her in time, and the mother has had at least five attorneys at this point. There is also nothing in the record to support that any of the five attorneys were inefficient.

Mother did not agree to the final pleadings in this matter back in May 2008 because they were intended as a temporary agreement. That is very clear in the pleadings, specifically the findings about mother's addiction. Further, mother agreed to final pleadings after failing a hair follicle test close to the trial date in this matter. Mother has had access to the child via the final parenting plan, which has also been modified by agreement on one occasion in May 2011.

As noted in Respondents' Briefing, the case of In re Custody of T.L., 165 Wn.App. 268, 268 P.3d 963 (2011) is not on point in this matter. The Vaughns pray this court denies Appellant's request and upholds the trial court's ruling.

## **II. RESPONSE TO IDENTITY AND INTEREST OF *AMICI***

Respondents understand the role that the NWJ project has in representing certain persons. At the same time children have a right to stability, consistency, predictability, routine, and safety in their lives. In the present case, the father of the child is deceased, and the mother lost custody of the child due to her severe drug addiction. (The case went on for two years, wherein the mother had time and the ability to become clean and sober, but did not, failing yet another drug test just shortly before the trial in this matter was to occur.)

## **III. RESPONSE TO ISSUES ADDRESSED BY *AMICI***

- A. Children's interests are best served when they have stability, consistency, predictability, routine, and safety in their lives, which is provided by the current statute requiring a substantial change of circumstances in order to modify a parenting plan.
- B. Public policy is not violated where the law does not remove incentive for parents in distress to place their children with a third party in non-parental custody cases.

- C. Public policy is not violated where the non-parental custody law does not remove incentive for parents to correct deficits, but provides finality for children.

#### IV. STATEMENT OF FACTS

The Statement of Facts is as set forth in Respondents' Brief.

#### V. ARGUMENT

- A. **Children's interests are best served when they have stability, consistency, predictability, routine, and safety in their lives, which is provided by the current statute requiring a substantial change of circumstances in order to modify a parenting plan.**

*Amici* cites Dependency case law in support of its position, when this is a non-parental custody case. In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011), stands for the proposition that dependency review hearings could not cure a void dependency order to establish the finding of dependency required for termination of the parent-child relationship, but the termination order was affirmed as being in best interest of the child. In re: Custody of E.A.T.W., 168 Wn.2d 335, 338, 227 P.3d 1284 (2010), stands for the proposition that *RCW 26.10.032* requires a superior court judge to deny a hearing on a motion for a third party custody order unless the non-parent submits an affidavit (1) declaring the child is not in the physical custody of one of its parents or neither parent is a suitable custodian and (2) setting forth

facts supporting the requested custody order. The facts supporting the requested custody order must show adequate cause that the parent is unfit or that placing the child with the parent would result in actual detriment to the child's growth and development. E.A.T.W. at 338. Both criteria were met in this case. Mother seeks to challenge the application of the modification statutes to non-parental custody decrees.

1. The current non-parental custody statute does protect parents and children.

As noted above, E.A.T.W. provides a very high bar for a petitioning third party to pass in order for adequate cause to be established for non-parental custody, which is reflected in *RCW 26.10.032*. Those protections acknowledge the difference between a parent v. parent and parent v. non-parent, and are a higher bar than required in dependency actions, where the state need only show that the child has (1) no parents to provide supervision and care for the child, or (2) the release of the child to the parents presents a serious threat of substantial harm to the child or (3) the parent to whom the child could be released has been charged under *RCW 9A.40.060* or *9A.40.070*. See *RCW 13.34.065*. Also, dependency hearings are largely based on hearsay and unsworn affidavits, unlike in non-parental custody cases.

*Amici* cites In re Luscier, 84 Wn.2d 135, 139, 524 P.2d 906 (1974), which is a dependency case that has been overruled, and stood for the proposition that appointment of counsel is constitutionally required in permanent deprivation proceedings. That is not on point with this case or relevant. The same is true for In re Dependency of J.H., 117 Wn.2d 460, 815 P.2d 1380 (1991). The Parnam v. J.R., 442 U.S. 583, 99 S.Ct. 2493 (1979) case cited by *Amici* is also not on point (it deals with admittance of children into mental health hospitals) and is criticized. In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006) and In the Matter of the Custody of B.M.H., 179 Wn.2d 224, 315 P.3d 470 (2013) are addressed at length in Respondents' Brief. Also not on point and cited by *Amici* was In re Custody of C.C.M., 149 Wn.App. 184, 202 P.3d 971 (2009), which was a non-parental custody case, but the issues were the applicable standard (best interests v. fitness and actual detriment) as it applies to Indian children, whether ICWA applies in this dispute, notice to the Indian tribe, standard of proof, and back child support.

2. Under the dependency statute, maintenance of the family unit is the goal, but we aren't under that statute. Further, that statute requires a permanency plan and services paid by the state.

Dependency statutes and dependency case law track one another just as they do in non-parental custody cases. While the provisions under each statute are different, dependency statutes don't require a showing of unfitness, and non-parental custody statutes do. It is irrelevant that non-parental custody statutes do not have a reunification plan, because we are dealing with different standards, and this is a non-parental custody case. While adequate cause is based on the Petition and Affidavit of facts, shelter care hearings are based on a Petition, mostly hearsay, and the Department takes your children and places them into foster care before the parents have ever been put on notice. Further, dependency cases use different standards [“best interest of the child” at *RCW13.34.190(1)(b)* and “change of circumstances”, at *RCW 13.34.150*], where the State can terminate in favor of foster-adoption at a lesser standard. A dependency would not have been a better course of action for Mother in this case. The Respondents would have been the foster parents and Mother's rights would have been terminated.

Dependency cases and Non-parental custody cases are completely different situations. In one case the State is removing the child under special circumstances and is required by that special statute to attempt reunification. In the other case, third parties have physical custody of the child or allege the

parent isn't suitable, notice is given to the parents and a hearing is had. NWJP doesn't argue that the court failed to follow the statute. NWJP argues there should be a different statute, more like dependencies. That argument is for the legislature, who makes laws. The courts have to follow the laws now in effect.

C.C.M., 149 Wn.App. 184 (2009), and its lack of application to this case is already addressed above. In re Parentage of J.A.B., 146 Wn.App. 417, 191 P.3d 71 (2008) was addressed at length in Respondents' brief. In re Custody of J.E., No. 32062-6-III, slip op. at 6 (Wn.App. Div. III Aug. 4, 2015), (quoting In re Custody of A.F.J., 179 Wn.2d 179, 314 P.3d 373 (2013)), are non parental custody cases, but are also not on point in this matter. In J.E., the issue surrounded fit parents and actual detriment to the child if moved, the findings with regard to actual detriment, the proper standard (best interests of the child v. actual detriment) and de facto parent arguments. A.F.J., 179 Wn.2d 179 is a de facto parentage case, not a non-parental custody action. Arguments about the applicability (or lack thereof) of In re the Custody of T.L., A Minor Child, 165 Wn. App. 268, 268 P.3d 963 (2011) are also discussed at length in Respondents' brief.

*RCW 26.10.200* and *26.10.190* regarding modification of non-parental custody parenting plans defer to the statute in Chapter *RCW 26.09*, and *RCW 26.09.260* for modification. *Amici* claims that the threshold required (adequate cause) as applied to parents is unconstitutional because it fails to acknowledge the parents' priority right. This argument is also addressed in Respondents' brief, and respondents defer to the brief for that argument. That being said, respondents reiterate the goal of the modification statutes to give children permanency and not allow a party to continuously modify a parenting plan simply to harass the non-moving party, which has occurred in this case.

**B. Public policy is not violated where the law does not remove incentive for parents in distress to place their children with a third party in non-parental custody cases.**

This argument is covered above and is also covered in Respondents' brief. On the one hand, *Amici* argues Ms. England thought this agreement was temporary, but on the other hand the court file belies that claim since Ms. England fought tooth and nail for her child.

**C. Public policy is not violated where the non-parental custody law does not remove incentive for parents to correct deficits, but provides finality for children.**

This argument is simply re-argues the arguments herein and the

arguments of Appellant.

## VI. CONCLUSION

It is in children's best interests to have permanency. As such, the modification statutes are the appropriate standard to modify a final custody order, whether in a dissolution or in non-parental custody cases. This is especially true where non-parental custody petitioners are held to a higher standard and meet that burden. The current statutory scheme re: non-parental custody petitions protects parents adequately. The dependency statutes are irrelevant to this case, as this was not a dependency. There simply is no public policy violation in the non-parental custody statutes. The arguments made by Appellant and *Amici* are better taken to the legislature and not the courts who enforce the legislation. The decision of the trial court must be upheld and the respondents pray for the same.

Respectfully submitted this 17<sup>th</sup> day of August, 2015.

  
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