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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO: 32431-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

MELISSA ENGLAND
Appellant,

and

DALEENA AND RICHARD VAUGHN,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Although not a carbon copy, this case is similar to the movie, “Losing Isaiah.” “Losing Isaiah,” is a story about a mother, like Appellant, who abandoned her child because of her drug addiction. However, unlike the mother in losing Isaiah, this mother (Appellant) didn’t just disappear for years, believing her child to be deceased. This mother was lucky enough to have a sister, Daleena Vaughn, and brother-in-law, Richard Vaughn, who took her child in as their own and have raised that child as their own for the last eight years. Despite Appellant’s claims that she believed this was a temporary scenario, the court file alone belies those claims.

Appellant dropped her child, Z.C., off at Daleena and Richard Vaughn’s home every chance she could beginning when Z.C. was roughly four months old. At ten months old, Daleena Vaughn started noting that after even brief visits with Appellant, Z.C. would return, acting strangely. Ms. Vaughn had Z.C. drug tested and methamphetamine was found in his system. Thus began the eight year battle over Z.C. that continues today. Z.C. is now 9-years-old.

Appellant fought the initial entry of a Non-Parental custody Decree with full force and even had the Guardian Ad Litem convinced of her

“sobriety,” until just prior to entry of the Decree she tested positive for methamphetamine. Appellant wound up in treatment, completed it successfully after roughly two years (2008-2010, during which time she chose to see Z.C. only approximately four times), voluntarily moved six hours away from her child, has exercised visitation with Z.C. roughly once per month since August of 2010, and now tells this court that she has her life together, and as such Z.C. should return to her. Appellant requests this despite Z.C. having a home with the Vaughns the past eight years. She cites no change with Z.C. or Respondents.

At Z.C.’s birth, Appellant showed that she was more interested in her wants, needs and desires when she abandoned Z.C. for drugs. Eight years later, Appellant shows this court she still is more interested in her own wants, needs and desires and not of those of her son, when she makes the request of this court to change the law and take Z.C. from everything and everyone that he knows and place him with her, for the very first time in his life, over 300 miles away from home. The Vaughns pray this court denies Appellant’s request and upholds the trial court’s ruling.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. THE TRIAL COURT DID NOT ERR BY DENYING ADEQUATE CAUSE EXISTED TO MODIFY THE NONPARENTAL CUSTODY DECREE.

2. THE TRIAL COURT DID NOT ERR IN MAKING THE FINDINGS OF FACT, AS SET FORTH IN SECTIONS 2.5.1, 2.5.2, 2.5.3 AND 2.5.4.

3. THE APPELLANT'S REQUEST FOR A CHANGE OF VENUE SHOULD BE DENIED.

4. THE APPELLANT'S REQUEST FOR ATTORNEY'S FEES ON APPEAL SHOULD BE DENIED.

III. STATEMENT OF THE CASE

This appeal stems from Appellant's failed attempts (on three different occasions) for a major modification of the parenting plan in this matter. CP 97-101, 180, 401-406. Respondents Vaughn filed the nonparental custody action on August 3, 2006, when Z.C. was only 10 months old. CP 1-5, 317-322. Z.C. has lived in the Vaughn home since he was 10 months old, but had been in the Vaughn home a majority of the time since Z.C. was only 4 months

old. CP 392-400. This was due to Appellant's drug addiction. CP 392-400, 579-580.

The Appellant did not acquiesce in Z.C. going to live with Respondents Vaughn, either on a temporary or permanent basis. CP1-672. Appellant fought this action every step of the way, which is evidenced in the 214 documents that make up the "Clerk's Papers" in this file. CP1-672. After almost two years of fighting, Appellant and the Respondents did enter final pleadings in this matter by agreement. CP 63-67, 58-62, 51-57. The only reason that Appellant agreed to sign off on final pleadings was because she failed another drug test on Jan. 10, 2008. CP 354. Findings entered at that time show mother's unfitness due to selling/using drugs and the child having methamphetamine in his system. CP58-62. At that time Appellant claimed to be clean and a Guardian Ad Litem even believed her sobriety after a "thorough" 50 day investigation. (The GAL was appointed on August 20, 2008. CP 11-14. His report was filed on Oct. 23, 2006. CP 622-645.)

Appellant realized that by agreeing to a parenting plan with the ability to earn changes, such as unsupervised visitation (CP 54) should she remain drug free, she was guaranteed more visitation than what a court may provide, given her unfitness. It also gave Appellant the ability to increase visits more than 24 overnights per year without showing adequate cause. (CP 52 & 54)

Before the major modifications were requested by Appellant, Appellant first attempted to modify the parenting plan by filing a meritless show cause action. CP 370-372. The show cause filed by the Appellant in August of 2010 stemmed from Appellant's tantrum after Respondents' were hesitant to allow visitation in Seattle where Appellant was living in a group home with other recovering drug addicts. CP 392-400. When the Final Parenting Plan was entered providing that Ms. England receive Local Rule 15 (every other weekend) visitation if certain criteria were met, she was living in Clarkston, not Seattle. CP 395. (Appellant also notes at CP 374 that she had been denied LR 15 visitation, but fails to mention that the then-existing parenting plan assumed both parties lived in Clarkston, when in fact Appellant moved six hours and over 300 miles away from the child.) Nevertheless, the Vaughn's agreed to modify the parenting plan to fit the reality of the distance between the parties. CP 72-78. This agreed parenting plan was entered on May 16, 2011, with the assistance of a local counselor. CP 72-78.

Appellant's first attempt for a major modification of the parenting plan was on May 21, 2012. CP 401-406. In that action Appellant alleged no specific allegation or legal basis in her petition to modify, simply referencing the Memorandum filed therewith. CP 401-406. That memorandum cited the case of In re Custody of T.L., 165 Wash.App. 268, 268 P.3d 963 (2011), and requested that the non-parental custody action be dismissed and Z.C. returned

to her. CP 499-509. Appellant also filed a Declaration, wherein she alleges essentially the same arguments as she alleged in CP 415-498.

On June 7, 2013, Appellant sought to have Judge Acey taken off of the case per a request in open court. CP 542, 543, 563, 564. Judge Acey made the record that he did not know Daleena Vaughn, but agreed to recuse himself. CP 542, 563, 564. Then on July 1, 2013, Appellant sought to vacate orders entered by Judge Acey and by other Judges who sat on this case. CP 537-539, 540-541, 542. Essentially, Appellant was making her second attempt at a major modification. Judge Lohrmann was appointed on July 12, 2013 and a Show Cause Order entered on September 10, 2013. CP 564, 92-93. Appellant again tried for a major modification. That request was denied on November 26, 2013 and court specifically found Judge Acey did nothing wrong and denied Appellant's request. (CP 94-96, at 95)

Appellant then sought to modify a third time, filing a petition on January 3, 2014. CP 97-101. The record incorrectly indicates Judge Frazier heard the matter, as it was Judge Lohrmann of Walla Walla that heard the matter. CP 254-256. Appellant alleged everything she had alleged in her prior modification attempts, but also cited the case In re the Custody of B.M.H., 165 Wn.App. 361, 267 P.3d 499 (2011), and alleged that there was a detrimental environment at the Vaughn home. CP 97-101. Nothing about the allegations were atypical and all were similar to allegations from 2006 forward. CP 122-

179, 264-267, 273-314, 335-336, 373-382, 415-498, 392-400, 513-519, 520-522, 648-662, 756-762. The nature of the allegation tried to paint the family feud as one-sided, with Ms. Vaughn at fault. CP 122-179. The court found that B.M.H. was not applicable, and the court noted Appellant was trying to change the statutory scheme. CP 254-256. (Appellant continuously argues had this been a dependency she would have her child back, ignoring the fact that it took her more than 2 years to get her life together, and under the dependency statutes that would mean termination of her parental rights.) The court also found nothing detrimental about the Vaughn home and denied Appellant's request on April 3, 2014. CP 254-256.

Appellant filed this appeal April 21, 2014, and is attempting to appeal issues all the way back to the initial case in 2006. Throughout Appellant's sad tale of woe to this court, including a request for attorney's fees from respondents, she fails to mention that during this eight year period of time where respondents have had physical custody of this child and engaged in these court battles, Appellant has never paid one dime of child support to Respondents. CP 214-215. Respondents have paid all of their own legal fees, paid the previous GAL fees (Appellant's were paid for by the County, CP 646-647) and again are paying all of their own legal fees. Respondents now request that the court uphold the lower court rulings and leave Z.C. at home with them, where he has been since his birth.

IV. ARGUMENT

A. Standard of review: the court of appeals reviews a trial court's decision regarding a child's placement for abuse of discretion, and a trial court will be found to have abused its discretion when it applies an incorrect legal standard.

Appellant's counsel is correct that legal issues on appeal are questions that are reviewed *de novo*. However, Appellant is asking this court to set aside the trial court's findings of fact and conclusions of law, specifically paragraphs 2.5.1, 2.5.2, 2.5.3 and 2.5.4. (CP 255.) Although Appellant cites In re Custody of B.M.H., 165 Wn. App. 361, 267 P.3d 499 (2011), as the legal authority regarding the proper standard, (e.g. mixed questions of law and fact are reviewed *de novo*.) the procedural posture of this case and the applicable standard of review is more aligned with In re the Custody of T.L., 165 Wn. App. 268, 268 P.3d 963 (2011). In T.L., the appeals court noted that it reviews a trial court's decision regarding a child's placement for abuse of discretion. In re the Custody of T.L. at 276. A trial court abuses its discretion when it applies an incorrect legal standard. T.L. at 277. Appellant alleges modification of a decree of nonparental custody should require a *different* legal standard, not that the trial court applied the wrong legal standard. Appellant attempts to change the statutory scheme regarding modifications of

nonparental custody, which doesn't translate to the lower court applying the wrong legal standard.

The evidence before the court showed that the facts alleged by the Appellant, e.g. that the environment in Ms. Vaughn's home is detrimental to Z.C. and therefore a substantial change in circumstances to the child, were not credible to the court and therefore did not meet the standard of adequate cause required in order to modify an *existing* decree. CP 122-179, 211-253. Appellant cites B.M.H. in support of a *de novo* review, but the facts and posture of the cases are markedly different. In B.M.H., a stepfather sought to establish de facto parentage and/or nonparental custody, whereas in T.L. the Appellant was seeking to modify an existing non-parental custody decree. Appellant's procedural posture is the latter and Appellant cannot show that the trial abused its discretion in making its factual findings. Even if the court were to apply the relaxed standard of *de novo* in reviewing the trial court's denial of adequate cause to modify the existing decree, Appellant cannot prevail. Appellant seeks to change the statutory scheme for adequate cause regarding modification of nonparental custody decrees, as opposed to arguing that the incorrect legal standard was applied.

B. The court properly denied adequate cause, where the statutory criteria of RCW 26.09.260 was not met.

Appellant filed a third modification action in July of 2014, alleging there was a detrimental environment in the Respondents' home and that Appellant's having her life together now was a substantial change of circumstances for the child. CP 97-101. The court properly denied adequate cause based on those allegations, finding there was not a detrimental environment in Respondents' home and that Appellant was asking the court to change application of the law with her request. 254-256. Nonparental custody is an extraordinary remedy because it abridges a parent's constitutional right, and that is why nonparental custodians face such a high burden in order to establish nonparental custody. Once nonparental custody has been established, Appellant should receive no favorable presumptions under the law in order to modify a parenting plan.

RCW 26.10.190, the Non-Parental Custody Statute, provides for modifications to be heard pursuant to RCW 26.09. RCW 26.09.260, Modification of parenting plan or custody decree, provides as follows:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court *shall not modify a prior custody decree or a parenting plan* unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, *that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. ...*

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070. (*emphasis added.*)

None of the above-referenced criteria are met in the present case.

Appellant cites petty and common family law allegations as a basis for a major modification due to a detrimental environment. CP 122-179. There is no change in the circumstances of the child or the non-moving party. CP 211-253. Z.C. has been at the Vaughns home for the entirety of his life, he is doing excellent at the Vaughns, he visits Appellant and there is no legal or factual basis to change this. CP 211-253.

Appellant is correct that a parent is entitled to a presumption that placement of a child with the parent serves the child's best interest [In re Custody of Shields, 157 Wn.2d 126, 146, 136 P.3d 117, 127 (2006)], but that

presumption is where we started back in 2006, when the initial Petition for Non-parental custody was filed, and Respondents prevailed. That presumption is not where we start now. Case law regularly rejects petitions like those of Ms. England, where her circumstances have allegedly improved, but there is no change in the circumstances of the child or the child's custodian. The mere showing of rehabilitation of the parent who was denied custody of a child is insufficient to support an order changing custody where the parent originally awarded custody is of equally sound character. McCray v. McCray, 56 Wn.2d 73, 350 P.2d 1006 (1960).

The law protects children and wants stability for them. That is why once a decree (whether in a dissolution or non-parental custody matter) is entered, it is very difficult to succeed on a major modification.

Appellant argues that in a dependency proceeding she would have been able to earn Z.C. back and therefore, the court should change the law for her in this non-parental custody matter. Appellant may think the law should revolve around her specific set of circumstances, but she is no different (and should enjoy no special preference or application of the law) than any other drug-affected parent who lost their child to the State or to Non-parental Custody. Appellant may have her life together now, but how long can the child sit on the shelf and wait?

Z.C. is blessed to have had a maternal aunt and uncle step in and take him into their home, filing a non-parental custody action as opposed to his winding up in foster care. Even if Z.C. had been placed into foster care, the dependency statutes favor relative placement (RCW 13.34.130), so Z.C. would likely have wound up at the Vaughn home. Further, given it took Appellant more than two years to get her life together, the State would have moved to terminate her rights and/or changed the case plan to non-parental custody as the primary plan. RCW 13.34.180(1)(e) and RCW 13.34.136(3). Children are not and should be required to wait years for their parents to pull their lives together.

Appellant cites the case of In re Parentage of J.A.B., 146 Wn. App. 416, 191 P.3d 71 (2008), for the premise that nonparental custody is “temporary.” J.A.B. was a case where the alleged de facto (step)father was seeking custody as against the absent biological father and mentally unstable biological mother. The step-father initially filed a non-parental custody action and then amended petition to a de facto parentage action. The comment about “temporary” was dicta and the procedural posture was clearly not the same as it is in this case. The lower court in that case did not rely on the non-parental custody statute, stating, “A de facto parent is an adult who has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life, with the consent of the legal parent in the same

household, without expectation of financial compensation, and for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.” (Based on Appellant’s arguments that it was to be a temporary situation, one could argue the Vaughns are the de facto parents of Z.C.) The court went on to explain that the non-parent custody statute and the de facto parent doctrine have very different purposes. The J.A.B. court was comparing initiating an action (non-parental vs. de facto) and the legal standards in each that a petitioner is required to meet. The court simply stated that if the fitness standard cannot be met and the action dismissed, then the non-parent has no right to continue a relationship with the child. The court was certainly not addressing modification of an existing Non-parental custody Decree. Adequate cause in the present case was properly denied. CP 90-91, 94-96, 254-256

C. The Appellant was adjudicated as unfit and it was found to be detrimental to the child to be placed in the Appellant’s care, so the modification statute does apply.

Ms. England argues the case of In re the Custody of T.L., A Minor Child, 165 Wn. App. 268, 268 P.3d 963 (2011), and claims that the case is “on all fours” with the present case. That is untrue. As noted hereafter, there are factual differences, which directly relate to the legal holding in T.L. that are not present here. The legal holding in T.L. was that, “the procedural and

substantive hurdles to modifying a custody decree provided by RCW 26.09.260 (1), (2) and .270 are unconstitutional *as applied to the facts of this case.*” In re the Custody of T.L., 165 Wn. App. 268, 271, (2011), *emphasis added.*

The court in T.L. focused on the fact that, the mother *joined* the petition of the grandmother granting the grandmother custody. The record doesn't reflect any contested custody hearings, only notes that the mother “originally resisted her mother’s petition.” T.L. at 271.

In the present case there was no “joinder.” CP 8-10. There were numerous contested hearings, whereas in T.L., the mother simply signed her child over to the grandmother, as it was in the child’s “best interests.” In the present case, as is reflected in the voluminous files, there were easily 15 contested hearings, all which resulted in Z.C. being placed with the Vaughns and giving Ms. England only supervised visits, due to the “unfitness” of Ms. England. CP 1 –762. (In addition to forum shopping, Ms. England is also now on her fifth attorney, having Ms. Richards, Mr. Cox, Ms. Sloyer, and Ms. Carmen previously. CP 1-762.)

In T.L., the mother filed with the court an explanation that this as to be a temporary placement, and she would get her child back when stable. The final pleadings were scant on the basis for the placement, except to say that it was in the child’s best interests. (Those pleadings also did not reflect that the

situation was temporary, but the key for the court was that there was a joinder and therefore, a lack of litigation.)

In the present case, unlike T.L., the final pleadings reflected permanency, and that Ms. England was unfit. The Findings that were entered on May 5, 2008, (CP 58-62) provided as follows:

1. Page 3, Paragraph 2.7, Best Interest of the Child, “The natural mother has a current drug problem that places the child in danger.”
2. Page 3, Paragraph 2.8, Adequate Cause, “Adequate cause for this proceeding is agreed as evidenced by the signatures on the last page of this document.”
3. Page 3, Paragraph 2.9, Limitations On Visitation, “The Mother has taken the child with her while she was selling drugs or using drugs. The child was found with methamphetamine in his system. The Respondent is going to enter a treatment center for addicts. Until the mother is clean from drugs, visitations shall be supervised.”

The Final Parenting Plan that was entered in May 2008 as well (CP 51-57), provided at Page 2, Paragraph 2.1, Limiting Conduct, “Melissa England’s residential time with the child shall be limited or restrained completely because Melissa England has engaged in the conduct which follows: Other: The Respondent is an admitted drug addict which poses a threat to the child’s growth and development.” Clearly, there was an adjudicated basis for the “unfitness” findings in the present case, whereas there was not in T.L.

In T.L., the final pleadings had no restrictions or limitations on the mother. In T.L., at 282, the Findings prepared by the grandmother were found not to establish facts showing any detriment to the child. Id. The Findings said, “[T.L.] has been with Pamela Link for most of his life and is secure and safe. He is currently emotionally and mentally stable. And happy and healthy.” Id. They further state that T.L. has not be in Tia’s physical custody since January 2006 because, “Tia Link has not been stable or responsible enough at this time to meet [T.L.’s] needs.” Id. And that, “Tia Link agrees that she is unable to care for [T.L.] at this time.” Id. The court indicated that the fact that a parent relinquishes care to another for an extended period of time, by agreement, does not establish that returning custody to the parent will result in actual detriment to a child. Id. In T.L., there were only general findings.

In the present case, there were very specific findings regarding the Appellant’s unfitness and the adverse effect to the child. CP 58-62. The Appellant acknowledged her unfitness with the limitations that were included in the plan and the Findings, e.g. taking the child on drug deals, the child having meth in its system, the Appellant being a danger to the child’s growth and development. CP 58-62. Whether at a trial or amidst the 15 contested hearings, mother fought this action every step of the way. It wasn’t until (another) positive drug test occurred close to the trial date that she mitigated the circumstances by negotiating final orders. CP 354, 392-400, 579-580.

In T.L., the mother had an LR 15-type visitation schedule, whereas in the present case Ms. England's visits were to be supervised and she had to earn her way (via remaining drug free, etc.) to increased visits and unsupervised visits. CP 51-57. It should be noted that from 2008 to 2010, Ms. England saw Z.C. roughly four to five times. CP 211-253. Ms. England complains that her visitation was never increased as outlined in the 2008 plan (Appellant's brief, page 10), but fails to note that she voluntarily moved six hours away, making week-day visits, etc. impracticable if not impossible. CP 211-253, 392-400. Further the Vaughns agreed to a modification in 2011 so that a new parenting plan designed for the geographic proximity could be implemented. CP 72-78. Appellant has also never requested a review of this parenting plan, despite their being mediation/dispute resolution provisions in it. CP 72-78. Instead she has chosen to file action after action in the trial court and now this appeal. CP 180, 97-101, 257-263, 370-372, 401-406, 540-541. (Appellant re-alleges various factual arguments in this section that the trial court found no merit in. Respondents simply refer to their past declarations at CP 79-89, 513-519, 520-522, 523-529.)

In T.L., the grandmother was found in contempt for not allowing court-ordered visitation and for moving. The mother then moved to modify for several reasons, including that the grandmother *was no longer taking proper care of the child*. That is also not present in this case. CP 211-253. (Further,

procedurally the plan in the present case has already been modified once, whereas it never was in T.L.)

RCW 26.10.100 provides that a third party seeking custody from a parent demonstrate that the parent is unfit or that placement of the child with the otherwise fit parent will result in actual detriment to the child's growth and development. T.L. at 275. No unfitness of mother was demonstrated in T.L., as only vague statements were made about the child's best interests, e.g. he was happy and healthy with grandma. There was actual detriment to Z.C. in the present case due to the Appellant's unfitness, (and it was stipulated to eventually), given the above-referenced provisions of the Findings and the Final Parenting Plan. How fit is a custodian whose 10 month old child tests positive for methamphetamine and at higher levels than the adult custodian?

In T.L., at page 276, the court discusses that the adequate cause requirement is unconstitutional in a modification action when a parent has *never* been shown to be unfit and where it has never been established that the child's residence with the parent will result in actual detriment to the child's growth and development. (*emphasis added.*) That burden was not met in T.L. (hence the ruling based on the *exact facts* of the case). The petitioners here met their burden. CP 58-62. There is a finding of unfitness in the present case. CP 58-62.

The final pleadings found a detriment to the child if placed with the Appellant, e.g. “The natural mother has a current drug problem that places the child in danger,” “The Mother has taken the child with her while she was selling drugs or using drugs. The child was found with methamphetamine in his system. The Respondent is going to enter a treatment center for addicts. Until the mother is clean from drugs, visitations shall be supervised,” and the Final Parenting Plan that was entered in May 2008 as well, provided at Page 2, Paragraph 2.1, Limiting Conduct, “Melissa England’s residential time with the child shall be limited or restrained completely because Melissa England has engaged in the conduct which follows: Other: The Respondent is an admitted drug addict which poses a threat to the child’s growth and development.” CP 58-62. These findings are far different from the general language in T.L. that the child was happy with the grandmother at the present time and that the mom wasn’t “presently” responsible enough.

When a statute is held unconstitutional “as applied,” its application in a similar context is prohibited. T.L. at 279. This is not a similar context. Regardless, the statute is not totally invalidated. T.L. at 279.

Clearly, the facts in this case are far different from the facts in T.L. In T.L., at page 283, the court held that, “*While we do not suggest that a parent cannot stipulate to facts that would bind her ... to an adverse finding of unfitness or actual detriment (thereby requiring that any later request by the*

parent for modification satisfy the substantive and procedural requirements or RCW 26.09.260 and .270) the record here does not support any such stipulation by Tia,” (the mother). (Emphasis added.) By contrast, Ms. England, after numerous hearings, stipulated to the facts that supported the adverse finding of unfitness and not just simply that it was “in the best interests of the child” for him to be placed with the Vaughns. CP 58-62. Unlike the mother in T.L., Ms. England has to meet the adequate cause threshold, which she cannot. (Further, Judge Lohrmann allowed *yet another* modification attempt post-recusal of Judge Acey, given Appellant’s arguments that she wasn’t getting a fair shake and ultimately found Judge Acey had done nothing wrong. CP 94-96, 180, 254-256. (Appellant fails to mention that Judges Lutes and Judge Henry also heard her case. CP 41, 48, 50, 383-384.)

D. The Modification Statute is constitutionally applied to a non-parental custody case, where ab initio the Appellant enjoys favorable presumption, and the non-parental custodians face a high burden and meet that burden; Biological parents should not enjoy a legal advantage later in time, simply because they are ready to parent.

Appellant cites the case of In re Custody of B.R.S.H., 141 Wn. App. 39, 169 P.3d 40 (2007), as demonstrative of why the court needs to change the law as it applies to modifications in non-parental custody cases. Appellant then refers to yet another dependency action, In re Dependency of J.H., 117

Wn .2d 460, 815 P.2d 1380 (1991), as exemplifying why B.R.S.H. is wrong. First and foremost, non-parental custody actions are not dependency actions. In a dependency action, the case is premised with a return home and rehabilitation of a parent with no competing non-parents at play. In a non-parental custody action, the petitioners are held to a high standard to prove unfitness of the parent, so there is no “return home” or “temporary” aspect of the case. Citing additional non-parental custody cases, Appellant correctly points out that over the years the case law has morphed to make it more difficult to obtain non-parental custody, e.g. In re Custody of R.R.B., 108 Wn.App 602, 31 P.3d 1212 (2001). Two things stand out about Appellant’s arguments: (1) the cases cited address the initial evidentiary requirements and we are in a modification posture; and (2) the Respondents met the increased evidentiary standard as required by recent non-parental custody case law even though the case was concluded prior to the case of In re Custody of E.A.T.W., 168 Wn.2d 335, 227 P.3d 1284 (2010). It should also be noted that despite giving parents additional protections by raising the burden, the court and legislature have chosen not to modify the Modification requirements under non-parental custody and have left them under the provisions of RCW 26.09. This is also the reason that a lot of modification case law (as is between parents) is usually cited. The standard is the same. This is because courts have long recognized the need to protect children from meritless modifications

or requiring children to wait around (for example) for four years. (Z.C. was born August 29, 2005 (CP 1-5), began essentially living with the Vaughns in December 2005 (CP 392-400), non parental custody was initially filed on August 3, 2006 (CP 1-5), Appellant failed a(nother) drug test in January 2008 (CP 354), the nonparental custody decree was entered in May of 2008 (CP63-67), Appellant didn't assume regular visits once per month until roughly August of 2010 (CP 211-253, 392-400, 513-519), and Appellant did not begin her attempts to have Z.C. returned to her until May of 2012 (CP 401-406). Appellant only saw Z.C. four times between 2008 and 2010 while she was working on her sobriety. CP 211-253.) Appellant claims she is not facially challenging the statute, but she is. She is asking this court to change the modification statute for her and other parents who lose their children to their own choices, such as drug use, after years have passed and they finally have their lives together.

The modification statutes and case law support custodial continuity. There is no legal preference for the parent in a non-parental custody modification, just as there is no preference for the non-custodial parent in a modification action. The parents enjoy a favorable presumption at the outset of a non-parental custody case, but once proven unfit, they should face the same burden as is faced between parents in a modification action. That supports the policy of custodial continuity. The goal under dependency

statutes is not the same (nor should it be) as it is in nonparental custody. Dependency gives the parents a time-line to get their lives together or face termination, whereas nonparental custody actions do not. However, if Appellant had pulled her life together in the two years of litigation in this matter, she would have won the case and had Z.C. in her home full time. Nonparental custodians also don't have help from the State, as do foster parents (or relative placements) in dependencies. The Vaughns have certainly had no help from Appellant over the past 8 years. CP 214-215.

Appellant pretends the legislature and the courts are not aware of the differences between dependency statutes and nonparental custody statutes. However, RCW 26.10.030 – Child custody proceeding — Commencement — Notice — Intervention, specifically provides:

(1) Except as authorized for proceedings brought under chapter 13.34 RCW, or chapter 26.50 RCW in district or municipal courts, a child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian. In proceedings in which the juvenile court has not exercised concurrent jurisdiction and prior to a child custody hearing, the court shall determine if the child is the subject of a pending dependency action.

(2) Notice of a child custody proceeding shall be given to the child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon

a showing of good cause, permit the intervention of other interested parties.

(3) The petitioner shall include in the petition the names of any adult members of the petitioner's household. (*Emphasis added.*)

The Vaughns complied with all of these provisions. The legislature and the courts have spoken and have provided that the burden for a non-parental custodian will be higher, but that modification burdens shall remain the same, because of the need for custodial continuity. See In re Custody of E.A.T.W., 168 Wn.2d 335, 344, 227 P.3d 1284 (2010), and In Re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). The Superior Court may ultimately issue a custody order granting the non-parent custody only if the court finds that the parent is unfit or placement with the parent would result in actual detriment to the child's growth and development. Id. at 344. This standard is necessary in order to adhere to the constitutional mandate that deference be accorded parents in child custody disputes with non-parents. E.A.T.W. at 344. The fact that a parent does not have physical custody of the child, standing alone, does not show that the parent is unfit or that actual detriment would result from placing the child with the parent. Id. at 344-345. Accordingly, merely setting forth facts that the child is not in the custody of a parent is not sufficient to provide adequate cause for a hearing. Id. at 345. Something more is required: the nonparent must set forth facts showing the

custody order should be granted in accordance with the standard articulated in Shields. Id. The superior court is mandated to deny the nonparent's motion if it does not find adequate cause for hearing the motion based on the affidavits. Id. See RCW 26.10.032(2). This interpretation of the statute is in harmony with the United States Constitution. Id.

Just as parents' constitutional rights are long established, it is also true that children have rights regarding their well-being that are important factors properly guiding courts' custody decisions. Id. at 346. Recognition of these rights is not offensive to the constitution. Id. Just as it is impermissible to interfere with a parent's custodial relationship without a showing of adequate cause, it is likewise harmful to force children to remain in the custody of parents who are unfit or who present an actual detriment to the children's growth and development. E.A.T.W. at 346. RCW 26.10.032 properly balances these constitutional and statutory rights and interests by requiring a nonparent petitioner to submit an affidavit (1) declaring that the child is not in the physical custody of one of his or her parents or that neither parent is a suitable custodian and (2) alleging specific facts that, if true, will establish a prima facie case supporting the requested order. Id. These requirements must be satisfied before the courthouse doors will open to the third party petitioner. Id. This statute, as interpreted herein, is in accord with this court's and the United States Supreme Court's holdings in *Troxel*, *Smith*, and *Shields*. Id.

Children must be protected, and to that end outside parties may challenge parental custody, but constitutionally protected parental rights may not be infringed merely because of a finding that someone else could do a better parenting job. *Id.* at 346-347. Respondents met this high burden. CP 58-62.

Appellant claims there is no way to reunite her family, yet she enjoys visitation with her child. CP 72-78. Throughout her brief, Appellant argues on the one hand the nonparental custody with the Vaughns was to be temporary, but on the other hand that Daleena Vaughn treated the situation as permanent from the outset. (Appellant's brief, Page 7.) She can't have it both ways. Appellant can't twist the facts (making them internally conflicting in her brief) in order to create a scenario that will result in Z.C. being return to her full-time care. The decision to award custody to a nonparent is, for all practical purposes, a final one which is modifiable only upn a showing of a change in the circumstances of the child or the custodian, not the parent. *See* RCW 26.10.190 and RCW 26.09.260.

Claims of Judge Acey's bias are also without merit as was found by Judge Lohrmann. Appellant has had multiple attorneys represent her and at least three judges hear her case. Are they all biased? Cases where the judge was likely biased and/or violated the appearance of fairness doctrine are cases such as Tatham v. Rogers, 170 Wn. App. 76, 283 P.3d 583 (2012), where

there was a clear violation. That is not present in Appellant's case, as she cannot show that a reasonably prudent and disinterested observer would conclude that she didn't have a fair, impartial and neutral hearing. State v. Bilal, 77 Wn. App. 720, 893 P.2d 674 (1995). At the outset of the matter, the child had methamphetamine in his system and the Appellant was later caught with drugs. CP 211-214. Appellant admits she was an addict and went into treatment. CP 122-179. Appellant also was charged criminally in Washington and Idaho. CP 211-214. Appellant had three different judges and signed two agreed parenting plans. CP 41, 48, 50, 51-57, 72-78, 383-384. Any reasonably prudent and disinterested observer would conclude that she did have fair, impartial and neutral hearings throughout the seven years this case has gone on. (See brief submitted regarding claimed judicial bias of Judge Acey. CP 565-578.)

Lastly, the correct legal standard was used in granting nonparental custody. The decree does note that the placement is in the best interests of the child, but the findings indicate the unfitness of the Appellant due to drug use and drug use in the presence of the child. Further, it is clear that the best interests of the child standard is proper when attempting to modify an existing nonparental custody decree. See RCW 26.09.260. See In the Matter of the Welfare of B.R.S.H., 141 Wn. App. 39, 169 P.3D 40 (2007).

E. There was no error by the trial court in finding that there were no facts present to met the definition of “detrimental environment” as alleged by the Appellant or in its finding that the non-moving party’s change of circumstances did not meet the statutory requirement for a major modification.

Contrary to Appellant’s claims, a review of E.A.T.W., indicates that the court did not hold that the facts as alleged by the Petitioner as a basis for modification should be viewed in a light most favorable to the Petitioner. The statutory scheme also does not support that assertion, given it starts from a premise that, “Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court *shall not modify a prior custody decree or a parenting plan* unless it finds,” RCW 26.09.260. Further, it is not a substantial change in circumstances of Z.C. for the Appellant to have her life together. The statute goes on to say, “the court *shall not modify a prior custody decree or a parenting plan* unless it finds upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, *that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.* ...” (Emphasis added.) In a minor modification, RCW 26.09.260 (5), the statute provides:

The court may order adjustments to the residential aspects of a parenting plan upon a *showing of a substantial change in circumstances of either parent* or of the child, (Emphasis added.)

It is clear that the legislature contemplated arguments such as Appellant's, which is why there is a distinction in whose circumstances change. It is also why there is a policy of custodial continuity.

Appellant did not allege sufficient facts to meet the adequate cause requirement. CP 122-179. Appellant alleged nothing different from most any family law case: They won't let me have the child on their time or for extra time, they aren't providing me a play-by-play of their time with the child, they talk badly about me, the family members who have aligned forces with me (the complainant) are being shut out, the child is fearful to show me love in front of the other parent, etc. CP 122-179. Each allegation was refuted by the Respondents. CP 211-253. Further, the court is the weigher of credibility; the fact finder. Those rulings will only be overturned if an abuse of discretion is shown and that is not present in this case. (With regard to the airplane travel issue, Ms. Vaughn used to work for Horizon out of Lewiston, which is where our local airport is located, and has first hand knowledge of the airline losing children. Appellant also fails to mention she has indicated to the court she can't afford to travel to meet halfway via automobile two times a month because of gas prices and an airline ticket is far more expensive. CP 211-253.)

Appellant cites Velickoff v. Velickoff, 95 Wn. App. 346, 21, 968 P.2d 20 (1998) in support of the position that Daleena Vaughn provides a detrimental environment by essentially parental alienation. She fails to note that in Velickoff the nonmoving party had been held in contempt twice within the past three years for failure to comply with the residential schedule [RCW 26.09.260(2)(d)]; and the nonmoving parent also had utilized CPS and law enforcement via a trumped up sexual abuse allegation against the father as to the child. Velickoff at 21-23. The facts are no where similar to the facts of this case.

Most of the alleged facts in Appellant's brief regarding statements of Ms. Vaughn, such as, "We are the only parents Z.C. has ever known," are not abusive use of conflict or obstruction: they are truth. What else would you call it if you are a 9-year-old child who has lived with your Aunt and Uncle for 96% of his life?

I do not want to reiterate all of my 2014 Memorandum of Authorities re: requested modification action. As such, I will simply refer to CP 201-210 for the court.

V. Response to Motion for Change of Venue

Appellant also takes a second run at a change of venue even though that is also not proper and there is no legal basis for the same. There was no legal basis under CR 60(b) to Vacate Orders, there was no violation of the

appearance of fairness doctrine and there was no violation of the Judicial Code of Conduct. Those are the avenues Appellant has for purposes of changing venues and she has been previously denied. Again in the interest of saving time and space, I will cite to CP 94-96 and 565-578, which addresses those issues. Further RCW 4.12.030 must be viewed alongside CJC Rule 2.1(A)(6), which only requires disqualification of the judge if the judge served as a lawyer *in the matter in controversy*. (Emphasis added.) Judge Acey was never an attorney for Respondent(s) in this matter. His firm represented Ms. Vaughn in a parenting plan issue 22 years prior and that matter was unrelated and with none of the same parties, except Ms. Vaughn. Although Judge Acey signed a pleading in the case, Ms. Vaughn advised the court that she met with his then-partner, Eva White, whose name is also referenced on the pleadings. CP 579-616. The child was born and has been raised in Clarkston. The child attends school and other activities here. All of the witnesses, except Ms. England, live here. Venue is proper in Asotin County. CP 211-253.

VI. The court of appeals should not award Fees on appeal.

RAP 18.1 allows for attorney's fees on appeal if there is a basis in the law. There is no basis to award attorney's fees to Appellant. As such, the court should not grant attorney's fees to her. If fees are granted, they should be on behalf of the Respondents. They have had to have counsel for the past 8 years in order to defend themselves in court against Ms. England. The

statutes for attorney's fees (RCW 26.10.080 and 26.09.1410) are designed to assist a person so they won't be deprived of their day in court by reason of financial disadvantage. Ms. England has certainly never been denied her day in court. The Vaughns believe she has used litigation to harass them, feeling that subsequent/repeated petitions for modification, which allege the same facts, but always with a twist, are a means of harassment. CP 228. Further, Ms. England has never paid a dime of child support to the Vaughns while they have raised Z.C. the past 8 ½ years. CP 214-215. These legal battles have cost them greatly and each time they have prevailed. Ms. England chose to utilize 5 different attorneys, and when she did not like an outcome, moved on. Each time she has an excuse and requests a "do over."

VII. CONCLUSION

The decision of the trial court must be upheld. The trial court did not abuse its discretion in the factual findings made, nor did it error as to application or interpretation of the law. There was no misconduct by the judge and Ms. England has had 8 years of bites at the apple. The evidence and the application of the law did not meet the adequate cause requirement necessary to modify an existing decree. The Respondents respectfully request that the trial court decision be upheld.

Respectfully submitted this 13th day of October, 2014.

A handwritten signature in black ink, appearing to read "Brooke J. Burns". The signature is written in a cursive style with a large, sweeping initial "B".

Brooke J. Burns, WSBA #38000
Attorney for Respondents Vaughn