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Court of Appeals
Division III
State of Washington

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

In re the Custody of

S.S. and L.S., Children

BARBARA BARR, Appellant

ROBERT SKAGGS, Respondent

ANNA SKAGGS, Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR YAKIMA COUNTY

RESPONDENT'S BRIEF

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I. Introduction

This case is another case in a string of recent appellate law cases that deal with the complications of a statute that is only constitutional as interpreted by the courts. Unlike the recent cases, this case deals not with the modification of a custody decree, but with the way the case can languish on a court's docket for approximately 600 days without ever having a proper adequate cause hearing. Despite lacking the mandatory determination of adequate cause, Mr. Skaggs' children were withheld from him for 20 months. This violated his constitutional rights and the way that it was done leaves him with virtually no remedies for this constitutional violation.

This case demonstrates that the constitutional infirmities permeate the entire process of the nonparental custody cases. Mr. Skaggs tried to raise the issue that there was no just cause for to remove the children from his care multiple times, even though it is the Petitioner, Ms. Barr, who had the affirmative duty to

establish adequate cause. Despite his efforts, Mr. Skaggs was unable to get the court to respond to his concerns until he formally put the issue before the court for a second time.

Despite the significant constitutional violation that occurred in this case, the contours of this case do not put this court in a position to have to determine whether it is simply impossible to repair the statute through reading constitutional protections into the nonparental custody statute.

This case deals a simple question of whether the trial court erred in making the factual determination that, “no adequate cause was ever found.”

The trial court made the determination that no adequate cause had been found twice. The first time in response to Mr. Skaggs’ motion for summary judgment and the second time in response to appellant’s motion to vacate.

II. Assignment of Error /Issue Presented

The trial court erred by failing to grant attorney's fees and sanctions, especially in response to Appellant's Motion to Vacate. Ms. Barr's failure to appropriately pursue her case resulted in the unconstitutional deprivation of Mr. Skaggs' children for 20 months.

Issues Pertaining to Assignments of Error

1. When a parent's constitutional right to the care, custody, and control of children are infringed upon for approximately 20 months, due to Petitioner's failure to properly plead the case, is the trial court's failure to award attorney's fees and/or sanctions is a *per se* abuse of discretion.
2. Ms. Barr put false information before the court when she alleged abandonment for long period of time. There is no dispute that Mr. Skaggs was in jail for two nights and had several family members willing to take care of the children.
3. The court failed to put the Indian status of the father and the children at the forefront of every decision by failing to ensure to use the best interest of Indian children as required by the Indian Child Welfare Act.

II. Statement of the Case

Robert Skaggs and Anna Stewart (f/k/a Anna Skaggs and Anna Barr)¹ had two children together, L.S. and S.S. Their

¹ For the sake of clarity, Anna Stewart will be referred to by her first name, since she was known by multiple names throughout the timeline of this case. Ms. Barr will refer to

mother Anna, wanted nothing to do with the children and sought to terminate her parental rights through the parties' dissolution. CP 264-271.

Mr. Skaggs is an enrolled member of the Cherokee Nation and L.S. and S.S. are Indian Children as defined by the Federal Indian Child Welfare Act. 25 U.S.C. § 1903(4) (2012). CP 571.

Mr. Skaggs and Anna finalized their divorce on October 9, 2013. CP 264. Approximately twenty-two days later, on October 31, 2013, Ms. Barr, Anna's mother, filed her nonparental custody action. CP 1. Anna never filed a response and was defaulted in the nonparental custody action on January 23, 2014. CP 229-30. Anna has never filed any declaration in the nonparental custody case. The family court investigator made no attempt to contact the mother in her investigation. CP 672.

Anna's mother, Barbara Barr, the appellant in this matter. No disrespect is intended by referring to Ms. Stewart by her first name.

Ms. Barr has a history of seeking to take the children from Mr. Skaggs. When Anna and Mr. Skaggs were having trouble in their marriage, they sent the children to spend time with their grandparents and Ms. Barr refused to return the children. CP 499. Mr. Skaggs had to go to Bellingham with a civil standby to get the children back. CP 499. Immediately after this, Ms. Barr filed a DSHS report against Mr. Skaggs. See the October 2012 DSHS investigation available at CP 494-568, specifically CP 496, where the referrer states the children had been with her for a week.

In response to this DSHS investigation, Anna stated, “she does not worry about the kids being with their dad,” that “she think that her mom is the one who called CPS, she said that her mom has been trying to get [S.S.] away from his dad for a long time [,]” and that “she would not have left the with him if she thought they were in danger.” CP 500.

The present issues began with Mr. Skaggs’ confusion regarding missing a hearing that resulted in his bond being

revoked. His bond company brought him to jail on October 28, 2013. CP 637.

On October 29, 2013, the police received a complaint from Moxee City Hall about a neighbor dispute. Through this, the police investigated the home of Mr. Skaggs' aunt, determined that home was inadequate and also refused to release the children to Mr. Skaggs' sister because she had a live-in boyfriend who was on probation. CP 637. Instead the police contacted DSHS to place the children in protective custody. CP 583.

Anna, the children's mother, was contacted on October 29, 2013 at 5:33 p.m. She affirmed that she is still not in a position to care for the children and that she has been couch surfing, that she is not employed, and that she has a bipolar diagnosis for which she is not receiving treatment. CP 584. She indicated that her parents would be able to take the children. *Id.*

On October 31, 2013, the father was at DSHS at 9:35 A.M. seeking to get his children back. DSHS scheduled a FTDM

(Family Team Decision Making) meeting in the afternoon. CP 590-591.

At the same time the father was attempting to get the children back. Ms. Cantu, the social work for DSHS was having conversations with Mr. Vernon Barr, Ms. Barr's ex-husband who still resides in the home with her. Ms. Cantu encouraged the Barrs to file for nonparental custody of the children. CP 585-586. In fact, when Mr. Barr called on October 31, 2013 at 7:24 A.M. to inquire whether the fact the father was out on bail would impact the nonparental custody case, the social worker told the grandfather to continue with the third party custody case. CP 585-86.

The FTDM meeting was scheduled for 3:30 p.m., on October 31, 2013, but at 2:01 P.M. the grandparents called and stated that they had obtained a third party custody order and that they would be coming to get the children. CP 590-591

At 2:30 P.M., DSHS contacted the father and informed him that the maternal grandparents had obtained a third party

custody order and that the Department would have to return the children to them. CP 589. Mr. Skaggs made it clear to he didn't understand what was going on and in response the Department told Mr. Skaggs they were closing their case. CP 589. DSHS involvement ended at this time.

When Ms. Barr turned to the court, she presented the court with misleading facts about the status of the father in order to obtain a temporary order. She stated she was told that that the "children would become wards of the state" if no one came forward. CP 79. Yet, at the time she filed the position, she was fully aware that the father was no longer in jail and working with DSHS to return to the children to his care and that there was an FTDM meeting that was supposed to be held that afternoon.

Mr. Barr's declaration, and the only declaration he filed in this case, mirrors Ms. Barr's declaration as to the reasoning for the petition for nonparental custody. CP 81-82. He also noted that he was planning on living on a boat so the children would

have their own room (CP 82), however this never ended up happening.

In her petition for nonparental custody, Ms. Barr falsely cited “Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions.” CP 10, line 13-14. Under 1.13 for “Adequate Cause” the reason cited is “The children are not been (sic) in the physical custody of either parent since October 29, 2013.” CP 11, which at the time of the court filing would have been one and a half days.

A hearing was originally set for November 14, 2013. The court was clear at the October 31, 2013 hearing that a hearing had to be within 14 days. As Ms. Barr’s counsel sought a motion for continuance this hearing was reframed as a show cause hearing for a restraining order against Mr. Skaggs and for temporary custody. Mr. Skaggs objected to not having his children (RP 9, lines 12-13, RP 10, lines 10-12, RP 12, line 19) but the court indicated that it was Ms. Barr’s motion so if she

wanted to continue it, they were allowed. RP 8, line 24. At this hearing, Ms. Remy put false information before the court when she indicated that there was ongoing CPS involvement in this case, even though the CPS case closed upon the filing of the nonparental custody action. RP 11, line 17.

The court order continued “this hearing on temporary restraining order” (sic) until December 4, 2013. CP 27-28, 30.

On December 2, 2013, Mr. Skaggs filed 10 declarations, including the declaration of the children’s physician and a response. CP 32-87. These declarations discussed Mr. Skaggs, his parenting, that he was strongly bonded with the children, and believed to be a good father. His response denied the third party custody position and noted that there was no “just cause” for this action. CP 53-54.

At the December 4, 2013 hearing, Ms. Remy, Ms. Barr’s attorney requested another continuance, this time until December 19th. RP 14.

On December 16, 2013, Ms. Barr filed 35 declarations (CP 93-171) from members of her church and co-workers. Members of her church, describing her as a member of their church and a good Christian woman.

Many of the declarations of Ms. Barrs' co-workers do not seem to understand what the case is about and their declarations appear to be more along the lines of the type of statement you would make for someone seeking a job recommendation. One even seems to completely misunderstand her relationship to the children, referencing her as the children's mother. CP 153-154.

The few declarations that discussed the children stated the opinion that Ms. Barr would be a good caregiver to the children. Only two declarations, that of Karla Ely (CP 93-96) and Gayle Miller (CP 112-114) make reference to Ms. Skaggs. These declarations only include hearsay and sometimes hearsay within hearsay statements and do not appear to have any first hand observations of the children in Mr. Skaggs' care. Ms. Ely seems

to simply believe that Ms. Barr has more financial resources to support their children than Mr. Skaggs.

No one makes the claim that Mr. Skaggs is unfit or that there would be a detriment to the children if the children resided with him.

Ms. Barr also filed another declaration consisting of four paragraphs citing Mr. Skaggs criminal past, pending charges for assault, and alleged lack of employment or home for the children as reasons why she is the “Best candidate for primary custodian of my grandchildren.” CP 174.

At this time, instead of proposing a proposed a finding of adequate cause, Ms. Barr filed a proposed residential schedule. She proposed that the children exclusively reside with her with her with the exception of winter break and other school breaks; during these breaks, either parent would be entitled to “supervised visitation at the discretion of Barbara Barr.” CP 178-179.

At the December 19, 2013 hearing, Ms. Remy characterized this hearing, which the court said would be a hearing regarding a temporary restraining order, as pertaining to:

“a motion to grant a permanent restraining order which permits visitation only at the petitioner’s discretion between Robert Skaggs and the two children[.]”

RP 17

The court noted that Ms. Remy had not properly filed the declarations and that Mr. Skaggs had not had an opportunity to review the declarations. RP 17. As such, the court continued the hearing until January 9, 2014, maintaining custody and visitation as “status quo.” CP 185.

On January 9, 2014,² the matter was brought before then Commissioner Gayle Hartchock.³ Ms. Remy stated:

The petitioner is asking that the court grant the visitation detailed in the proposed residential schedule, which is primarily at the discretion of

² Please note, the transcript for this hearing is not provided with the Report of Proceedings, instead it can be found at CP 433-452.

³ On April 21, 2014, Commissioner Hartchock became Judge Hartchock through an appointment by Gov. Inslee. At the time of this hearing she was not a judge. The powers of a commissioner are granted under Const. art. IV § 23 and RCW 2.24.040. This issue was not raised at the trial court level and as such, it is beyond the scope of this appeal to address whether a commissioner has the authority to determine adequate cause in a contested proceeding.

Barbara Barr, which grants visitation for the Respondent Anna Barr at the discretion of Barbara Barr, which orders child support as determined pursuant to the Washington State Child Support Statutes, which restrains or enjoins Robert Skaggs from disturbing the peace of Barbara Barr or any of the children which restrains him from going onto the grounds or entering the workplace or the school of the other parties, the daycare or the school of [S.S.] or [L.S]

RP 4 lines 1-14.

Later she stated, “Your Honor, essentially we’re asking the children remain where they are, which is with the Petitioner, Barbara Barr.” RP 6, lines 10-12.

Ms. Remy did not ask for a finding of adequate cause and the court did not make an adequate cause finding. The court said, “There’s some difference of opinion about whether or not you’re fit, Mr. Skaggs.” The court stated, “I think we research into the background, an investigation about what is in the best interest of the children and whether or not you truly are an unfit parent or whether or not return to your care would be detrimental to the children.” CP 447.

The January 9, 2014 order that accompanied this hearing was a handwritten “Temporary Order” stating that the children remained with Ms. Barr, that the children and the father are Indian, and that Mr. Skaggs is “*currently* unable to safely care for his children.” CP 224-225. (emphasis added.) The court did not provide any facts in support of this finding. The court required the entire burden of travel and the expense of supervised visitation to fall solely on the father who stated he did not have the financial ability to pay for travel and the supervised visitation. CP 224-225 and CP 447 -449.

Almost four months later, the report from Family Court Services was completed on May 6, 2014.⁴ The family court investigator, never saw the children or Anna, the children’s mother. She interviewed Ms. Barr over the phone on March 17, 2014. She interviewed Mr. Barr on April 30, 2014. CP 679. She interviewed Mr. Skaggs on April 22, 2014. CP 668.

⁴ Two versions are available, a summary at CP 233-238 and the full report at CP 668-699.

The father explained that the cost of a trip to Bellingham was prohibitive. CP 675. He also could not leave Yakima until his hearing on the assault case was over. CP 676. He expressed a fear about going to Bellingham given the grandparents history of making false allegations to CPS. CP 675.

The grandmother stated that CPS encouraged her to file for nonparental custody and that Andrea Cantu, a social worker, was adamant that the father should not have custody of his children. CP 678.

Per the family court investigator, there were a “significant number of CPS reports involving these parties dating back to 2000[.]” CP 681. Many of these reports were related to the Ms. Barr and her parenting of Anna. CP 682-683. The issues included accusations that Anna’s brother sexually assaulted her on an ongoing basis from the ages of 6-8 years old (CP 681), inadequate supervision that allowed Anna to be raped by a 27-year-old man in Barrs’ home when she was approximately 12 years old (CP 682), Anna having severe depression and

substance abuse problems, so that she had been hospitalized for mental issues and in substance abuse treatment multiple times by the age of 16, at which time, she apparently left the state with an older man (CP 682).

With regard to the father's fitness the report states: "While I have no doubt the father loves his children, it is difficult to ascertain his ability to effectively parent these children." CP 698 lines 13-14. "The father may indeed be a fit parent, but at this point in time there is not enough information to ensure the safety of the children if they were placed in his care." CP 698-699. At least some of the family court investigator's concerns seemed to be related to Mr. Skaggs criminal history, as he spent a considerable amount of time in jail for an assault and burglary from when he was approximately 19 years old. CP 235. There were two non-driving incidents that existed after he was released in approximately 2005.

The first incident was related to a protection order Anna obtained in 2010. When Anna dropped the protection order she

“stated she does not feel threatened by the father and was pressured to obtain a protection order by ‘outside sources.’” CP 236, lines 11-13.

The second incident of concern to the family court investigator appears to have been the father following a discipline request by his niece’s mom. His niece bit a child and his niece’s mother asked him to bite the child as a method of discipline. CP 237 lines 3-5. Mr. Skaggs felt a bite was better than what her parents typically did, which was beat her with a belt. CP 673-674. Andrea Cantu, the same social worker who would later advise the Barrs to pursue third party custody (CP 586), investigated this case and determined the allegation as founded. This incident occurred on March 29, 2013, but it was not reported to police until July 22, 2013. CP 645 and 642. Mr. Skaggs was charged then charged with fourth degree assault, he missed a hearing, and it is from this incident that he ended up in jail for a day and a half, which led to this nonparental custody action.

After the January 9, 2014 hearing, the next time the parties appeared in court was on November 24, 2014 for a Status Conference. The Status Conference appears to have only involved a discussion of trial and how many witnesses the parties would call. CP 244-245.

At this time, Ms. Remy filed a note for trial setting, identifying no dates of availability for trial for five months. CP 245-246. On December 12, 2014, the court set trial for March 17, 2015. CP 247. Trial was set during a time when Ms. Remy noted she was not available. CP 246. On March 18, 2015, trial was rescheduled to June 29, 2015. CP 248.

On April 8, 2015, Mr. Skaggs attempted to file a Motion for Summary Judgment, but was instructed by the clerks that it should be a Motion to Dismiss. The heading on the first page and the motion was otherwise filed without changes. CP 249-304. See RP 23.

Mr. Skaggs argued that the case should be dismissed for lack of adequate cause. Ms. Skaggs argued in the alternative, that

if the court believed that there was adequate cause, that the court should issue an order specifically stating what the facts were supporting adequate cause as well as what Mr. Skaggs would be required to do to remedy parenting deficiencies. CP 262 and CP 290-293.

Ms. Barr filed her response on April 23, 2015. CP 308-310. Her argument was simply that summary judgment is only appropriate where there is no genuine issue of material fact and because trial was set for June 29, 2015, it should just go to trial. CP 311.

At the April 24, 2015 hearing, Mr. Skagg's motion was denied because it should have been a motion for summary judgment and Ms. Barr was not provided enough time to respond. CP 313.

Mr. Skaggs re-filed the motion and re-noted for June 11, 2015. CP 314-369. On May 19, 2015, Ms. Barr's counsel filed a motion for continuance. CP 372. Mr. Skaggs objected to

continuance asserting that this case had been allowed to go along for far too long without adequate cause. CP 375-377.

At the hearing for the motion for continuance Ms. Barr was put on notice that the court did not believe adequate cause had been established:

[Mr. Skaggs] raises the question -why hasn't there ever been an adequate cause hearing. And I looked through the file and I didn't find that there had ever been an adequate cause finding.

RP 28 lines 13-16.

The court warned Ms. Remy "You need to make sure it's in the record...Because otherwise you will not be in compliance with the law." RP 30.

The court ordered Ms. Remy to include a motion for a finding of adequate cause:

I'm going to require that your response include a motion for a finding of adequate case and it seems to me adequate cause we're going to have to talk about is adequate cause now, not the adequate cause may have been in 2013 because we are at now now.

RP. 33 Lines 11-14.

Ms. Barr was allowed until June 18, 2015 to respond and file a motion for adequate cause. CP 380.

Ms. Barr did not follow the court's order, instead on June 16, 2015, Ms. Barr filed her Response to the Motion for Summary Judgment, which was in many ways duplicative her earlier response. CP 382-385. One of the differences was in the law and argument section where the Motion stated that, "Petitioner is not asking for a determination on custody as matter of law at this time, merely a denial of Mr. Skaggs' motion." CP 385, lines 11-12. Noticeably absent from this brief, especially given the court's explicit order, is a discussion of adequate cause. There is certainly no motion for adequate cause that Ms. Barr was ordered to file.

Instead she filed an IEP for S.S., two declarations from Ms. Barr, one with her claim that as the former CFO for the NW Indian Tribe, she would be willing to help the children explore their heritage (CP 390-393) and Ms. Barr's update on the children, and Anna, the mother who has been defaulted out and

never appeared or provided a declaration in this case. She also stated that the children were bonded with Anna's new husband (his full name never appears to have been provided to the court) (CP 394-396), and a declaration of S.S.'s special education teacher (CP 386-389).

Ms. Barr's stated concern regarding placement with Mr. Skaggs is that he will take off with the children. CP 389. Noticeably absent is any declaration that addresses Mr. Skaggs and his current ability to parent the children.

On June 25, 2015, the court granted summary judgment finding that adequate cause was never filed. CP 414.

On July 17, 2015, Ms. Barr appealed, through her new counsel, Ms. McLaughlin. CP 415.

On August 14, 2015, Ms. Barr filed a Motion to Vacate the Order of Dismissal. CP 425-431. This brief argued that the January 9, 2014 hearing was in fact an adequate cause hearing. Ms. Barr's prior counsel's prior argument was that it was not an

adequate cause hearing because she did not believe adequate cause was required.

Ms. Barr, through her new counsel, argued that the court's failure to recognize the January 9, 2014 hearing as an adequate cause hearing was an "*irregularity* in the court's order" (emphasis in original). CP 427. Ms. Barr also argued that the court ruled as a matter of law that the Petitioner did not have standing to maintain the lawsuit and that this was an "irregularity" because the involvement of CPS. CP 429-430.

Ms. McLaughlan in support of her motion to vacate, refiled the CPS reports for October 29, 2013 (CP 781-793) (The entire CPS report, including the October 29, 2013 notes were previously provided on December 17, 2013 at CP 492-640). She also filed counseling records from a James Marten, LMHC, dated May 26, 2015 (CP 794-796)⁵ and records dated June 9, 2014

⁵ This report appears to be dated May 26, 2015, but the reporting that was provided to the counselor states that he only spoke to his dad once on the phone. It is unclear whether this is once with the counselor or if they are reporting that S.S. has only talked to his father once since beginning to reside with the Barrs. Regardless, the counselor urges more communication with the father.

from Donna Davis, LHMC CP 797, both of these were available to Ms. Barr prior to the June 3, 2015 hearing.

Mr. Skaggs filed his response on August 25, 2015. CP 798-807. Mr. Skaggs' response sought sanctions in the amount of \$15,000 for filing a frivolous motion.

The court denied the Motion to Vacate on August 27, 2015. Of particular interest is the colloquy with the court regarding the issue of adequate cause:

it appears the court jumped immediately to temporary custody and it never made the initial determination of adequate cause... But even if an adequate cause determination had been made, ultimately the issue is whether Mr. Skaggs is an unfit parent at the time of that determination. And all of the information provided about Mr. Skaggs all had to do with this one very short time period right around the end of October 2013, and there were allegations that for a long time after that that he was incarcerated. I think the Court was given the impression that he was continued to be incarcerated and in fact he was in and out quickly and ultimately there's no dispute about the fact that the charges against him were dismissed and yet that was never brought to the Court's attention by the petitioner.

... If the case gets to the point at which it is undisputed that the father is not an unfit parent, then

there's no reason to go ahead with a trial. And in this case, he provided the evidence to show that the allegations that had originally made him appear to be unfit were all gone. And he in fact was not in any kind of a long-term incarceration, that he was in fact in jail for, what, a day or less, or something like that

—

MR. SKAGGS: Day and a half.

THE COURT: -- and then the charges against him were dismissed. And so if the charges against him were dismissed, the fact that he was incarcerated then becomes no evidence at all that he's unfit.

RP 58-60

III. Legal Analysis

It is important to center this case in the constitutional principles that were not properly addressed throughout much of this case. Nonparental custody is an extraordinary remedy, since it abridges a parent's constitutional rights." *In re B.M.H.*, 179 Wash. 2d 224, 236-39, 315 P.3d 470, 475 (2013) Furthermore:

The United States and Washington Supreme Courts have long recognized parents' fundamental rights to the care and custody of their children. The "rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man' 'It is cardinal with us that the custody, care and nurture

of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) (citations omitted) (quoting *Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). The rights have been recognized as protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, and the Ninth Amendment. *Id.*

State interference with the parent’s right to rear her or his children is subject to strict scrutiny, “justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.” *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57 (2000).

In re Custody of T.L., 165 Wn. App. 268, 268 P.3d 963 (2011) (extra internal citations omitted).

Standard of Review

Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 487-88, 84 P.3d 1231 (2004). A material fact is one

upon which the outcome of the litigation depends. *Id.* Citing *Morris v. McNicol*, 83 Wn. 2d 491, 494, 519 P.2d 7 (1974).

The court must consider all of the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Id.* Citing *Clements v. Travelers Indem. Co.* 121 Wn. 2d 243, 249, 850 P.2d 1298 (1993). The nonmoving party has the opportunity to present additional evidence that would support the nonmoving party's claim, but they cannot rely on bare allegations. *Id.* Citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989).

Trial court findings of fact are reviewed for substantial evidence in support of the findings. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010) (Citing *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)). Even if there is conflicting evidence, an appellate court may not disturb findings of fact supported by substantial evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d

162, 164 (2010) (citing *In re Marriage of Lutz*, 74 Wn. App. 356, 370, 873 P.2d 566 (1994)).

Parents are entitled to a presumption of fitness. *In re Custody of T.L.* 165 Wn. App. 268, 268 P.2d 963 (2011). The burden is on the party petitioning for nonparental custody to establish the parent is unfit or that there would be actual detriment to the child. *In re Custody of Z.C.*, 191 Wn. App. 674, 679 (2015).

1. WHEN A PARENT’S CONSTITUTIONAL RIGHT TO THE CARE, CUSTODY, AND CONTROL OF CHILDREN ARE INFRINGED UPON FOR APPROXIMATELY 20 MONTHS, DUE TO PETITIONER’S FAILURE TO PROPERLY PLEAD THE CASE, THE TRIAL COURT’S FAILURE TO AWARD ATTORNEY’S FEES AND/OR SANCTIONS IS A *PER SE* ABUSE OF DISCRETION.

a. The Court Made a Factual Finding that Adequate Cause was Never Found

Here, the trial court made a factual finding that adequate cause was not only never found, but that Ms. Barr never moved the court for a finding of adequate cause, despite the court’s order

to file a motion for adequate cause. CP 380. The finding that adequate cause was never ordered is a factual finding.

Ms. Barr had almost 600 days to file a motion for adequate cause. Ms. Barr was made aware of Mr. Skaggs' argument that there was no adequate cause on April 28, 2015. CP 249-303. The court required Ms. Barr to file a motion for adequate cause by June 18, 2015. CP 380. Ms. Barr did not do this.

Ms. Remy, essentially admitted there was no adequate cause when she stated in the hearing, "I don't believe that adequate cause is necessary in a non-parental custody petition." RP 37, lines 14-15. Perhaps Ms. Barr was intentionally avoiding the issue of adequate cause and the constitutional requirements involved in a nonparental custody action.

The court properly held that Ms. Barr had never established adequate cause.⁶

⁶ On page 21-22 of Appellant's brief, she misleads the court by stating that, "in its rigid application of CR 56 [the court] excluded this evidence, crucial to Ms. Barr's case, ruling it was inadmissible..." The court noted that Ms. Remy had filed "literally dozens of declarations that talk about what a good and responsible person your client is but I did not see any declaration with any personal knowledge that indicated they had personal

The court denied Ms. Barr’s motion to vacate. The court noted that even if Ms. Barr had established adequate cause back on October 31, 2015, at any point prior to trial, Mr. Skaggs could file a summary judgment arguing that adequate cause no longer existed. The court compared this to a “*Knapstad* motion to show that in fact there’s no legal basis to proceed once we kind of sorted out what the facts actually are.” RP 59, lines 9-10.

b. Ms. Barr lacks standing to bring the nonparental custody petition.

RCW 26.10.030 requires that the child not be in physical custody of one of its parents or for the petitioner to allege that neither parent is a suitable custodian. Ms. Barr was fully aware when she made her petition that the father was released from jail and was seeking to get his children back. Ms. Barr intentionally ended CPS’s involvement when she filed a nonparental custody proceeding. The fact that she took this step does not allow her to claim that the children

knowledge of the father’s unsuitability as a custodian for the children.” RP 41-42. The court also explicitly reviews the Family Court Investigator’s Report. RP 43.

were not in the father's care or that his children were willfully abandoned.

Aside from her false statement that the father willfully abandoned the children, Ms. Barr never alleges that the father is unsuitable. Without actually meeting either requirement for commencing an action under RCW 26.10.030, Ms. Barr has no standing to make Nonparental custody claim.

c. Summary Judgement, based on a lack of evidence that the parent is unfit, *i.e.*, because there is no adequate cause, is always appropriate in a Nonparental Custody Case Because Constitutional Rights are at Stake

The nonparental custody statute and the case law are unequivocal – a noncustodial parent is not entitled to a hearing without adequate cause. RCW 26.10.032(2). The State cannot interfere with the liberty interest of parents in the custody of their children unless a parent is unfit or custody with a parent would result in “actual detriment to the child's growth and development.” *In re Custody of B.M.H.*, 179 Wn.2d 224, 235-36,

315 P.3d 470, 475 (2013) citing. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 338, 227 P.3d 1284 (2010); See also, *In re Custody of Shields*, 157 Wn.2d 126, 142-43, 136 P.3d 117 (2006).

The Washington State Supreme Court addressed the question of adequate cause in nonparental custody statutes in *In re Custody of B.M.H.* *In re Custody of B.M.H.*, 179 Wn.2d 224, 235-36, 315 P.3d 470, 475 (2013). The court held there is a heightened standard, “that when properly applied, the requisite showing required by the nonparent is substantial and a nonparent will be able to meet this substantial standard only in “extraordinary circumstances.” (Quoting *In re Custody of Shields*, 157 Wn. 2d 126, 142-43, 136 P.3d 117 (2006), which quoted *In re Marriage of Allen*, 28 Wn. App. 637, 649 626 P.3d 16 (1981)). Facts that merely support a finding that nonparental custody is in the “best interests of the child” are insufficient to establish adequate cause. *B.M.H.*, 179 Wn. 2d at 237 (citing *In re Custody of S.C.D.-L*, 170 Wn.2d 513, 516-17, 243 P.3d 918

(2010) and *In re Custody of Anderson*, 77 Wn. App. 261, 266, 890 P.2d 525 (1995).

If, during the pendency of a case, fitness is no longer an issue, a parent is entitled to move the court to dismiss this case. Arguably, if a court becomes aware that unfitness or the concern regarding detriment is remedied, a court has an affirmative duty to dismiss the case as the court lacks jurisdiction to interfere with the constitutional rights of a parent to the care, custody, and control of his or her child(ren) if the concerns regarding the parent's parental deficiencies are remedied.

d. If a parent is entitled to modify an agreed order if they become fit, it follows that during the pendency of a final custody decree, if a parent becomes fit prior to trial, the case must be dismissed

Appellant's arguments that somehow summary judgment should not be available was technically not made in connection to the order she is appealing and should not be allowed to be argued on appeal. Nevertheless, Ms. McLaughlin raised that issue in her motion to vacate, which she filed after the appeal was

filed. She did not file a motion with the court to include this second order, but she did include the hearing and her motion in the request for clerk's papers and a report of the proceedings. Appellant makes the argument that the adequate cause requirement of RCW 26.10 precludes a CR 56 motion. The trial court correctly rejected this argument in the motion to vacate.

There exists no procedural motion to establish there is no adequate cause. It is worth noting that Mr. Skaggs did argue in the alternative for or an order regarding adequate cause. CP 262. Summary judgment is how a parent would make the argument that adequate cause never existed or it has been remedied.

Adequate cause is also something that is intended to happen in the initial stage of a nonparental custody matter. Summary judgment can happen at any time. Thus, summary judgment is the appropriate remedy a parent would use if, during the pendency of a nonparental custody case, they remediated any parenting deficiencies.

Recently, courts have struggled with the question of what happens when there is a finding of adequate cause and an entry of a nonparental custody decree and then the parent becomes fit. Thus far, the cases have focused on the modification of a nonparental custody decree when there is no judicial finding that the parent is unfit because the parties enter an agreed order.

In re Custody of Z.C., has similarities to the issues in this case. In that case, the agreement to adequate cause relied on findings that the mother had a current (at the time of the order) drug problem. The mother rehabilitated herself and then spent years fighting to get her child back. *Z.C.*, 191 Wn. App. 674 (2015). (Referencing *In re Custody of T.L.* 165 Wn. App. 268, 268 P.2d 963 (2011)).

At the outset of this nonparental custody case, there was a possibility the father could be charged and prosecuted with fourth degree assault. When the charges were dropped, the father was essentially rehabilitated.

The court noted that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.” *Z.C.*, 191 Wn. App. 674 (2015). (Citing *In re Welfare of B.P.*, 188 Wn. App. 113, 165, 353 P.3d 224 (2015) (Fearing, J. dissenting), which cited *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

The logic that has allowed for modification when parties agreed to a nonparental decree should be applied in the initial stage of nonparental custody determinations. A parent is entitled to an order returning the child to their care as soon as any concerns regarding their parenting are resolved. Mr. Skaggs should not be in a worse position than parents who agreed to a nonparental custody decree. This is especially true given how long this case languished in an inactive status in the trial court. Mr. Skaggs children were withheld 20 months. There was no guarantee trial would proceed as scheduled as it had already been

scheduled and postponed numerous times and no effort towards trial had been made, i.e., no exchange of witness lists or trial exhibits.

To deny Mr. Skaggs the ability to file a motion for summary judgment would deny Mr. Skaggs any remedy and allow for an even more protected denial of his constitutional rights and deny the children the care and love the parent who is able to take care of them.

A parent who agrees to a modification cannot be in a stronger position to get remedies than a parent who is fighting a nonparental custody action, but is denied his right to the care, custody and control of his children while he awaits a trial that never comes.

Appellant's argument is essentially that once adequate cause is established, a nonparental custodian "acquires a substantive right to a hearing." No case law or statute supports the notion that the moving party in a nonparental custody action acquires rights that usurp the constitutional rights of a parent to

the care, custody, and control of their child before there is a custody decree. The trial court explicitly rejected Ms. McLaughlin's argument when it denied her motion to vacate.

The only time there is any evidence that Mr. Skaggs was unable to care adequately care for his children was when he was in custody. It is undisputed that he was in custody for very short time. The CPS report that Appellant insists shows that Mr. Skaggs was unfit stated, "Father Robert L. Skaggs failed to provide adequate food, shelter and supervision necessary for the children prior to his incarceration." 598. The report also acknowledges the father was not aware that he had a bench warrant (CP 600), which would make it hard to prepare provide for his children in his incarceration. Regardless, his "incarceration" was not long-term, nor was it willful abandonment.

Mr. Skaggs went to DSHS early in the morning after his release and sought to get his children back. The Barrs chose to intercede and file a third party custody action, aware that this

would require DSHS to transfer custody of the children to the Barrs and close the DSHS case. Then the Barrs not only refused to return the children to their father, but refused to work with the father so that he could see his children during the entire 20 months for which they had the a temporary order placing the children in their control.

The IEP records that Appellant seems claim should somehow demonstrate adequate cause was dated January 22, 2015, approximately 15 months after the children were in Ms. Barr's care. There is no evidence that the behavioral issues S.S. experienced were connected to anything that related to his father as opposed to the actions of his grandmother who kept the children from their father who had been their primary caretaker.

The same is analysis is true for the school records. There is no evidence in the record that supports what is apparently Ms. Barr's theory that any behavioral issues are related to trauma inflicted upon them by Mr. Skaggs.

Even if every piece of evidence Ms. Barr provided were allowed in and reviewed in a light most favorable to her, it would still fail to overcome the constitutional presumption that a parent is fit.

2. Ms. Barr lacked standing because she put false information before the court when she alleged abandonment for long period of time. There is no dispute that Mr. Skaggs was in jail for a very short time and had several family members willing to take care of the children.

If Ms. Barr had not engaged in deceptive practices at the outset, the court may not have ever granted her a temporary order. Ms. Barr stated, “I was further advised if no one came forward to seek custody of the children they would become wards of the state.” CP 13.

This directly contradicts the information in the CPS reports that indicate that the grandparents were fully aware of the process when CPS is involved: “SW informed the g’father again the role of the Dept. and then informed him of 3rd party

custody and what was entailed... SW informed the g'father in the interim, the Dept. would need to schedule a FTDM mtg. and explained what this entailed." CP 586. The Social worker contacted Mr. Barr at 11:58 a.m. to inform him of the FTDM meeting in the afternoon.

This highlights one of the major differences between dependency and nonparental custody, in a dependency case, a parent is provided with a clear understanding of what their parenting deficiencies are. Under RCW 13.30.020, once a child has been taken into limited custody, DSHS must offer crisis intervention services to the family and DSHS must pursue a primary goal of attempting to returning the child to the family home. *See* RCW 13.34.025 (coordination of services); RCW 13.34.090 (rights to counsel, to be heard, etc.); RCW 13.34.092 (right to counsel); RCW 13.24.180 (regarding provision of services.). There are no requirements in nonparental custody cases to work to reunite the family.

In this case, but for Ms. Barr's following the social worker prodding to file the nonparental custody case, there would have been an FTDM meeting that was supposed to take place at 3:30 P.M. The children would have been returned to their father or a plan would have been established to facilitate the children's return to their father. Instead, the Barrs told the social worker at 2:01 P.M. that they had an order. It is unclear whether the Barrs also deceived the Social Worker that an order was entered prior to the FTDM meeting as the time stamp on the order is 3:54 p.m. approximately two hours after they claimed they had the order and less than a half hour after the FTDM meeting was supposed to occur. Yet the Barrs made no mention of the meeting to the court.

3. The court failed to put the Indian status of the father and the children at the forefront of every decision by failing to ensure to use the best interest of Indian children as required by the Indian Child Welfare Act.

The Indian Child Welfare Act (ICWA) seeks to help preserve the Indian culture. ICWA prohibits foster care placement

or termination of parental rights with respect to an Indian child unless the state court is satisfied that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” RCW 13.38.040.

Under ICWA, nonparental custody actions are included as they are considered foster care placement as it is an action “removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home, institution, or with a relative, guardian, conservator, or suitable other person where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.”

Arguably ICWA requires courts to treat a nonparental custody case that involves registered members of recognized tribes similar to a dependency. The court was required to analyze Mr. Skagg’s parenting, to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.

The failure of the court to put the Indian status at the center of its decision making compounded the constitutional error of failing to address adequate cause.

IV. Motion for Attorney's Fees

Mr. Skaggs seeks attorney fees pursuant to RCW 4.84.185 because this appeal is frivolous and a waste of the Court's judicial time. An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679,691,735 P.2d 510 (1987).

"The purpose of RCW 4.84.185 is to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for purposes of harassment, delay, nuisance, or spite." *Ahmad v. Town of Springdale*, 178 Wn. App 333, 343, 314 P.3d 729 (2013). An award of attorney fees on appeal, pursuant to RCW 4.84.185 and RAP 18.9(a) is appropriate when

the appeal cannot be supported by an rational argument on the law or facts *Stiles v. Kearney*, 168 Wn. App 250, 260, 277 P.3d 9 (2012).

Mr. Skaggs also seeks attorney's fees pursuant to RAP 18.1 and RCW 26.10.080 based on his need relative to Ms. Barr's ability to pay on the authority of RAP 18.1 and RCW 26.10.080.

Here, the fact that Mr. Skaggs was unable to afford an attorney during his fight for his children put him at a significant disadvantage. It is only because he was able to obtain the assistance of an attorney, willing to work on pro bono basis that he even understood that important procedural steps were missed in his case and that he could pursue summary judgment to remedy this. Had proper procedures been followed or had proper concern been taken regarding the infringement of Mr. Skaggs' constitutional right to parent and the importance honoring the relationship of the parents to their children, then the irreparable

harm caused by Ms. Barr's overarching efforts to invade the familial relationship would not have occurred.

V. Conclusion

This case demonstrates that how broken the nonparental custody statute is. This court in *Z.C.* encouraged the legislature to amend the nonparental custody provisions to address the constitutional liberty interest of parents. *In re Custody of Z.C.* 191 Wn. App. At 706. The fact that the statute explicitly uses a "best interest of the child" standard so familiar in family law leads to exactly this kind of problem and it is far too easy for a case like this to slip through the cracks resulting in a deprivation of constitutional rights, a deprivation that has virtually no remedy.

The problem, as this court is well-aware is that nonparental custody meets an important need in our society and simply overruling the whole statute as unconstitutional because of the legislature's lack of action in remedying the constitutional infirmities creates a scary question of what would happen to the

all the families that avail themselves of the nonparental custody statute? Perhaps it would not be the worst thing because *In re: Z.C.* demonstrated that as soon as nonparental custody petition is filed, the court has no ability to require DSHS to provide any remedial services.

Regardless, this case does not require the court to decide the issue of whether the court's efforts to read constitutional protections into the nonparental custody statute have failed. Here the trial court dismissed the case because Ms. Barr failed to ever demonstrate adequate cause. Her case was dismissed with prejudice. The court need only uphold the trial court's decision.

Attorney's fees in this case are vital. The Barrs have already demonstrated that they will continue their efforts to harass Mr. Barr, they will just switch to a different arena. Ms. McLaughlin filed a petition on behalf of Anna to restrain the relocation of Mr. Skaggs. RP 61. Shortly after the return to Mr. Skaggs care, Anna called the police on Mr. Skaggs because she went two days without talking to the children on the phone. CP

810-813. Without something stronger than a denial of their motion, the Barrs will be emboldened to continue to fight Mr. Skaggs anyway they can without any consideration for the best interest of the children.

Respectfully Submitted,

/s/ Jill Mullins-Cannon

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

In re the Custody of

S. Skaggs. and L. Skaggs

BARBARA BARR, Appellant

v.

ROBERT SKAGGS, Respondent

ANNA SKAGGS, Respondent

No. 336522

Declaration of Service

Jill Mullins-Cannon certifies as follows:

On April 4, 2016, I served upon the following true and correct copies of Respondent Robert Skaggs' Response and this Declaration by electronic mail ("email").

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

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DECLARATION OF SERVICE

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