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In re the Custody of:
Elliot A.T. Wilson and Evan Y. Wilson

VITO & YASUKO GRIECO,

Petitioners,

vs.

SACHI T. WILSON,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

LAW OFFICES OF
CYNTHIA B. WHITAKER

By: Cynthia Whitaker
WSBA No. 7292

1200 Fifth Avenue, Suite 2020
Seattle, WA 98101
(206) 382-0000

Attorneys for Petitioners

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ORIGINAL

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I. ISSUE PRESENTED FOR REVIEW

The parties dispute the facts. That is why trial is necessary. This appeal presents the legal issue whether adequate cause to proceed to trial was shown under RCW 26.10.032(1), which requires that a petitioner seeking to establish adequate cause for a third party custody action submit "an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order." Were the grandparents required to allege that the father, the children's only living parent, was unfit or that conditions in the father's home would be detrimental in order for their third party custody petition to proceed to trial when the children were not in the physical custody of either parent, and with the father's acquiescence and agreement had lived with the grandparents for the past five years?

II. SUPPLEMENTAL ARGUMENT

A. “The Legislature Means What It Says,” And Once The Petitioners Showed That The Children Had Not Been In The Physical Custody Of Their Only Living Parent For The Previous Five Years, Adequate Cause For Their Third Party Custody Petition Was Established.

At issue in this appeal is the proper statutory construction of RCW 26.10.032(1), which provides that “[a] party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order.” Here, Division One held that a petitioner can establish adequate cause for a third party custody action only by showing more than the statute itself demands. Division One held that a petitioner must also make “factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent.” *Grieco v. Wilson*, 144 Wn. App. 865, 875, ¶ 24, 184 P.3d 668 (2008), *rev. granted*, 165 Wn.2d 1015 (2009).

By interpreting the statute in this manner, Division One read into the statute a provision “which the legislature did not see fit to enact. Courts will not read into a statute something which is not there.” *In re Baker's Estate*, 49 Wn.2d 609, 611, 304 P.2d 1051

(1956); see also **Custody of Smith**, 137 Wn.2d 1, 12, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." **Davis v. State ex rel. Department of Licensing**, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (citations omitted). This Court must reject Division One's interpretation because it would make the statute's provision that a petitioner allege that "neither parent is a suitable custodian" superfluous and would render the statutory term "or" meaningless. Under Division One's interpretation, RCW 26.10.032(1) would require that a petitioner allege that the child "is not in the physical custody of a parent" and "that the parent is not a suitable custodian."

Division One's interpretation would also render superfluous the statutory requirement that a petitioner allege that "neither parent is a suitable custodian" when the children are in a parent's physical custody. If a petitioner is in every instance required to assert the unfitness of the parent or actual detriment to the child if placed with the parent in order to establish adequate cause, there would be no

reason to also have to assert that a parent is not a “suitable custodian” if the child is in the parent’s custody when the petition is made, as an allegation that the parent was unfit or that placement with the parent would be detrimental would of itself make the parent not a “suitable custodian.”

In a decision published two months after the decision in this case, Division Three properly interpreted RCW 26.10.032(1) in *Custody of BJB*, 146 Wn. App. 1, 189 P.3d 800 (2008). “The purpose of statutory construction is to discern and give effect to legislative intent. Intent is derived primarily from the language itself. We presume the legislature means what it says.” *Custody of BJB*, 146 Wn. App. at 9, ¶ 13, citing *Custody of Smith*, 137 Wn.2d at 8. Accordingly, Division Three held that under a plain reading of the statute, RCW 26.10.032(1) only requires that a petitioner show that “the child is not in the custody of either parent or that one or both parents is not a suitable custodian” to meet the adequate cause threshold for a third party custody action. *Custody of BJB*, 146 Wn. App. at 9, ¶ 13. Division Three went on to hold that it is not at the threshold adequate cause hearing, but at the subsequent trial, that the petitioner must show “the parent is unfit, or that

placement with an otherwise fit parent would detrimentally affect the child's growth and development." *Custody of BJB*, 146 Wn. App. at 10, ¶ 15.

The facts of this case demonstrate why Division Three's reading of the statute is correct. Here, the children had not lived with the father for five years by the time of the adequate cause hearing, and with the father's written consent had lived solely with their grandparents for the previous two years after their mother died. Other than alleging, as they did, that it would be detrimental to the children to disrupt this living arrangement (CP 22, 24, 50; see also CP 88-90, 156-57), the grandparents would have been handicapped to prove parental "unfitness" or to challenge the condition of the father's home for the simple reason that the father had not had custody of the children for the previous five years. Nor should the petitioners have to prove the unfitness of a non-custodial parent or harm in the parent's home at this preliminary stage of the proceedings. By the terms of the statute itself, petitioners must be given the opportunity to prove their case once they met the initial threshold of showing that for a significant period of time the children were not, and had not been, in the physical custody of a parent.

The purpose of statutory construction is to discern and give effect to legislative intent. *Custody of BJB*, 146 Wn. App. at 9, ¶ 13. This cannot be done by reading into the statute provisions that the Legislature did not include, as Division One did here. This Court should hold that Division Three properly construed RCW 26.10.032(1), and reject Division One's interpretation requiring a petitioner to show more than is required under the statute to establish adequate cause for a third party custody action.

B. Given The Importance Of Custodial Continuity, That The Children Have Not Been In The Father's Custody For The Previous Five Years Is A Sufficient Basis To Establish Adequate Cause For The Third Party Custody Petition.

The father argues that despite the plain language of the statute, a third party should not be able to establish adequate cause based solely on the fact that the children were not in a parent's custody because "it sets the bar far too low" and does not adequately protect the parents' constitutional "priority right" to their children. (App. Br. 4-5) But the fact that the children are not in the custody of either parent, through no action of the State, is clearly relevant in determining whether to allow a petitioner to pursue a third party custody action to trial. Contrary to the father's claims

(see App. Br. 8), the petitioners do not advocate an interpretation of the statute that would allow a third party to seek custody of children who are only temporarily out of the custody and care of their parents. Instead, when, as here, a parent has voluntarily relinquished custody to a third party for a significant period of time, the continued welfare of the child becomes a fit subject for consideration by the courts in a third party custody action.

The adequate cause requirement protects children from unwarranted interference in existing family relationships. “Where the reason for deferring to parental rights – the goal of preserving families – would be ill-served by maintaining parental custody, as *where a child is integrated into the nonparent’s family*, the *de facto* family relationship does not exist as to the natural parent and need not be supported.” ***Marriage of Allen***, 28 Wn. App. 637, 648, 626 P.2d 16 (1981) (emphasis added) (award of custody to stepmother allowed the child to maintain the family unit formed on his father’s marriage to the stepmother); see also ***Custody of Brown***, 153 Wn.2d 646, 654, ¶ 14, 105 P.3d 991 (2005) (trial court does not infringe on fundamental rights by allowing a third party to pursue custody when children are not in a parent’s custody). Detriment

can clearly arise if a child is removed from his home with a third party who has undertaken responsibility for the child's physical and emotional needs, making major decisions for the child, in order to give custody to an otherwise fit parent, regardless of the condition of the parent's home. The father's position to the contrary, focusing on the parent's "rights" and not on the continued exercise of those rights to protect the children's interests, is too "parent-centric" and ignores the reasons for the third party adequate cause requirement.

Our Legislature and courts have repeatedly recognized the importance of custodial continuity and the detriment caused by its disruption. The importance of third party custodial continuity is reflected in RCW 26.10.190(1), which requires the same high burden of proof to modify an existing third party custody arrangement as in parenting plans between parents. *Welfare of BRSH*, 141 Wn. App. 39, 49, ¶ 27, 169 P.3d 40 (2007) ("fundamental liberty interest is no longer at issue" when parent seeks to modify third party parenting plan). And the fact that a child's residential arrangement is one established by agreement, not court order, does not mean it is unworthy of protection. For purposes of modification, for instance, adequate cause is

established when "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," RCW 26.09.260(2)(b), reflecting the significance placed on where the child "views" his "established home" regardless of court orders or parental "rights." See *Timmons v. Timmons*, 94 Wn.2d 594, 601, 617 P.2d 1032 (1980) ("the children's views as to where 'home' is, and whether the environment established at each parent's residence is permanent or temporary are significant in determining whether 'consent' and 'integration' are shown"); *Thompson v. Thompson*, 56 Wn.2d 244, 248-49, 352 P.2d 179 (1960) (reversing order placing child with father when child had established himself at mother's home despite an original custody order providing the child live with his grandmother).

The grandparents do not argue that a parent's relinquishment of physical custody for a significant period is alone sufficient to award a third party custody. Instead, this fact is sufficient under RCW 26.10.032(1) to open the court's doors to a third party petitioner to prove at trial that the removal of a child from his home and placement with a parent with whom the child has not

resided for a significant period of time would cause actual detriment to the child. Given the importance of custodial continuity to the courts' best interests analysis, that the children have not been in the father's custody for the previous five years is a sufficient basis to establish adequate cause for this third party custody petition.

C. Division One's Interpretation Of The Adequate Cause Statute Would Improperly Encourage Third Parties To Pursue Relief Under The Common Law To Avoid Statutory Strictures That Are Intended To Protect Parents.

Division One's interpretation of RCW 26.10.032(1) would render the third party custody statute unusable by petitioners who have cared for a child in their homes for a significant period of time. If RCW 26.10.032(1) is properly interpreted, on the other hand, the grandparents will have the ability to pursue their third party custody action under existing statutory law. Construing the statute to prevent petitioners with physical custody from establishing adequate cause for a third party custody action will needlessly encourage litigants to assert a claim for common law *de facto* parentage simply to avoid the strictures of the statutory cause of action.

The common law *de facto* parentage doctrine was established by this Court to allow a non-biological mother to maintain a common law parentage action when there was no other statutory mechanism to pursue her parental rights over the belated objection of the child's biological parent in ***Parentage of LB***, 155 Wn.2d 679, 688-89, ¶ 14, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). It should be to the grandparents' credit that in this third party custody action they are not seeking to usurp the father's role by being declared "parent in fact," ***Parentage of LB***, 155 Wn.2d at 692, fn. 7, but instead seek to confirm by court order the children's true living arrangement, pursuant to agreements with the father acknowledging that they are the "physical custodians" of the children (CP 13), giving them the authority to "make any and all health care decisions" (CP 10) and to have access to school information (CP 13); and recognizing that they "accept the responsibility for the Children's daily needs, both physical and emotional, and . . . that they are in a parental role." (CP 17)

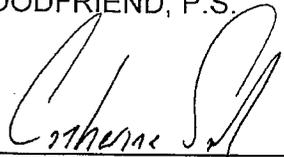
Division One's dismissal of the third party custody action did not affect the grandparents' alternate claim for relief as *de facto* parents. **Grieco**, 144 Wn. App. at 867, fn. 1. To the extent that Division One through its interpretation of RCW 26.10.032(1) intended to prevent an unconstitutional interference with a parent's right to the care and control of their child, its rewriting of the statute will have the opposite effect. By preventing these grandparents and others similarly situated from seeking relief under the third party custody statutes, Division One's interpretation leaves petitioners with no choice but to pursue *de facto* parentage. Unlike a third party custody action, a *de facto* parentage claim does not require a threshold hearing; petitioners claiming *de facto* parentage can file an action and demand a trial to prove their relationship with the child without any allegation concerning fitness of the parent or detriment to the child. This Court must reject an interpretation of the third party custody statute that will encourage third parties to pursue *ad hoc* common law claims that can be applied in a manner that does not adequately protect parents and their family relationships from undue interference.

III. CONCLUSION

This State needs, and this State's children deserve, a viable third party custody statute. This Court must interpret RCW 26.10.032(1) as the Legislature wrote it, reverse Division One, and reinstate the trial court's adequate cause order.

Dated this 30th day of March, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Catherine W. Smith

WSBA No. 9542

Valerie A. Villacin

WSBA No. 34515

Attorneys for Petitioners

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DECLARATION OF SERVICE 2009 MAR 30 P 4: 09

The undersigned declares under penalty of perjury, under ^{BY RONALD R. CARPENTER} the laws of the State of Washington, that the following is true and correct:

That on March 30, 2009, I arranged for service of the foregoing Supplemental Brief of Petitioners, to the court and to counsel for the parties to this action as follows:

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Patricia Novotny Attorney at Law 3418 NE 65th Street, Suite A Seattle, WA 98115	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Nancy Hawkins Attorney at Law 6814 Greenwood Avenue N. Seattle WA 98103	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Cynthia B. Whitaker Attorney at Law 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 30th day of March, 2009.


Tara D. Friesen

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