

No. 69757-9-I

COURT OF APPEALS, DIVISION 1
 OF THE
 STATE OF WASHINGTON

IN RE THE CUSTODY OF:

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

Children,

PHET XAYKOSY,

Appellant,

And

ADAM MARTIN,
 JERRI LYNN MARTIN,
 TAE SAVON XAYKOSY,

Respondents.

REPLY BRIEF OF APPELLANT

Ty Ho
 WSBA No. 35808
 Ho & Associates
 502 Rainier Avenue South,
 Suite 202
 Seattle, WA 98144
 Telephone: 206.328.2401
 Facsimile: 206.329.0351

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REPLY BRIEF

The appellant respectfully submits this brief in reply to the responses filed by Respondent Jerri Lynn Martin and Respondent Adam Martin.

ARGUMENTS IN REPLY TO JERRI LYNN MARTIN'S RESPONSE

A. The Trial Court Precluded the Issue of Visitation from Trial. Any Findings Relating to the Children's Best Interest was to Support Its Ruling in Placing the Custody of the Children with Respondent Jerri Lynn Martin.

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

The trial court denied visitation as a matter of law, as the court has precluded this issue pursuant to its ruling on the motion in limine. Effectively, if at trial, the court found the parents to be unfit, it would have to decide whether to place the children with Ms. Phet Xaykosy or Ms. Jerri Lynn Martin. The court found that it was not in the best interest to

place custody with Phet Xaykosy, but with Ms. Jerri Lynn Martin. *Id.* The finding of the children's best interest was limited for residential placement. It would not have made any sense to rule on visitation when the court already precluded that issue with its ruling on the motion in limine and Phet Xaykosy did not request any reliefs for such visitation after such ruling.

As evident in the trial court's ruling, it did not deny Phet Xaykosy's request for visitation on the merit because the trial court recognized the importance of having the children be connected to their maternal grandmother, Phet Xaykosy. The court's hands, however, were tied on the issue of visitation. The court recognized that any visitation with Phet Xaykosy would be voluntarily orchestrated by the person who has residential time with the children. This is evident in its finding when it stated that "the law is not settled on exactly what happens to grandmother on the maternal side and any rights that she might have. It seems to me that if Tae is able to get herself in a position to have unsupervised visits, then she would be able to orchestrate visits with the children with Grandma [Phet Xaykosy]. And I'm hopeful that's the way this is going to go because even if there's a rift between these two sides of the family, the children have a family on the other side, too, that has to be

recognized, acknowledged, and somehow incorporated into their lives, so I hope that's able to happen." Respondent's Report of Proceedings at 12.

Because the children's mother is incarnated, the children have had no contacts with the maternal side of the family. The trial court's erroneous decision has deprived the children from any opportunity to have visitation from their maternal grandmother, Phet Xaykosy, and their half-sisters, Alynda and Alyssa. These individuals maintained a significant relationship with the children. After Jerri Martin secured custody of the children, all ties were severed with the children's maternal side of the family. This is cruel to the children, who may want and need a relationship with Phet Xaykosy and their sisters, relatives, and others, many of whom are the children's blood relatives, and to maintain ties to their Laotian heritage.

B. The Trial Court's Error was Prejudicial

Because of the trial court's ruling to preclude the issue of visitation at trial, Phet Xaykosy did not present evidence relating to this issue or requested for this relief at closing argument. The trial court's error was with prejudice. Had the trial court did not make that ruling, Phet Xaykosy would have asked for visitation. Phet Xaykosy was allowed pretrial visitation. She could have asked and the court could have entertained a

restrictive visitation schedule, i.e. supervised, telephone calls, visitation during holidays, birthdays, or Laotian holidays. The trial court's error was not harmless.

C. The Trial Court Erred When It Ruled that Phet Xaykosy Did Not Have Standing Without Considering the Equitable and Common Law Principles.

"The equitable power of the courts to adjudicate relationships between children and families is well recognized, and our legislature has evinced no intent to preclude the application of an equitable remedy." *In re Parentage of L.B.*, 155 Wash.2d 679, 698, 122 P.3d 161 (2005)

Washington courts have invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities, in spite of legislative enactments that may have spoken to the area of law, but did so incompletely. *In re Marriage of Jeffrey E. Anderson*, 134 Wn.App 506, 141 P.3d 80 at 84 (2006). This court should require the trial court to consider such equities.

ARGUMENTS IN REPLY TO ADAM MARTIN'S RESPONSE

Adam Martin's Statement of the Case should not be considered by this Court because not only it is not referenced to any citation to the record, majority of it is simply untrue and were not established at the trial court. Adam Martin was incorrect when he stated that Phet Xaykosy's

that he was “forced by [his] mother to move to her house.” *Brief of Respondent Adam Martin, Pages 1, 3.* Phet Xaykosy’s brief did not state such accusation. It is an error for this court to consider Adam Martin’s untrue and unreferenced accusations.

CONCLUSION

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

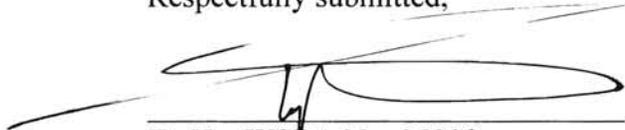
The trial court’s erroneous decision has deprived the children from any opportunity to have visitation from their maternal grandmother, Phet Xaykosy, and their half-sisters, Alynda and Alyssa. These individuals maintained a significant relationship with the children. After Jerri Martin secured custody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

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

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

Dated this 8th day of August, 2013

Respectfully submitted,



Ty Ho, WSBA No. 35808
Ho & Associates
502 Rainier Avenue South, Suite 202
Seattle, WA 98144
Telephone: 206.328.2401
Facsimile: 206.329.0351

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

In re the Custody of
A.V.X.M and T.M.X.,

Children,,

COA No: 69757-9-I

Jerri Lynn Martin,

Respondent,

Certificate of Service

Phet Xaykosy,

Appellant,

and

Adam Martin,

Respondent,

Tae Savon Xaykosy,

Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under the penalty of perjury of the laws of the State of Washington that on _____ I served true and correct copies of the Reply Brief upon:

Clerk's Office
Court of Appeals, Division 1
600 University Street,
Seattle, WA 98104

via USPS

Jerri Martin via Araceli Amaya
SUSAN MILLICAN O'BRIAN &
ASSOCIATES, P.S
Redmond Town Center
7525 – 166th Ave NE, Suite D-230
Redmond, WA 98052
Email: Araceli@smobrian.com

via Email and USPS

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Valerie A. Villicin
Smith Goodfriend
1619 8th Avenue North
Seattle, WA 98109-3007
Email: valerie@washingtonappeals.com

via Email and USPS

Adam Martin
28101 - 73rd Ave NW
Stanwood WA 98292

via USPS

Tae Xaykosy, DOC 754456
WA Correction Center for Women
9601 Bujacich NW
Gig Harbor, WA 98332

via USPS

DATED this 8TH day of August, 2013.
Ho & Associates


Name: WYEN HO