

No. 69757-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Custody of:

Adyn Vonnaklee Xaykosy-Martin, Tayien Martin-Xaykosy,
Children,

JERRI LYNN MARTIN,
Respondent,

PHET XAYKOSY,
Appellant,

and

ADAM MARTIN
Respondent,

TAE SAVON XAYKOSY,
Respondent.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT JERRI LYNN MARTIN

SMITH GOODFRIEND, P.S.

SUSAN MILLICAN O'BRIAN &
ASSOCIATES, P.S.

By: Valerie A. Villacin
WSBA No. 34515

By: Araceli Amaya
WSBA No. 33657

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Redmond Town Center
7525-166th Ave. N.E.
Suite D-230
Redmond, WA 98052
(425) 869-8067

Attorneys for Respondent Jerri Martin

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I. INTRODUCTION

This court should affirm the trial court's decision granting third party custody to the respondent paternal grandmother, and denying visitation to the appellant maternal grandmother. The trial court properly concluded that appellant would have no standing to seek visitation if denied custody of her grandchildren, because our state does not have a third party visitation statute. Even if appellant had standing, this court must affirm because the trial court found after a 5-day trial that as a matter of fact any residential time between the children and appellant was not in their best interests because appellant's home was "not a healthy environment," and appellant has not challenged this finding on appeal.

II. RESTATEMENT OF FACTS

A. Identity of Parties.

Respondent Jerri Martin is the paternal grandmother of her two young grandsons, who were ages 2 and 4, when she filed her petition for third party custody. (CP 15, 16) Respondent Adam Martin is Ms. Martin's son and the father of the children. (CP 15-16) Respondent Tae S. Xaykosy is their mother. (CP 16) Tae's

mother, appellant Phet Xaykosy, is the children's maternal grandmother. (CP 29-30)

B. The Superior Court Found Adequate Cause For Jerri Martin To Pursue Third Party Custody Of Her Grandsons After Their Father Failed To Perform Parenting Functions And Their Mother Was Incarcerated For Stabbing The Father.

Jerri Martin filed a petition for third party custody of her grandsons on October 4, 2011, asserting that neither parent was a suitable custodian for the children. (CP 15, 18) Ms. Martin asserted that Adam¹ had willfully abandoned the children for an extended period of time or substantially refused to perform parenting functions. (CP 17-18) Ms. Martin was "concerned that Adam's mental health is not under control and he is allowing things to happen to him and his family that any healthy parent would think unacceptable." (CP 156)

Ms. Martin alleged that Tae, who was then incarcerated for stabbing Adam, had engaged in a history of acts of domestic violence and abused the children. (CP 18, 160) Ms. Martin described Tae as "a violent, unpredictable, mentally unstable individual with drug, alcohol, and gambling problems." (CP 157)

¹ Because the parties share the same last names, to avoid confusion the younger parents are referred to by their first names. No disrespect is intended.

Ms. Martin also expressed concern about Phet Xaykosy, her grandsons' maternal grandmother, in whose care Adam left the children while he was at work. Ms. Martin described Ms. Xaykosy as someone with a "very violent temper," whose "parenting style involves a lot of physical reprimand." (CP 158) Ms. Martin worried that the boys were being maltreated in Ms. Xaykosy's care. (CP 158)

On November 23, 2011, the superior court found adequate cause warranting a trial on Ms. Martin's third party custody petition. (CP 172-74) The court entered a temporary residential schedule that placed the children primarily with Ms. Martin and gave Adam supervised visitation and Tae telephone contact with the children.² (Ex. 15) The court appointed Mary Erickson as guardian ad litem for the children, and ordered her to investigate and report to the court. (Ex. 16)

C. The Children's Maternal Grandmother, Phet Xaykosy, Intervened In Ms. Martin's Action, And Also Sought Third Party Custody.

On March 14, 2012, Ms. Xaykosy, the maternal grandmother, was allowed to intervene in Ms. Martin's action and to file her own

² At the time, Tae was still incarcerated. (Ex. 15) She was subsequently sentenced to a 4-year prison term, and was prohibited from contacting Adam for ten years. (Ex. 12)

third party custody petition. (Ex. 18) The order was granted based on Ms. Xaykosy's representation that she spent a significant of time with the children before Ms. Martin gained temporary custody and that she and the children had "a clear, strong, and historical relationship." (Ex. 18) As part of this ruling, the court granted Ms. Xaykosy supervised visitation with the children. (Ex. 18)

Ms. Xaykosy filed her petition for third party custody on April 4, 2012. (CP 29) On September 14, 2012, the two petitions for third party custody were consolidated for trial. (CP 175-77)

D. The Trial Court Granted Ms. Martin's Third Party Custody Petition And Denied Visitation To Ms. Xaykosy After Finding That It Was Not In The Children's Best Interests.

Just prior to trial, Ms. Martin asked King County Superior Court Jeffrey Ramsdell (the "trial court") to dismiss Ms. Xaykosy's third party custody petition based on discovery answers implying that Ms. Xaykosy was seeking third party *visitation* rather than custody. (CP 8, 10) The trial court denied the motion based on Ms. Xaykosy's representation that she in fact was pursuing third party custody. (CP 60, 152) The trial court further ruled that if Ms. Xaykosy was denied custody, she had no standing to seek visitation with the children under Washington's third party visitation

statutes, which have been invalidated and ruled unconstitutional. (CP 152) The trial court limited the “issue at trial” to third party custody and not “visitation as between Jerri Martin and Phet Xaykosy.” (CP 152)

The parties participated in a five-day trial, during which 10 witnesses testified, including the parties and the guardian ad litem, who had issued 3 separate reports all recommending that third party custody be granted to Ms. Martin. (CP 178; Ex. 25, 26, 27) The trial court ultimately granted third party custody to Ms. Martin. The trial court rejected allegations that Ms. Martin pursued third party custody out of any “self-interest” on her part, and found that Ms. Martin was “sincere” in her desire to provide a home for her grandsons. (11/30 RP 8) The trial court found that it was in the children’s best interests to remain in the custody of Ms. Martin “from the standpoint of stability, the prospects for additional educational accomplishment, health care, physical protection, future growth and development, love and affection, and as well as the prospect for maintaining the greatest likelihood of the boys’ continued future contact with both of their biological parents.” (11/30 RP 8)

The trial court found that allowing the children to return to the custody of either parent would cause actual detriment to the children. (Findings of Fact (FF) 2.7, CP 103) The trial court found that their father failed to “protect the children from emotional and physical harm from their mother or others around them,” and failed to take steps to prevent future abuse to the children from their mother. (FF 2.7, CP 103) The trial court found that Adam was not a “suitable custodian” because he “failed to take on a full parenting role before the mother was incarcerated and after.” (FF 2.7, CP 104)

The trial court found that the mother too was not a suitable custodian since she was “incarcerated and serving out a prison term for assault against the father/respondent Adam Martin. She cannot meet the children’s needs while incarcerated.” (FF 2.7, CP 103-04) The trial court found that Tae “engaged in a pattern of physical or emotional abuse of the children” and committed an act of domestic violence, which caused grievous bodily harm. (FF 2.7, CP 103) The trial court further found that Tae “has a history of alcohol abuse, violent behavior which includes domestic violence toward the father.” (FF 2.7, CP 103)

Neither parent has challenged the trial court's decision granting Ms. Martin third party custody.

The trial court denied Ms. Xaykosy's request for third party custody. (FF 2.13, CP 105) Despite ruling prior to trial that it would not consider Ms. Xaykosy's request for visitation if custody were denied, the trial court did in fact consider her request after trial, and found that visitation between the children and Ms. Xaykosy would not be in the children's best interests. It therefore ordered that "no terms for visitation or contact with the children shall be provided." (FF 2.13, CP 105)

The trial court stated that Ms. Xaykosy's home was "not a healthy environment for raising these two boys" because of the domestic violence that occurred within her family, which Ms. Xaykosy "minimized." (11/30 RP 3, 5) The trial court found that domestic violence was a "recurrent problem in the Xaykosy household, and I suspect it will remain that way." (11/30 RP 7) The trial court noted that despite asking for custody or visitation, Ms. Xaykosy had failed to exercise all the visitation that she was allowed under the court orders. (11/30 RP 3)

The trial court expressed concern over Ms. Xaykosy's parenting abilities, noting, for example, that while the children were

in her care, they played with knives and machetes that she left accessible. (11/30 RP 3-5) The trial court was also concerned that while Ms. Xaykosy denied the allegation that she inappropriately touched the children, she was aware that the children “exhibited sexualized behavior,” but nevertheless minimized the significance of this behavior. (11/30 RP 4)

The trial court also found that Ms. Xaykosy “repeatedly” misrepresented that she had primary care of the children before Ms. Martin filed her petition, which had been the basis for Ms. Xaykosy being allowed to intervene. (11/30 RP 9-10; Ex. 18) The trial court stated that there was no “evidence whatsoever” to support Ms. Xaykosy’s earlier claims about the amount of care that she had provided the children. (11/30 RP 10) As a result, the trial court assessed \$2,500 against Ms. Xaykosy for the attorney fees that Ms. Martin incurred addressing her misrepresentations. (11/30 RP 10) The trial court noted that it “could have justified more, but given her financial circumstances, I couldn’t in good conscience assess more than \$2,500.” (11/30 RP 10)

Ms. Xaykosy appealed. (CP 117) After filing her Notice of Appeal, Ms. Xaykosy stated her intention to not file a full Verbatim Report of Proceedings in this court. (CP 201) Ms. Martin objected

and asked the trial court to order Ms. Xaykosy to obtain the full report. (CP 185) The trial court denied Ms. Martin's motion, finding that "a complete transcript is not necessary" to review the "narrow legal issue" that Ms. Xaykosy intended to raise on appeal – whether she had standing to pursue third party visitation. (CP 231) The trial court noted that its finding that it would not be in the children's best interests to have any residential time with Ms. Xaykosy is "conclusive" because Ms. Xaykosy stated she did not intend to assign error to that finding. (CP 231)

III. ARGUMENT

A. Regardless Whether The Appellant Had Standing To Pursue Third Party Visitation, The Trial Court Properly Denied Her Request On The Merits When It Was Not In The Children's Best Interests.

It is not necessary for this court to reach the question whether appellant had standing to pursue third party visitation absent statutory authority, because the trial court found as a matter of fact that any visitation between appellant and the children was not in the children's best interests. (FF 2.13, CP 105) As the trial court properly noted, this determination is "conclusive." (CP 231-32) Its finding that visitation was not in the best interests of the children is a "verity on appeal," because appellant did not assign

error to this finding. *Marriage of Clark/Gunter*, 112 Wn. App. 805, 807, 51 P.3d 135 (2002). Even if appellant had assigned error to this finding, the trial court’s decision “must stand,” because she failed to provide an adequate record with which to challenge the trial court’s determination that it was not in the best interest of the children, who were then ages 3 and 5, to have visitation with the maternal grandmother because of the domestic violence in her home and her failure to ensure the safety of the children while in her care.³ *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

Appellant complains that the trial court erred in concluding that she had no standing to seek third party visitation. But “error without prejudice [] is not grounds for reversal.” *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026. Therefore, even if appellant had standing

³ “When a trial judge's oral opinion is consistent with the formal findings of fact, it may be utilized by an appellate court to clarify the findings.” *Marriage of Yates*, 17 Wn. App. 772, 773, 565 P.2d 825 (1977).

to pursue third party visitation, she cannot show how she was prejudiced by its decision when the trial court considered her request and denied it on the merits.

B. The Trial Court Properly Concluded That The Maternal Grandmother Had No Standing To Pursue Third Party Visitation Absent Statutory Authority.

While it is not necessary to reach the question whether appellant had standing to pursue third party visitation since the trial court denied visitation on the merits, the trial court did properly conclude that appellant lacked standing because our state has no third party visitation statute. Appellant concedes that RCW 26.10.160(3) has been invalidated by our State Supreme Court as facially unconstitutional because it infringes on parents' constitutional rights to rear their children without state interference. (App. Br. 6-7, *citing Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998)) However, she argues that because respondent is not a "parent," the reasons for invalidating the statute are not present here, and appellant should have been allowed to pursue third party visitation under the now invalidated statute. (App. Br. 8)

But "the effect of holding a statute facially unconstitutional is to render the statute totally inoperative." *Parentage of L.B.*, 155

Wn.2d 679, 714, ¶ 52, 122 P.3d 161 (2005)(quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004), *cert. denied*, 547 U.S. 1143, 126 S.Ct. 2021, 164 L.Ed.2d 806 (2006)). It has now been 12 years since the third party visitation statute was invalidated as unconstitutional in *Custody of Smith*, 137 Wn.2d 1, 5, 21, 969 P.2d 21 (2001), and until the legislature enacts a constitutionally valid third party visitation statute, there exists no statutory right to third party visitation in Washington. *Parentage of L.B.*, 155 Wn.2d at 714 (holding that a *de facto* parent could not pursue third party visitation of a child whom she raised since birth).

Our existing statute only allow third parties to pursue *custody* of a child if neither parent is fit. RCW 26.10.030. And while RCW 26.10.160(1) provides the trial court with authority to grant visitation to a *parent* who is not granted custody, no similar statutory provision exists for visitation to a third party who is denied custody. *See e.g. Custody of Brown*, 153 Wn.2d 646, 105 P.3d 991 (2005).

In *Brown*, for instance, the child's grandmother and aunt both pursued third party custody under RCW ch. 26.10. The trial court applied the best interest of the child standard in deciding between the competing petitions. It granted custody to the aunt,

because the grandmother's household was a "threat to the child's well-being." *Brown*, 153 Wn.2d at 650, ¶ 6. As a result of this decision, and absent statutory authority allowing otherwise, the grandmother, with whom the child lived for six years prior to the commencement of the action, could not pursue visitation.

This court should reject appellant's claim that even absent statutory authority, she should have been allowed to pursue third party visitation as a matter of equity. (App. Br. 9-12) As noted in Argument § A, the trial court did in fact consider the equities, and denied third party visitation to appellant as a matter of fact. In any event, appellant is wrong when she claims that "despite the unconstitutionality of the non-parental visitation statute, courts in Washington have allowed third party standing to request visitation in custody proceedings." (App. Br. 5, *citing Marriage of Anderson*, 134 Wn. App. 506, 141 P.3d 80 (2006)) In fact, no appellate court in this state has allowed a third party to pursue visitation as a matter of equity or otherwise since the third party visitation statutes were invalidated.

Appellant misplaces her reliance on *Anderson*, because the question there was not whether a third party could pursue visitation, but whether a third party who had already been granted

visitation before the statute was invalidated, could continue to enforce visitation rights. In *Anderson*, Division Two confirmed that as a result of the invalidation of the third party statute, the third party – the former stepfather – would be “precluded” from pursuing third party visitation for the first time, but because the invalidation was “prospective” only, he could nevertheless enforce his previously granted third party visitation rights. 134 Wn. App. at 511, fn. 13.

Division Two also held that as an alternative ground, the stepfather should be allowed to enforce his visitation rights as a matter of equity because “he had played a major role in the child’s growth and development,” and had regularly exercised the visitation he had been granted. *Anderson*, 134 Wn. App. at 508, ¶ 4. But here, appellant never had any right to visitation, the trial court found that there was “no evidence whatsoever” that she had ever been a primary care provider for the children, and while she was allowed visitation while the action was pending, she failed to regularly exercise that visitation. (11/30 RP 3, 10) *Anderson* simply does not apply in this situation.

Appellant’s reliance on *Parentage of L.B.*, 155 Wn.2d 679, to claim that “visitation orders may be established by reliance on

court's equity powers and the common law" is also misplaced. (App. Br. 10) In *L.B.*, the Court held that if a third party can establish standing as a *de facto* parent, the court will treat them "in parity with biological and adoptive parents in our state," and allow them to pursue visitation. 155 Wn.2d at 710, ¶ 45. But if the petitioner cannot establish herself as a *de facto* parent she would be precluded from pursuing visitation. 155 Wn.2d at 714, ¶¶ 51, 52. Thus, the Court in *L.B.* rejected petitioner's claim, similar to the claim made here, that she should be allowed to pursue visitation as a matter of equity or under the common law as a third party. In doing so, the Court reversed the Court of Appeals decision, which would have allowed the petitioner to pursue visitation under the invalidated statute as an alternative ground if it could be applied without interfering with the parent's constitutional rights.

Finally, the foreign cases on which the appellant relies are equally inapposite. In each of those cases, the petitioner had been a "parent-like" figure, similar to what the *L.B.* Court referred to as a *de facto* parent. Thus, they would not be considered a "third party" under our law. See *Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868 (1996) (petitioner who sought visitation right had raised the child for eight years before discovering that he was not

the biological father); *Custody of H.S.H.-K*, 193 Wis.2d 649, 533 N.W.2d 419 (1995) (petitioner seeking visitation rights had been partner to the biological mother of a child that they had previously agreed to raise together as a family), *cert. denied*, 516 U.S. 975, 116 S.Ct. 475, 133 L.Ed.2d 404 (1995); *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999) (petitioner seeking visitation rights had been partner to the biological mother of a child that they had previously agreed to raise together as a family) (all cited in App. Br. 10-11), *cert. denied*, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed.2d 386 (1999). The trial court properly concluded that appellant had no standing to seek third party visitation absent statutory authority, and that there was no equitable ground to allow her to pursue visitation, because any visitation was contrary to the children's best interests.

C. This Court Should Deny Appellant's Request For Attorney Fees, And Should Instead Award Attorney Fees To The Respondent For Having To Respond To This Appeal.

This court should deny appellant's request for attorney fees, because she states no statutory or contractual basis for such an award. *Snyder v. Haynes*, 152 Wn. App. 774, 783-84, ¶ 12, 217 P.3d 787 (2009). If any fees are awarded it should be to the respondent

for having to respond to this appeal, which is meritless in light of the trial court's unchallenged finding that any visitation between the children and appellant are contrary to the children's best interests. RAP 18.9.

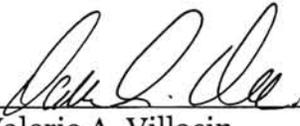
IV. CONCLUSION

The trial court properly denied visitation to the appellant as a matter of law and as a matter of fact. This court should affirm the trial court's decision and deny appellant's request for attorney fees.

Dated this 27th day of June, 2013.

SMITH GOODFRIEND, P.S.

SUSAN MILLICAN O'BRIAN &
ASSOCIATES, P.S.

By:  _____

Valerie A. Villacin
WSBA No. 34515

By:  _____

Araceli Amaya
WSBA No. 33657

Attorneys for Respondent Jerri Martin

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 28, 2013, I arranged for service of the foregoing Brief of Respondent Jerri Lynn Martin, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Araceli Amaya Susan Millican O'Brian & Associates, P.S. 7525 166th Ave. NE, Ste. D320 Redmond, WA 98052-7828	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Ty Ho Ho & Associates 502 Rainier Ave. S., Suite 202 Seattle, WA 98144	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Adam Martin 28101 73rd Avenue N.W. Stanwood, WA 98292	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Tae Xaykosy, DOC 754456 WA Correction Center for Women 9601 Bujacich N.W. Gig Harbor, WA 98332	<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 28th day of June, 2013.



Victoria K. Isaksen