No. 79938-5

J.M. JOHNSON, J. (concurring)—I agree with the majority that "A.C. was returned to Cork's custody" correctly by Montana (majority at 2) but would also hold that the mother's custody of her child should be confirmed by Washington. I would uphold the Washington court's jurisdiction since the family had lived in Spokane for the requisite six-month period. Since our precedent requires ordering the child returned to his mother, I would direct entry of judgment by the trial court to that effect.

Parents have a constitutional right to the custody, care, and control of their children. This is true under the United States Constitution and that of Washington (presumably also Montana). This right is fundamental when a court considers interference with or destruction of a family. Although emotional bonds form in temporary foster care with loving foster parents, the resulting ties must not be allowed to interfere with a parent's constitutional

right to long-term custody.

I am concerned that the majority's opinion may prolong an already nightmarish situation since custody was improperly taken by the lower court. What is the mother to do now? After having her son returned to her years ago in Montana, then losing him by an order of a Washington court, and fighting for years through the appeal process, she may have to return to Montana and start litigation anew. I therefore concur in the result only as the majority's decision will ultimately overturn, but unfortunately not undo or even finalize, the harm caused by the lower court's judgment. I write separately to emphasize what the majority omits—the law in Washington regarding a parent's constitutional right to the custody of their child.

To resolve this case, we must consider two questions: did the Washington court have jurisdiction to consider permanently taking the child and what is the correct standard in making such a decision? Though I agree with the majority's framework regarding the Uniform Child Custody and Enforcement Act, I simply cannot find in the record "'a judgment, decree, parenting plan, or other order'" of the Montana court barring Washington from having jurisdiction. Majority at 6 (quoting RCW 26.27.021(3)). The

mother originally admitted below that she and A.C. had lived in Washington for the jurisdictional six months, the trial court found jurisdiction, and there is no record to the contrary. Clerk's Papers at 4, 9. This should be sufficient for jurisdiction in this case allowing a decision on the merits.

On the merits, the judgment to permanently take this child from his mother is contrary to established law, including core constitutional principles. "[P]arents have a fundamental right to autonomy in child-rearing decisions. The United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference." *In re Custody of Smith,* 137 Wn.2d 1, 13, 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). State interference with a parent's fundamental right is justified only "if the state can show that it has a compelling interest and such interference is narrowly drawn to meet [that] interest. *Id.* at 15.

The State's interest in interfering with a parent's fundamental right may be found compelling only in two very limited circumstances: if the parent is unfit or if placement with that parent would result in "actual detriment to the child." *In re Custody of Shields*, 157 Wn.2d 126, 128, 136 P.3d 117 (2006).

With regard to the second circumstance, the nonparent must bear "a heightened burden to establish that actual detriment to the child's growth and development will occur if the child is placed with the parent." *Id.* The test is "not a balancing of all the aspects of each household and on [the child]'s wishes." *Id.* at 150.

The nonparent's requisite showing under this heightened standard is so "'substantial'" that a nonparent may meet that burden only in "'extraordinary circumstances.'" *Id.* at 145 (quoting *In re Custody of Shields*, 120 Wn. App. 108, 123, 84 P.3d 905 (2004); *In re Marriage of Allen*, 28 Wn. App. 637, 649, 626 P.2d 16 (1981)). There are only a few cases illustrating the exception to the general constitutionally based rule of respect for family integrity. *Id.*; *see, e.g., Allen,* 28 Wn. App. at 649 (actual detriment was established when child was deaf and stepmother knew sign language but natural father would not learn so as to communicate more fully with the child); *In re Custody of R.R.B.,* 108 Wn. App. 602, 31 P.3d 1212 (2001) (actual detriment was established when child was bipolar and suicidal and natural parents could not provide the needed therapy and stability); *In re Custody of Stell,* 56 Wn. App. 356, 783 P.2d 615 (1989) (actual detriment

was established when child had been physically and sexually abused, and the natural parent could not provide the needed therapy and stability). The more common application of this rule from our jurisprudence is illustrated in *In re Custody of Anderson,* 77 Wn. App. 261, 890 P.2d 525 (1995) (actual detriment was not established where nonparents offered a superior home environment).

An early case in this court still correctly states the law: "that [a child] might be better educated, and better clothed, and have a more pleasant home with some one else than the parent can have no weight with the court as against the natural rights of the parent." *In re Neff,* 20 Wash. 652, 655, 56 P. 383 (1899).

Although A.C. occasionally displayed troubling behaviors and emotions, which might have resulted from foster parent pressures, the extraordinary circumstances required to deprive a fit mother of the right to parent her child are clearly not met. It is worthy of note that the child's problems were exacerbated after the Nagels' visits resumed frequency.

"[T]here is a presumption that fit parents act in the best interests of their children." *Troxel,* 530 U.S. at 68. Both the Washington and Montana

social services agencies agreed the mother should retain her child. She provided a clean and comfortable home, enrolled him in school, went to parent-teacher conferences, and even visited his school classes (as too few parents do today).

The mother voluntarily allowed the Nagels monthly visitation after she moved to Spokane but decided to stop these visits when they caused problems for A.C. This court has held, and the United States Supreme Court has affirmed, that "[p]arents have a right to limit visitation of their children with third persons." *Smith,* 137 Wn.2d at 21. The mother had the right to restrict the Nagels' visitation. A.C. did well his first semester at school when he had no contact with the Nagels. After the Nagels resumed visitation, behavioral problems began to emerge.

"[T]he paramount goal of child welfare legislation is to reunite the child with his or her legal parents, if reasonably possible." *In re Dependency of J.H.*, 117 Wn.2d 460, 476, 815 P.2d 1380 (1991). Although strong emotional bonds might form in foster care, "[t]he nature of the foster care relationship is distinctly different from that of the natural family; namely, it is a temporary arrangement created by state and contractual agreements."

Renfro v. Cuyahoga County Dep't of Human Services, 884 F.2d 943, 944 (6th Cir. 1989).

The Nagels admit here that if their "basis for custody was that they had a better bond with [A.C.] than [Holly], they would clearly have no basis for custody." Resp'ts' Suppl. Br. at 22-23. But this is the basis of their claim.

The trial court expressly would not find the mother to be an unfit mother. Although I commend the Nagels for their service as foster parents and their care of A.C., foster parents must not use their bond with a child to take custody from a child's fit natural parent.

Conclusion

This young boy's life is already a long story, far too many chapters in litigation. I recognize the burden this has placed on the mother, the Nagels, and especially on A.C. Judicial delay and error has resulted in A.C. moving between homes, after living with foster parents for years. Taking A.C. from his mother and adding insult to injury by ordering her to pay child support is simply unacceptable.[1] I fear the majority's decision may allow further litigation in Montana and A.C.'s future will not be finally resolved for some

[1] The trial court ordered the mother to pay child support to the foster parents. I assume the majority will dissolve this requirement as well.

time. As any parent can attest, time lost with your child is something you can never get back. The constitution and laws require that A.C. be immediately returned to his natural mother. Since that result may be delayed under the majority, I only concur.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Richard B. Sanders