IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of THOMAS JAMES BENNER, Petitioner, and ASHLEY MARIE BENNER, Respondent.	No. 40513-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Thomas Benner appeals the final parenting plan issued in the dissolution of his marriage to Ashley Benner. The parenting plan denies Thomas[1] any contact with the three children from his marriage to Ashley and, in addition, denies Thomas any contact with another child, "Child One," from his previous marriage to Ashley's mother. In a separate action, the trial court declared Ashley a nonparental custodian of Child One, who is both Ashley's half-sibling and stepchild. At a pretrial temporary order hearing and also at trial, the trial court found that Thomas had sexually abused two of his stepchildren and had committed acts of domestic violence as defined in RCW 26.50.010. On appeal, Thomas alleges that (1) the trial

[1] For the sake of clarity, the Benners will be referred to by their first names. To protect their privacy, the children who are the subjects of the contested parenting plan have been assigned numbers corresponding to birth order since some of them have the same initials.

court improperly excluded Thomas's evidence from trial, (2) the trial court erred by allowing the temporary parenting plan to prejudice the final parenting plan and failed to consider RCW 26.09.187 when it set the final parenting plan, (3) Thomas received insufficient notice of the temporary order hearing, and (4) the trial court erroneously found Ashley to be Child One's de facto parent. We affirm the parenting plan and decline to address the de facto parent finding because any opinion on this issue would be advisory.

FACTS

Background

Mary Benner and Thomas married in 1992 or 1993, making Thomas a stepfather to Mary's three minor children from a previous marriage: Ashley, Theresa Benner, and Michael Benner. During the marriage, Thomas and Mary had one child, Child One (born in 1994). Mary died in a car accident in August of 1996. Three years later, Thomas married Ashley, his 19-year-old stepdaughter, on October 6, 1999. During their marriage, Thomas and Ashley had three children: "Child Two" (born in 1999), "Child Three" (born in 2003), and "Child Four" (born in 2007). Thomas and Ashley separated on June 10, 2009.

The trial court simultaneously heard three cases involving Thomas and Ashley, although the cases were not consolidated: the dissolution action filed by Thomas (the case *sub judice* on appeal), Ashley's petition for nonparental custody of Child One, and Ashley's petition for a domestic violence protection order.[2] On September 14, Ashley filed five declarations with the

[2] The trial court heard the dissolution proceeding under cause no. 09-3-00068-4, the nonparental custody proceeding under cause no. 09-3-00085-4, and the protection order proceeding under cause no. 09-2-00312-4. Because Thomas appeals only the decree of dissolution under cause no. 09-3-00068-4, the record concerning the nonparental custody decree and the domestic violence protection order is incomplete. The record on review contains only the final nonparental custody decree and the permanent order of protection.

court, some of which alleged that Thomas had committed domestic violence[3] and previously committed emotional and sexual abuse of Ashley and Theresa.[4] On September 22, Thomas filed a motion to continue, arguing that he needed more time to find witnesses that could refute the allegations of abuse. On September 24, the trial court held a testimonial hearing on temporary orders (TO hearing). At the TO hearing, the trial court denied Thomas's motion to continue and stated,

> I'm going to deny the motion at this stage, listen to the testimony and make a determination if additional testimony should be allowed. That's not foreclosing [Thomas] from producing additional evidence. But he would need to make an offer of proof at the end of the testimony what he -- who he expected to call and what their anticipated testimony would be.

Report of Proceedings (RP) (Sept. 24, 2009) at 13. Ashley, Theresa, and Michael testified about the allegations of abuse detailed in their declarations. Thomas testified and he called two witnesses on his behalf: Ken and Nathaniel Miller. After testimony was completed, the trial court spoke with Child One privately in chambers. After speaking with Child One, the court stated,

> And so [Child One is] not at all complimentary, Mr. Benner, I will tell you that, and basically confirms many of the statements made by Mrs. Benner. And there are some fond memories [Child One] has of you . . . but they are certainly overcome by a lot of bad memories.

RP (Sept. 24, 2009) at 128. The trial court decided not to issue a ruling from the bench because

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[3] "Domestic violence" means "(a) [p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member." RCW 26.50.010(1).

[4] The facts supporting the trial court's findings in relation to these allegations are fully documented in the record and are well known to the parties. To protect the privacy of the victims, these facts need not be repeated here.

it believed that the case required "more careful consideration." RP (Sept. 24, 2009) at 136.

On November 9,[5] the trial court issued a memorandum decision finding that it was in the children's best interests to stay in Ashley's custody because she was the parent who had been "performing almost all of the parenting functions relating to the daily needs of the children" and she had "maintained and manifested a loving, stable, consistent, and nurturing relationship with the children." Clerk's Papers (CP) at 110-11. The trial court also found that Ashley was Child One's de facto parent. Last, the trial court found that Thomas had sexually abused a child, committed acts of domestic violence, and that Thomas's physical acts of violence created an environment permeated with fear.

On December 17, 2009, the trial court held a hearing to enter temporary orders based on the memorandum decision it had issued on November 9. The trial court entered findings of fact and conclusions of law for a temporary parenting plan, which reflected the findings made in the memorandum decision. The trial court also signed an order finding adequate cause to proceed with the nonparental custody case and granted Ashley temporary custody of Child One.

Trial was held on February 22, 2010. Ashley had all her witnesses at court and prepared to testify. But at the beginning of the trial, the court made the following oral ruling:

> The Court previously, on September 24th, heard testimony -- September 24th, 2009 -- extensive testimony regarding certain facts that may be at issue here. This court's position after significant research that [sic] those issues are res judicata or collaterally precluded from being challenged. To that end, the Findings of Fact and Conclusions of Law certified along with the Memoranda, [sic] Decision that I've already filed, I'm going to make those Exhibit 1, and they'll be admitted into evidence.
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> . . . .
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> . . . And it is my position, and I will hear argument on this, that I've

[5] Approximately one month prior to this, on October 13, Thomas's attorney withdrew from representation. Thomas proceeded pro se for the remainder of the case.

> decided issues that have not been appealed and, within this case, I think are the law of the case and, in this case, the facts of the case. That is, Mr. Benner, that you engaged in sexual abuse of children, which more or less renders any attempt to have contact with them in any meaningful way useless. The idea being that we've had examination and cross-examination of witnesses which reflect on your parenting. And I don't believe that the law allows you then to retry those cases or those – or put those people again through that kind of testimony.

RP (Feb. 22, 2010) at 9-10. Ashley agreed that the trial court's decision was appropriate because Thomas had the opportunity to fully cross-examine the witnesses at the TO hearing. Ashley also argued that Thomas "had a very good motivation to fully litigate those issues as he was facing being denied contact with his children" and that Thomas was in a better position at the TO hearing because he had been represented by an attorney during the TO hearing but not at trial. RP (Feb. 22, 2010) at 11. Thomas argued that he did not think his prior attorney did a good job but he could not get a new attorney because he had no money. After argument, the court maintained its ruling refusing to reopen testimony. However, the trial court did tell Thomas that if he had new evidence to present, the trial court would allow it. Thomas replied, "If you won't allow the children to be examined, I can't give you any new evidence, your Honor."[6] RP (Feb. 22, 2010) at 14.

Both Ashley and Thomas testified at trial. The children's guardian ad litem (GAL), Scott Jacot, recommended that Thomas have no contact with any of the children, including Child One. He related that Child One "does not want contact with his father unless his father gets help, as he puts it." RP (Feb. 22, 2010) at 132. Child One testified in open court and stated that he did not want to have any visitation with his father. In its oral ruling, the trial court found that Thomas

[6] Thomas filed multiple requests to have the court order psychological evaluations of the children but the trial court denied them. Thomas does not assign error to the trial court's refusal to order psychological evaluations of the children.

had engaged in sexual abuse of a child requiring restrictions on parental access pursuant to RCW 26.09.191(2)(a) and that he had committed acts of domestic violence as defined in RCW 26.50.010. The trial court noted that no testimony presented at trial had given it a reason to change its mind about its original findings.

On February 25, 2010, the trial court dissolved Thomas and Ashley's marriage and named Ashley the sole residential parent of Child One, Child Two, Child Three, and Child Four. The trial court also entered continuing restraining and protection orders preventing Thomas from having any contact with Ashley or the children based on the trial court's findings that Thomas had engaged in physical, sexual, or a pattern of emotional abuse and domestic violence. Thus, Thomas has no residential time with any of the children, including Child One, under the final parenting plan.

The findings of fact and conclusions of law supporting the decree and final parenting plan include the following conclusion of law:

> If the nonparental custody statutes (RCW Chapter 26.10) are later found inapplicable to or unconstitutional as applied to stepparents, such that the respondent has no adequate remedy at law to protect her custodial rights in [Child One], this Court concludes that [Ashley] is a *de facto* parent of [Child One].

CP at 82.

Initially, the trial court was going to make Ashley Child One's sole residential parent because it considered her Child One's de facto parent. But Ashley persuaded the trial court that de facto parent status did not apply to stepparents under the decision in *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010). Accordingly, the trial court granted Ashley's petition for nonparental custody of Child One, finding that neither of Child One's parents were suitable

custodians because Child One's mother was deceased, Thomas had violently assaulted Child One, and placement with Thomas would result in actual detriment to Child One. The nonparental custody decree incorporated the visitation provisions and the child support provisions from the final parenting plan.

Thomas timely appeals the decree of dissolution and, specifically, the final parenting plan.

ANALYSIS

Thomas appeals the decree of dissolution and the parenting plan under cause no. 09-3-00068-4. He argues that by entering the testimony and findings of fact from the TO hearing and declaring that further testimony on the same matters was collaterally estopped or barred by res judicata, the trial court improperly precluded him from refuting allegations of physical and sexual abuse at trial. Thomas also assigns error to the trial court's reliance on the temporary parenting plan in formulating the final parenting plan. In addition, Thomas assigns error to the residential restrictions in the parenting plan, the parenting plan provision requiring the GAL to review and approve any petition for modification, the continuing restraining order and the domestic violence protection order.

Collateral Estoppel Determination

Thomas argues that the trial court improperly ruled that he was collaterally estopped at trial from eliciting further testimony related to the court's previous finding that he had sexually and physically abused children. To the extent that Thomas agues the trial court committed an error of law by applying the doctrines of res judicata and collateral estoppel to its decision, he is correct. Nevertheless, because substantial evidence in the record confirms that Thomas committed physical and sexual abuse of children, the error was harmless. Accordingly, we affirm.

We review a decree of dissolution and parenting plans for an abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). As this court recently explained in *State v. Lamb*, 163 Wn. App. 614, 625, 262 P.3d 89 (2011),

> A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. . . . When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case.

Res judicata and collateral estoppel preclude the relitigation of issues after a final judgment has been entered in a prior proceeding. A subsequent action is barred by res judicata if it is identical to the prior action in the following respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). Collateral estoppel applies only if four basic requirements are met: (1) the identical issue was decided in the prior action, (2) the first action resulted in a final judgment on the merits, (3) the party against whom preclusion is asserted was a party or in privity with a party to the prior adjudication, and (4) application of the doctrine does not work an injustice. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993).

Here, the trial court stated that it would admit the testimony, declarations, and findings of fact from the TO hearing under the doctrines of res judicata and collateral estoppel. This was an error of law because there was no final judgment in those proceedings and the doctrines of res judicata and collateral estoppel did not apply. *See Pederson v. Potter*, 103 Wn. App. 62, 68-71, 11 P.3d 833 (2000) (discussing whether confession judgments were final judgments for the

purposes of applying res judicata and collateral estoppel), *review denied*, 143 Wn.2d 1006 (2001). Nevertheless, the error does not require reversal because substantial evidence in the record, *apart from the trial court's findings from the TO hearing*, supports the trial court's finding at trial that Thomas committed child physical and sexual abuse.[7]

A harmless error is one "which is trivial, formal, or merely academic and which in no way affects the outcome of the case." *State v. Gonzales*, 90 Wn. App. 852, 855, 954 P.2d 360, *review denied*, 136 Wn.2d 1024 (1998). Here, whether the trial court considered the cumulative testimony from the TO hearing in designing the final parenting plan is harmless because substantial evidence was presented at trial necessitating a finding of abuse.

First, the GAL report was admitted at trial.[8] In the report, the GAL describes one instance, corroborated by Thomas, when Thomas threw Child Two (then age three) off his boat and into the water in reaction to Child Two having thrown items from the boat into the water. Another incident involved Thomas slamming Child One into a wall while holding Child One's throat. The report relates that Thomas could not recall the second incident but acknowledged that "it's possible" that it occurred. CP at 4. Child One independently related the assault to the GAL. After interviewing Ashley, Thomas, Child One, Child Two, and a significant number of collateral contacts for both parties (all of which the report details), the GAL determined,

> In divorce cases, as the court is well aware, the accusations of one parent versus another can be seemingly endless. . . . It is not uncommon for one or both parents to be untruthful at times, or to exaggerate events for their own benefit. In

[7] We do not address whether it was, in fact, improper for the trial court to consider the testimony given at the ancillary TO hearing. Rather, because substantial evidence exists to support a finding of abuse independent of the testimony from that hearing, any possible error was harmless.

[8] When questioned by the court about the report, Thomas stated, "I don't agree with the report. But I don't object to it." RP (Feb. 22, 2010) at 143.

> this case there are allegations of sexual abuse, physical abuse, verbal abuse, alienation, financial irresponsibility, deviance, manipulation, suicide attempts, and so forth. I will address, first, what I believe to be factual and what I believe to be significant "red flags" that seem to support many of Ashley's allegations.
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> Ashley has essentially alleged that her marriage to Mr. Benner was not consensual, but that it was the product of sexual abuse and mental manipulation that began at an early age for her. . . . I would suggest that these facts are significant red flags pointing to a strong possibility that this relationship did indeed involve the abuse and manipulation of Ashley by Thomas as she alleges. I don't base this opinion solely on the nature of their relationship and their age difference. I considered also that two (2) other female children of Thomas Benner have also come forward and declared under penalty of perjury that they also were molested by Mr. Benner.
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> . . . .
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> I do not believe that unsupervised visitation between the children and their father, Thomas Benner, should be considered in this case. There is enough evidence and cause for concern that unsupervised visitations are not now and likely never will be in the best interests of the children.

CP at 15-18. Thomas had an opportunity to cross-examine the GAL at trial about the report and did so. However, he chose not to question the GAL about any of the allegations of abuse detailed in the report. In *Mansour v. Mansour*, 126 Wn. App. 1, 9, 106 P.3d 768 (2004), Division One of this court found that a detailed GAL report admitted at trial sufficiently corroborated a trial court's finding that abuse had occurred. Here, the trial court not only had the benefit of the GAL report but, in addition, heard further testimony—including cross-examination by Thomas—of the GAL report's author.

Second, at trial, Ashley testified about Thomas's physical and (to a lesser extent) sexual abuse of her. Thomas had an opportunity, at trial, to cross-examine Ashley about these and other allegations of abuse. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119

Wn.2d 1011 (1992). Here, the trial court heard and considered substantial evidence—apart from the findings of fact from the TO hearing—supporting its finding that sexual and physical abuse of a child occurred. Absent a clear abuse of discretion, we will not overturn a decision resting on a finding supported by substantial evidence in the record.

Final Parenting Plan

Thomas argues that the trial court violated RCW 26.09.060(10)(a) because a temporary order should not "prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings." Thomas also argues that the trial court abused its discretion by failing to consider the criteria listed in RCW 26.09.187 when formulating the final parenting plan.

Thomas's reliance on both RCW 26.09.060(10)(a) and RCW 26.09.187 is misplaced. While it is true that a temporary parenting plan should not prejudice the rights of a party when the trial court formulates a final parenting plan, and that a trial court normally must consider the criteria for establishing a permanent parenting plan found in RCW 26.09.187, a trial court has very limited discretion in awarding a parent custody or visitation once it has made a finding of abuse. *Mansour*, 126 Wn. App. at 10 ("RCW 26.09.191 is unequivocal. Once the court finds that a parent engaged in physical abuse, it must not require mutual decision-making and it must limit the abusive parent's residential time with the child.").

RCW 26.09.191(2)(a) provides, in relevant part, that

> [t]he parent's residential time with the child *shall* be limited if it is found that the parent has engaged in any of the following conduct: . . . (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(Emphasis added.) The statute also requires that

> [i]f the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

RCW 26.09.191(2)(m)(i).

RCW 26.09.187(3)(a) states that the court should consider the following seven factors when determining residential placement:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
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> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
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> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
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> (iv) The emotional needs and developmental level of the child;
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> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
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> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
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> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

But the statute also explicitly states that these factors need only be considered when the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule. RCW 26.09.187(3)(a).

Here, the trial court made all the required findings for limiting residential time under RCW 26.09.191, including that Thomas had sexually assaulted a child, that Thomas had engaged in domestic violence, and that limitations on contact would not adequately protect the children. Ample evidence in the record supports these findings. Therefore, RCW 26.09.191 was

dispositive in determining the residential placement of the children. Accordingly, the trial court did not abuse its discretion by failing to use the seven factors in RCW 26.09.187 in determining residential placement.

Notice for the TO Hearing

Thomas asserts that "[i]f the court concludes that the hearing on September 24, 2009 was legitimately a hearing on final order, this court should consider the notice provided for that hearing." Br. of Appellant at 13. Review of the record reveals that the notice Thomas received of the TO hearing was sufficient. Thomas's argument appears to be that, should we determine the temporary hearing from September 24 was a final hearing, the notice he received was insufficient. As we decline to treat the TO hearing as a final hearing, and because evidence independent of that presented at the TO hearing required that the trial court limit Thomas's contact with the children, this argument is immaterial. In addition, Thomas makes no clear argument as to why we should consider the September 24 hearing a final hearing and he does not offer any authority supporting his assertion that the notice provided was insufficient. We cannot consider issues unsupported by argument or citation to authority and the record. RAP 10.3(a)(6); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991); *Holland v. City of Tacoma*, 90 Wn. App. 533, 537-38, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998). Accordingly, we decline to consider further Thomas's argument that he received improper notice for a final hearing.

GAL Provision and Restraining/Protection Orders

Thomas also assigns error to the trial court including a provision in the final parenting plan stating that it would only revisit the issue of visitation upon initiative of the GAL,[9] to the trial court entering a continuing restraining order, and to the trial court entering a domestic violence protection order. Again, Thomas fails to present argument or citations to authority and the record for all of these assignments of error. Accordingly, we do not review further these alleged errors. RAP 10.3(a)(6); *Am. Legion*, 116 Wn.2d at 7; *Holland*, 90 Wn. App. at 537-38.

De Facto Parent

Thomas argues that based on our Supreme Court's recent holding in *M.F.*, the trial court erred by finding that Ashley was Child One's de facto parent. Ashley responds that this issue is moot because of the trial court's primary resolution of a nonparental custody decree under RCW 26.10.030, which Thomas does not challenge on appeal. Because the relief Thomas requests does not affect the validity of the nonparental custody decree, any opinion on the validity of the trial court's de facto parent finding would be purely advisory. We do not issue advisory opinions. *Commonwealth Ins. Co. of Am. v. Grays Harbor County*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004) (citing *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). Accordingly, we decline to review the trial court's finding that Ashley was Child One's de facto

[9] The provision reads, in part, "If the petitioner wishes for the court to review the matter of visitation in the future, the petitioner may seek mental health counseling and have said counselor provide reports to the [GAL]. The GAL shall carefully review these counseling reports to determine whether genuine progress appears to have been made. . . . The issue of visitation may be revisited by the court solely on the initiative of the GAL, at such time as the GAL assesses such progress to have been made." CP at 88. At trial, the court explained that it intended on including this provision because "Mr. Benner has a lot to offer as a father if we can just get past the junk." RP (Feb. 22, 2010) at 203. This provision was actually intended to benefit Thomas and he did not object to the court including this provision at trial.

parent. *Commonwealth Ins. Co. of Am.*, 120 Wn. App. at 245.[10]

Attorney Fees

> Ashley requests attorney fees under RCW 26.09.140. RCW 26.09.140 provides that
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> [u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

We grant Ashley's request for reasonable attorney fees pursuant to RCW 26.09.140 in an amount to be determined by a commissioner of this court and affirm the final parenting plan.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, C.J.

[10] We note that this court recently decided *In re Custody of B.M.H.*, No. 41211-0-II, 2011 WL 6039260 (Wash. Ct. App. Dec. 6, 2011). Had this court been required to determine Ashley's eligibility to be a de facto parent, we would have similarly determined that there is no blanket disqualification of stepparents under *M.F.* *See B.M.H.*, 2011 WL 6039260, at *8 ("Our narrow reading of *M.F.* leads us to conclude that *M.F.* precludes stepparents and former stepparents from acquiring de facto parent status only when the child has two existing, fit parents."). Therefore, Ashley would have been eligible to be considered a de facto parent because Child One's biological mother was deceased and his biological father was unfit.