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MARCH 25, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32367-6-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE

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In re the Custody of

S.F-T.C., Child

JASMINE CAREY  
Appellant

and

JANET CAREY, NICK CAREY, LAURA CAREY  
Respondents

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

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AMENDED BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. RESTATEMENT OF ISSUES ..... 2

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT IN RESPONSE TO APPEAL ..... 22

    A. THE SCOPE OF REVIEW AND GENERAL PRINCIPLES  
    GOVERNING THE TRIAL COURT’S DECISIONS. .... 22

    B. THE TRIAL COURT FOUND PLACEMENT OF S WITH HER  
    MOTHER WOULD RESULT IN ACTUAL DETRIMENT. .... 24

        1) THE TRIAL COURT COMMITTED NO ERROR WHEN IT  
        ENTERED A “BEST INTERESTS” FINDING..... 25

        2) THIS CASE PRESENTS THE SAME KIND OF  
        EXTRAORDINARY CIRCUMSTANCES AS HAVE JUSTIFIED  
        NONPARENTAL CUSTODY AWARDS IN WASHINGTON  
        CASE LAW. .... 26

        3) THE EVIDENCE IS SUBSTANTIAL THAT THE CHILD’S  
        HEALTHY GROWTH AND DEVELOPMENT DEMAND THE  
        STABILITY AND SECURITY OF HER CURRENT PLACEMENT.  
        ..... 30

    C. THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW. . 39

    D. THE TRIAL COURT HAS BROAD DISCRETION TO ORDER  
    DECISION-MAKING AND OTHER PROVISIONS IN A  
    PARENTING PLAN; IN ANY CASE, THE PARTIES AGREED AS  
    TO THE “RELIGIOUS RITES” PROVISION. .... 42

V. CONCLUSION ..... 43

## TABLE OF AUTHORITIES

### Washington Cases

<i>In re Clark</i> , 26 Wn. App. 832, 611 P.2d 1343 (1980) .....	30
<i>In re Custody of B.J.B.</i> , 146 Wn. App. 1, 189 P.3d 800, 804 (2008) .....	22
<i>In re Custody of B.M.H.</i> , 179 Wn.2d 224, 315 P.3d 470 (2013) ..	25, 26, 29
<i>In re Custody of B.R.S.H.</i> , 141 Wn. App. 39, 169 P.3d 40 (2007) .....	41
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971, 981 (2009) ..	25
<i>In re Custody of R.R.B.</i> , 108 Wn. App. 602, 31 P.3d 1212, 1218 (2001)..... .....	26, 28, 37, 40
<i>In re Custody of S.R.</i> , 183 Wn. App. 803, 334 P.3d 1190, 1195 (2014)...	24
<i>In re Custody of Shields</i> , 157 Wn.2d 126, 136 P.3d 117, 127 (2006) .....	26, 28, 29
<i>In re Dependency of J.B.S.</i> , 123 Wn.2d 1, 863 P.2d 1344, 1350 (1993) .....	40, 41
<i>In re Mahaney</i> , 146 Wn.2d 878, 51 P.3d 776 (2002) .....	28, 29, 31, 40
<i>In re Marriage of Allen</i> , 28 Wn. App. 637, 626 P.2d 16 (1981) .....	28, 29, 30, 40
<i>In re Marriage of Katare</i> , 175 Wn.2d 23, 44, 283 P.3d 546 (2012).....	23
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993) .....	22
<i>In re Marriage of Landry</i> , 103 Wn.2d 807, 699 P.2d 214, 215 (1985) ....	24
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997) .....	23
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003) .....	32
<i>In re Stell</i> , 56 Wn. App. 356, 783 P.2d 615, 620-21 (1989) ...	23, 27, 28, 40

<i>Indus. Indem. Co. of the Nw. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	39
<i>Nguyen v. City of Seattle</i> , 179 Wn. App. 155, 317 P.3d 518, 522 (2014)	23
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	23
<i>Wash. Asphalt Co. v. Harold Kaeser Co.</i> , 51 Wn.2d 89, 316 P.2d 126, 127 (1957).....	43
<i>Wenatchee Sportsmen Ass’n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	23, 39

**Statutes, Rules, & Other Authorities**

RAP 9.2.....	43
RCW 26.10.032 .....	26
RCW 26.10.100 .....	25
RCW 26.10.190 .....	41

## I. INTRODUCTION

S is a ten-year-old survivor of multiple, complex trauma. She has suffered neglect by her mother, sexual abuse by her mother's roommate, removal from her mother by the state, abandonment by her mother, removal from her stepmother's care, and her father's suicide. For three years, she has lived with her uncle's family and is one of four siblings in that household. In this stable and supportive environment, S is excelling in school and in extracurricular activities and, most significantly, in her overall well-being and attachment to her family. The biological mother's effort to regain custody, after three years of little to no contact, poses a profound risk to S. The trial court was asked here to determine, in the words of S's counselor, "how much a little girl can take." RP 445. To this inquiry, the mother's current recovery from a lifetime of addiction is irrelevant. The focus properly is on maintaining stability for a child whose first eight years of life were marked by as much loss, violation, and fear as few people experience in their entire lives. The court recognized return to the mother's custody would be detrimental to S's continued growth and development. Basically, the court said this little girl should not be asked to endure any more. That decision should be affirmed.

## II. RESTATEMENT OF ISSUES

1. The trial court's decision is reviewed for an abuse of discretion and its factual findings for substantial evidence.
2. The trial court's finding that the child would suffer actual detriment if removed from the custodians is supported by substantial evidence, meaning evidence sufficient to persuade a rational, fair-minded person.
3. The trial court as fact-finder weighs the evidence, determines credibility, and resolves conflicts in the testimony. On review, this Court defers to those determinations and, in evaluating a challenge to the evidence's sufficiency, needs only to consider the evidence favorable to the prevailing party.
4. The trial court applied the proper legal standard to the evidence, meaning that it weighed the evidence for whether it was clear and convincing and derived its conclusion regarding actual detriment from the evidence.
5. The evidence is sufficient as a matter of law and harmonizes significantly with relevant precedent in this area.
6. The nonparental custody statute provides adequate safeguards for a parent's constitutional right, but that interest must yield where the child's welfare hangs in the balance.

### III. STATEMENT OF THE CASE

Jasmine spent much of her statement of the case explaining the circumstances surrounding her historical conduct, including the role played by others in her life. For example, she attributes much of the tumult in her marriage with Kyle Carey to him. Br. Appellant, at 4-5. His version of those events died with him. Moreover, Jasmine ignores that many aspects of her personal story were vigorously contested at trial (e.g., her unsubstantiated medical diagnoses; her claim to have abandoned her children to save them from a criminal, though he was in prison at the time; despite this alleged threat, she went to Kyle's house; etc.). The trial court made no findings as to these issues, nor as to Jasmine's credibility; rather, the court focused on Jasmine's current circumstances (e.g., following dismissal of a dependency as to her youngest daughter) and on the history and condition of her oldest daughter, S. Respondents will do the same in this statement of the case.<sup>1</sup>

S will turn eleven years old in October 2015. RP 569. Since March 2012, she has lived exclusively with her aunt and uncle, Nick and Laura Carey, and their three children, aged eleven to six. RP 291-292.

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<sup>1</sup> The record in this case consists mainly of the verbatim report of proceedings from the trial in October 2013. An earlier trial, in March 2013, resulted in a mistrial after the judge recused himself. CP 853-858. The appellant cites to a portion of the transcript from that trial (CP 152-295). See, e.g., Br. Appellant, at 5 (citing to CP 214-215, etc.). It does not appear the judge who entered final orders in this case ever read the March 2013 testimony. RP 1355 (court would consider materials admitted in trial).

Like S, two of these children have a biological parent with whom they do not live (i.e., Nick is their stepfather). RP 321. The transition to living with the Careys full time was eased for S by the fact that she had spent considerable time with the family in the past, including, at times, living with them during the week. RP 311-312, 407, 425, 426. By July 2013, S claimed the Carey home as her “forever home.” RP 354. She views the Carey children as her siblings and Nick and Laura as parents. RP 352. She acknowledges having three mothers: Jasmine, Holly (with whom she lived for nearly three years while in her father’s custody), and Laura, whom she describes as her “number one mother.” RP 353; see, also RP 315-317, 405-406.

As a family, the Careys typify households with four children. RP 347-348. Weekday routines revolve around school: showers, breakfast, school, home, snack, homework, activities, dinner, tuck-in, bedtime. RP 403-404. The time just before sleep allows for talk, review of the day, exploration of feelings. RP 404-405. As S has grown more trusting of Nick and Laura, the reciprocal attachment has deepened. See, e.g., RP 315-318, 406-408, 424, 427-428, 1387-88; Exhibit 37.

S’s relationship with her siblings in the Carey household is, in certain respects, typical. There is love and rivalry, play and argument. See, e.g., RP 303-305, 331-332, 409-410, 413, 1390-1391. But for S, the



relationship with her siblings is also extraordinary because, despite so much loss in her life, she has come to count on her siblings. When, for example, she returned from camp to find her youngest sister, BC, gone (on trip with grandparents), the echo of loss upset her deeply, so much so that the Careys had to talk her through it nightly and arrange telephone contact with the sister until she returned from camp. RP 313, 412-413.

The bonds built through daily routines are reinforced on weekends and holidays, when the family juggles extracurricular activities in town or escapes for a holiday in the woods or at the beach and in the snow. See, e.g., 305-308, 310-311, 413-414. Both Nick and Laura testified to S being a “very happy” child in their family. See, e.g., RP 298-299, 314, 355-356, 465-467, 537-538.

S attends elementary school with two of the Carey children (the oldest is in middle school); she was in third grade at the time of trial. RP 278, 1400; see RP 1299 (Jasmine misreporting she was in second grade); Exhibits 1 & 2 (school records). Laura volunteers to help in various school functions and she and Nick attend conferences and otherwise maintain contact with teachers. RP 274, 408, 1384. Though S qualified in Spring 2012 to attend another school, a program for highly capable children, Laura and Nick decided it would benefit her more to remain in the same school, rather than switching schools again, especially as that

decision could always be revisited later. RP 411. This decision allowed S, for the first time, to be at the same school two years in a row, and, thereby, continue friendships and be in school with her sister, BC. RP 410-412. S's half-sister, B, also attends the same school, which the Careys valued as "another tie" they did not want to take from S. RP 412. In school, S excels. Exhibits 1 & 2; RP 265-266 (1<sup>st</sup> grade); RP 281 (S "loves school. She loves it. She thrives off of it"), 298-299; see, also RP 529 (S missed lots of school due to sickness when in Jasmine's care). Here, as in other contexts, her desire to please works to her benefit. RP 267-268 (teacher describing as "Girl Friday"); 280-281 (another teacher describing as a "pleaser" and "model student"); 1129 (Lang describing as a "pleaser"); 1152 (same).

S also participates enthusiastically in extracurricular activities, such as figure skating, karate, soccer, and swimming. See, e.g., RP 298-300, 305. She also likes to help out around the house and to cook. See, e.g., RP 299-300, 410. She and her siblings have chores to do, including sorting their own laundry, though they do not always get them into the right drawers. RP 1406 (S apparently grabbing clothes belonging to her younger sister).<sup>2</sup> S is a "big helper" around the house. RP 299.

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<sup>2</sup> Jasmine accused the Careys of not providing proper clothing and shoes for S, though she did not raise the issue directly with them. RP 1280-1282, 1290-1292, 1296-1297, 1337, 1348-1349. The numerous professionals who have worked with S, including those

Unlike most children, S also spends time in counseling, in one-on-one and group sessions, and spends time with her biological mother, Jasmine, and her two half-sisters (B and J). RP 312, 466, 468, 1070. While presently S is thriving, at home and in school, these past two year mark the longest period of stability and security in her life. By the time of trial, she was just turning nine years old and already had experienced trauma that, in the trial court's words, "we would hope no one would experience in the course of their entire lifetime ..." CP 339 (C.4). In medical terms, per her counselor, Lyn Lang, S presents with complex trauma: multiple traumas and caregivers. RP 437-438. Lang specified the traumas as follows:

- separation of her parents, Kyle and Jasmine (2006);
- their divorce (2007);
- sexual molestation by a trusted caregiver at a young age (2008);
- living with her mother in dangerous and unhealthy conditions (2008-2009);
- parentification (i.e., taking care of her younger sister, B, when living with her mother and without the competence to do so) (2008-2009);

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who have visited the Careys' home, never reported any concern that S was being other than very well cared for. S never reported any trouble with her clothing. RP 1388-1390, 1396, 1399-1400, 1405-1406.

- seeing her mother being strangled by a paramour [Burnett], giving rise to fear for herself and her mother (2008);
- removal from her mother (January 2009);
- no contact with her mother after June 2009;
- separation of her father, Kyle, and his fiancée, Holly (who had a son together, Kahless) and loss of the stepmother (late 2011);
- Kyle’s suicide, which Lang described as “over the top” (March 2012).

RP 438-441.

For most children, the attachment to primary caregivers is critical to well-being; for S, whose attachments have repeatedly been severed, the attachment to Nick and Laura is a matter of survival, as multiple professionals and the guardian ad litem attested.

Laura Scrapper (Guardian ad Litem)

Scrapper was appointed by the court to perform a full investigation into S’s history and to report on her findings, including to report S’s expressed preferences regarding placement, which she did. Exhibit 46; RP 521-538; CP 379-695.<sup>3</sup> Scrapper reported that S is happy where she is and that she was upset at the prospect of seeing Jasmine. RP 538-539. S said

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<sup>3</sup> A piece missing from the GAL’s investigation is the informational packet from Brigham Sandberg, Jasmine’s domestic partner, who did not return the packet. RP 535-536, 566.

she “really likes” being at the Careys’ and described the fun and comfort she experiences there. CP 384-385. Scrapper recommended S be left in the care of Nick and Laura because, given the significant trauma already endured, removal from her current stable environment and placement with Jasmine “would be detrimental” to S. RP 540-541; see, also RP 539 (“actual detriment would occur should S[...] be returned to the care of her mother”); CP 392. S “requires much needed stability and consistency that would be key to her mental and emotional goal of well-being.” RP 541. Her opinions, as reported in November 2012, did not alter by trial, even after reading reports of visitation between S and Jasmine. RP 562.

Michele Leifheit

Michele Leifheit performed a bonding/attachment assessment in July 2013. Exhibit 36. Leifheit has a Masters degree in mental health counseling and 25 years of experience. RP 336-341. For this case, she assessed S’s attachment to the Careys, and vice versa. RP 343 (describing the particulars of her assessment); Exhibit 36. She defined attachment and explained its importance to a child’s health and well-being, distinguishing between attachment and connection, the former being deeper and more meaningful. RP 343-346. A secure and stable attachment “sets a child up for life” and is “critical to a child’s development and ... future well-being.” RP 357. She explained that age and development are also

important in assessing attachment and “S is at the developmental stage where structure, stability and trust are paramount.” Exhibit 36, at 6; see, also, RP 366.

In the relationship between the Careys and S, Leifheit found strong and mutual attachment. In their very blended family, S is treated as one of the children and identifies herself in this way. RP 352-353. S could not imagine living anywhere else, not even with her Nana (Janet Carey). RP 353-354. She described the Careys’ as her “forever home.” RP 354. Leifheit found Nick and Laura to be committed to S and their interactions to be relaxed and comfortable, genuine and reciprocal. RP 355, 360-363, 365, 368. Nick and Laura believe S “to be one of their children and treat her as such.” RP 368. She concluded S was “clearly attached, clearly bonded, and ... this attachment and bonding was reciprocal, it was both ways, child to caregivers, caregiver to child.” RP 368. She noted that S feels safe and secure with the Careys, feels that she can go to them with her needs, trusts and relies on them. RP 365-366. S identifies herself as a member of the family and “wants to be there.” RP 368. Leifheit remarked on the Careys’ dedication to their children, the lack of any mental health issues, and their financial stability. RP 364. They are S’s “emotional and psychological parents.” Exhibit 36, at 5. Leifheit observed the same

positive and relaxed character in the interactions among the siblings. RP 364.

Leifheit was aware of the trauma experienced by S and thought it went “without saying the more trauma that a child would experience[,] the more difficulties they could have.” RP 358. S needs stability and security to process the historical traumas of her life, making it particularly important “that she doesn’t have more trauma.” RP 359. Leifheit described some of the dire consequences to children from threatening or severing their bonded relationships: fearfulness, impulsivity, difficulties in school and with peers, loss of identity, concentration impaired, acting-out behaviors, regression, depression, mental health issues. RP 350-351, 367. Particularly, as to S, Leifheit feared detriment to S’s emotional, psychological, and even her physical well-being from disruption of her attachment to the Careys. RP 368.

#### Lyn Lang

Lyn Lang has a Masters in counseling education and 20 years of experience in the field, including considerable experience working with traumatized children. RP 434-436. She has counseled S beginning in 2008, after the molestation, and S made some progress toward processing the event during their eleven sessions. RP 445. However, because Jasmine fell out of contact, the sessions ended prematurely, before S had

been able to understand the violation and before she could achieve closure. RP 445-446.

Lang saw S again during the dependency that followed upon the removal of S and her sister from Jasmine's care in January 2009. RP 446. S was experiencing anxiety and depression, given the uncertainty in her life, particularly in terms of who would care for her. RP 447-449. Her mother stopped visiting, leaving S to worry about her. *Id.*; see, also, RP 467 (Jasmine explained to S she did not visit because she did not want to lead bad guys to her children). S feared the dark, being left alone, and being abandoned. *Id.* Though she had not processed the traumatic events that occurred while in her mother's care, S stopped coming to counseling about the time Kyle, her father, obtained a modification of the parenting plan, making him the primary residential parent and limiting Jasmine's time with S and ordering Jasmine to obtain treatment. RP 448-449; see, also RP 250-252 (S very happy living with Kyle and Holly).

S returned to counseling in 2012, after her father's death, and remained in counseling at the time of trial. RP 450. At the start, S was overwrought from the death of her father, afraid of her future and feeling like she no longer had a family. RP 450. She would report missing her father and missing Holly (her stepmother) and that Nick and Laura were going to care for her, that they were her family. RP 451. She did not



report missing Jasmine; she said she had no memories of her mother, it was too long ago. RP 451, 453. She talked about her mother as using drugs, living on the streets, and having bad friends. RP 448, 453-454, 1140. She talked about a sibling who died during Jasmine's pregnancy (a stillborn). RP 454. Mostly, she said she did not think of Jasmine very much. Id., RP 456

With regular sessions, S slowly made progress processing her father's death. RP 451. In 2012, with Jasmine seeking to re-establish her status, Lang worried about the disruption to S's recovery, particularly as S did not have a history of stability with Jasmine. RP 457-458.<sup>4</sup> Lang reported her primary concern is S's mental health and future. RP 458. In a drawing, S manifested the complicated feelings contact with her mother aroused. Exhibit 44; see, also, RP 456-457, 459-460.

After a year of visitation with Jasmine, S told Lang she enjoyed the visits and the gifts her mother brought and the fun things they did. RP 461-462. When, in June 2013, Lang asked if she wanted more time with

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<sup>4</sup> Immediately after Kyle's death, Jasmine demanded S be returned to her, although she and S had been separated for 3.5 years and Jasmine was in the midst of the dependency related to her newborn, J, and attending services eight hours a day or more. RP 167-168, 1219. She had been using meth as recently as during the pregnancy with J. RP 887, 1203. Nevertheless, she claimed the parenting plan entitled her to custody (though it allowed only supervised visitation and required treatment) and she harassed Janet Carey with numerous calls and texts during the 48 hours after Kyle's death and four times during his funeral. RP 1324 (compare Exhibit 52); RP 1384-1385. Kyle was Janet's son. After consultation with professionals, including CPS, Janet understood if they did not seek nonparental custody, S would be placed in foster care. RP 1384-1385.

Jasmine, S replied, “No, I’m good.” RP 462; see, also RP 468 & 1152 (describing therapist as being a person S does not have to worry about pleasing); CP 1166-1168 (updated 01/15/14). S no longer thinks about Jasmine now that she visits with her, which is helpful, in Lang’s view. RP 1154.

Lang explained the difficulty a child has comprehending the vicissitudes of a life such as Jasmine’s. RP 469, 1141. She views S as having a bond with Nick, Laura, and their children and she fears removal from the Carey family would cause trauma to S. RP 469. “That kind of cumulative trauma can really cause a lot of problems for a person in their life, even physical problems, and definitely mental health problems.” RP 469-470. Already, S has to contend with multiple griefs, which can cause depression, and with maintaining an ability to have faith in the people who care for her. RP 470. If her current attachment is severed, Lang feared S would not ever be able “to believe that people were going to continue to be there for her.” RP 470. The consequences of trauma in childhood have very long-lasting effects, including alcoholism, drug abuse, promiscuity, STDs, depression, anxiety, physical ailments, and chronic illnesses in adulthood (e.g., diabetes and heart disease). RP 470, 1142.

Lang distinguished how S views Laura and Jasmine in terms of caretaking. For care, S looks to Laura and has found comfort and security

in the Carey home. RP 1155-56. With Jasmine, she is having a good time, but she does not relate to her as a caretaker. Id.

Susan Holden

Holden has a Masters in education and 23 years of experience as a counselor. RP 272. She got to know S while S was a first-grader at Washington Elementary during the 2011-2012 academic year. Holden talked with S over the year about her history, including being sexually molested, and events occurring to her that year, including the dissolution of her father's marriage to Holly, whom she had grown to think of as a mother; having to move (when the marriage dissolved); loss of a pet; and her father killing himself. RP 273-275. In Holden's opinion, given originally in the aftermath of Kyle's death and the initiation of the nonparental custody proceeding, was that it was "really important" for S "to know stability and to have some continuity in her life." RP 276. Given "all of the upheaval," stability was important for S's development and healing. RP 275. A change of placement would be detrimental to her health, her education, and her well-being. RP 277.

Though Holden had not seen S since the end of the 2011-2012 school year (i.e., not quite a year before the first trial), the court viewed her opinion as applying "equally to this time frame as it did back in June of 2012." CP 339 (C.3).

### Jasmine's Circumstances

Jasmine is 29 years old (dob 01/01/86, RP 76) and has been diagnosed with alcoholism (RP 1315), anxiety disorder (RP 620), social phobia, amphetamine dependence in remission, and adjustment disorder with depressed mood (RP 866). She reports she also suffers from endometriosis and interstitial cystitis, which she describes as being disabling in the past and requiring sedating medications (e.g., opioids, benzodiazepines). RP 99, 385-387, 530, 585, 685, 837, 880, 905, 920, 1176, 1301, 1346-1347; see, also, RP 1301 (provided no records of these conditions from 2008-2012); RP 29-30 (reported to aunt using pain medications but not being in pain); RP 99 (said in pain but did not appear incapacitated). Her conditions are exacerbated by stressors in her life, including finances, unemployment, time management, chemical dependency, domestic violence, and litigation, which treatment cannot eliminate. RP 561, 880, 900-903, 923, 1101, 1112, 1331.

Jasmine began using drugs at an early age (i.e., between age 12-13), with methamphetamine prominent among the drugs she used, continuing through her most recent pregnancy (child J born in January 2012). RP 26-30, 49, 89, 527-528, 577-578, 887, 996, 1225, 1310. At the time of trial, she claimed to have been clean for two years. RP 1226. Following her birth, J was placed in a dependency, which, after Jasmine

complied with multiple services, was dismissed in early November 2012. RP 1326. Though not certain at first who was the father of J, Jasmine now lives with the putative father, Brigham Sandberg, after several years of an off and on relationship. RP 35, 128, 154, 1306. Sandberg, age 48, has a history of methamphetamine manufacture, for which he was convicted in 2004, and a history of methamphetamine use, including during J's dependency (i.e., 2012). RP 129-139, 182, 533-535, 801. Sandberg also has a history of alcohol abuse and a diagnosis of alcohol and methamphetamine dependency. See, e.g., RP 144, 157. He has also received treatment for marijuana abuse. RP 138.

Jasmine reported Sandberg to the police for threatening to kill her, but at trial she backtracked from those allegations. RP 1098 (did not disclose to couples counselor); 1210 (explaining she told police Sandberg had threatened to kill her and bury her in desert because she sometimes perceives danger where there isn't danger); 1211 and 1307 and 1330 (explains her statements to others about Sandberg kicking her out of house were not true, but that he had asked her to leave at times);<sup>5</sup> see, also RP 53-54 (Jasmine's aunt describing witnessing Sandberg assault Jasmine, etc.).

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<sup>5</sup> Jasmine explained her accusations against Sandberg resulted from her mental health issues, but did not extend that explanation to her accusations against Kyle. See, e.g., RP 1303-1306 (anxiety under control at that point but she was scared for her life); 1307 (severe anxiety for years).

Jasmine has been pregnant seven times resulting in three miscarriages, a stillbirth, and three children. RP 613, 621-622, 1330-1331. The pregnancies seemed to exacerbate her medical problems, according to her sister. RP 240. She testified she was not sure Kyle Carey was S's father, though she also claimed his infidelity caused their marriage to end. RP 569, 670. Her second child, B, resides primarily with her biological father, Shawn Jett, whom Jasmine claimed she kicked out of their house when he was accused of molesting another child. RP 584, 1257.

Jasmine recites a long history of abuse and neglect suffered by her, both as a child and an adult. RP 667-668, 858, 1210, 1315. Her sister describes how their parents' divorce was especially difficult for Jasmine to handle. RP 236. Jasmine claims to have been a repeated victim of domestic violence in multiple relationships, including her present one, and the victim of robberies, burglaries, and assaults by hardened criminals. See, e.g., RP 84-85, 236-237, 568-569, 590 (S witnessing Burnett choking Jasmine), 624 (witnessing in her childhood home), 667, 1098, 1101, 1322, 1329, 1350. She has never received counseling for that issue specifically. RP 616 (claiming she has reviewed with her other counselors); RP 708 (addiction counselor does not remember Jasmine revealing "DV" history); RP 773-776 (couples counselor not address "DV" because Sandberg and Jasmine denied it); RP 794-811 (Jasmine did not discuss "DV" with 2nd

dependency GAL counselor or receive services for that issue, though DV-specific counseling would be especially important if issue appeared across multiple relationship); RP 874 and 8889-890 (Jasmine did not reveal DV to dependency mental health evaluator); RP 1096-1101 (counselor testifying Jasmine did not disclose “DV” history, so did not address that).

During J’s dependency, the year before trial, Jasmine engaged in multiple services offered by the state and succeeded, with support mainly from Sandberg’s parents (mother and stepfather), in gaining dismissal of the dependency. RP 789-800. At the nonparental custody trial, she offered testimony of many professionals she worked with in the dependency the year before (i.e., Tanninen, Loree, Wilde, Chacon). With dismissal of the dependency, these services have ended, but Jasmine reports continuing to attend NA/AA meetings, including ones focused on mothers and children (i.e., Safe Baby/Safe Moms). RP 994, 1223-1228. Sandberg also attended inpatient treatment and stated that he attends 12-step meetings to avoid relapse, but has no other aftercare plan or treatment. RP 137-144, 796-797 (dependency GAL believing Sandberg was in process of getting into aftercare).

Jasmine has not worked outside the home for many years and Sandberg struggles to make a living, having started his own construction business after a falling out with his father, for whom he had worked. RP

76-80, 110-116. They have received financial assistance from the state and from Sandberg's mother and stepfather as he attempts to get his business off the ground, for which purpose he works long hours away from home. RP 144-155.

Sandberg and Jasmine live together with the infant, J. RP 81. J was born with methamphetamine in her system and her early caregivers reported issues with colic, tremors, rigidity, bowel problems, acid reflux, and difficulty sleeping. RP 620, 972, 1000, 1361-1363; CP 381, 385.<sup>6</sup> Jasmine also has visitation with her middle child, B. RP 1257. Jasmine began making child support payments for B in April 2013, with an \$18 payment toward substantial arrearages. RP 1408-1409. She does not pay child support to the Careys and none was ordered. CP 341

#### Trial Court's Decision

The trial court awarded custody of S to the Careys on the basis that "there would be actual detriment to [her] growth and development if placed in the mother's care..." CP 339. The court found the mother was not a suitable custodian at the beginning of the case, during the dependency for her child, J, but also found the Careys had not proven that

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<sup>6</sup> The GAL, after review of relevant records, reported J was positive for meth at birth, which Jasmine disputed at trial. RP 546, 1205. The dependency records were excluded from the trial at Jasmine's motion. CP 45-54, 55-67. However, Jasmine admitted being tested positive for meth several months before J was born. See, e.g., RP 29, 527-528, 616-617 (at least four uses during 2011).



Jasmine was presently unfit. CP 338. In making this assessment, the court felt compelled to discount the evidence of Jasmine's circumstances from 2006 through 2011, including her drug use during her last pregnancy, though the court noted at those times Jasmine was, "arguably, an unfit parent." CP 338.

The Careys do not challenge the court's assessment of the evidence or its conclusion that Jasmine was not proved to be presently unfit. Rather, they note the court's focus on S's circumstances, including the history of multiple traumas she suffered while in the care of her parents. CP 339. The court observed that "part of that trauma was the failure of her mother, Jasmine Carey, during a significant period of her life, to provide the parenting and the parental guidance and support that she very much needed." CP 339. The court took to heart the professional opinions regarding S's acute need for stability and the detriment to her should she be removed from what "she considers to be her permanent home" and family. CP 339. The court found "by clear, cogent and convincing evidence that removing [S] from her current home at this time would cause actual detriment to her stability, well-being, growth and development." CP 340. Specifically, the court found "it is important to [S's] emotional and psychological well-being for her to remain where she is and that to remove her, considering all of the traumas that she has

undergone to this point in her life, would be an actual detriment to her.” CP 340. Though S is doing “amazingly well for everything that she has gone through,” her present stability and security “are very important to her continued well-being,” such that “to remove her from the home that she is in at this time would detrimentally affect that security and safety and her well-being.” CP 340. Jasmine appealed.

#### IV. ARGUMENT IN RESPONSE TO APPEAL

##### A. THE SCOPE OF REVIEW AND GENERAL PRINCIPLES GOVERNING THE TRIAL COURT’S DECISIONS.

In this case, the trial court carefully sifted through eight days of testimony from 40 witnesses, including numerous professionals, and weighed considerable documentary evidence, before concluding that placement of the child, S, with her mother would be an actual detriment to the child’s growth and development. CP 339 (FOF C.1). Under the extraordinary facts of this case, particularly the complex and multiple traumas affecting S and her acute need for stability, this decision makes complete sense.

In challenging this decision, Jasmine bears a heavy burden, since “[t]his court reviews custody decisions for an abuse of discretion.” *In re Custody of B.J.B.*, 146 Wn. App. 1, 10, 189 P.3d 800, 804 (2008) (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). She must show the trial court’s decision is manifestly unreasonable or

based on untenable grounds or untenable reasons.” *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997)).

Moreover, Jasmine must carry this burden without retrial of the factual issues, since the trial court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record. *Katare*, 175 Wn.2d at 35. The evidence is “substantial” if it is “sufficient to persuade a rational fair-minded person that the premise is true.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, this Court “need only consider evidence favorable to the prevailing party.” *Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518, 522 (2014).

For that reason, “appellate courts are generally reluctant to disturb a child custody disposition because of the trial court's unique opportunity to personally observe the parties.” *In re Stell*, 56 Wn. App. 356, 366, 783 P.2d 615, 620-21 (1989). After all, it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *accord Nguyen*, 179 Wn. App. at 163 (appellate

court defers to trial court's assessment of witness credibility and evidence weight).

These principles serve a general preference for finality as well as a specific legislative policy "in favor of finality of custody determinations." *In re Custody of S.R.*, 183 Wn. App. 803, 813, 334 P.3d 1190, 1195 (2014). As a consequence, "[t]he trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214, 215 (1985).

Jasmine essentially challenges the trial court's factual findings, though she spends much of her argument restating the legal standards applicable in nonparental custody proceedings. As discussed below, the court applied the correct legal standard (actual detriment) to the facts as it found them. Those facts are verities because they are supported by substantial evidence, which the court measured against the proper evidentiary burden (clear and convincing). Under the principles above, the trial court's decision should be affirmed.

**B. THE TRIAL COURT FOUND PLACEMENT OF S WITH HER MOTHER WOULD RESULT IN ACTUAL DETRIMENT.**

Washington law permits nonparental custody because the statute, as interpreted, protects the parent's right by imposing on petitioners a heavy substantive burden, which must be satisfied by clear and convincing

evidence. *In re Custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013) (petitioner must prove unfitness or detriment to the child’s growth or development); *In re Custody of C.C.M.*, 149 Wn. App. 184, 205, 202 P.3d 971, 981 (2009) (proof by clear and convincing evidence). Here, the petitioners met this burden, as the trial court found.

1) The trial court committed no error when it entered a “best interests” finding.

Jasmine assigns error to the trial court’s entry of a finding that it was in S’s best interests to be placed in the petitioners’ custody. Br. Appellant, at 2 (assigning error to Finding 2.7A); Id., at 29 (arguing the court should strike the finding). This finding is mandated by the statute, which provides “[t]he court shall determine custody in accordance with the best interests of the child.” RCW 26.10.100. For this reason, presumably, it appears on the mandatory form. See Appendix (Form CU1\_0100 FFCL). It cannot be error to have complied with the statute, particularly as the trial court did not stop with this finding, but applied the standard read into the statute by the court.

Perhaps because Jasmine seems to argue a standard whereby nonparental custody petitioners would never prevail, it bears noting the complicated history of the nonparental custody statute. Its substantive standard, contained in RCW 26.10.100, which on its face requires only a best interests standard, was interpreted by the court to require a showing

of harm, i.e., proof of the parent's unfitness or proof of detriment to the child's growth or development. *In re Custody of R.R.B.*, 108 Wn. App. 602, 613, 31 P.3d 1212, 1218 (2001) (noting body of law incorporated into the statute by legislative re-enactment).<sup>7</sup> Otherwise, the statute would be unconstitutional. *In re Custody of Shields*, 157 Wn.2d 126, 150, 136 P.3d 117, 127 (2006). Recent cases have not altered the standard. *See, e.g., B.M.H.*, 179 Wn.2d at 235-236) (reaffirming standard and precedent). As noted above, this is the standard the trial court in this case carefully applied.

- 2) This case presents the same kind of extraordinary circumstances as have justified nonparental custody awards in Washington case law.

Had the trial court stopped with a "best interests" finding, its order would be inadequate. However, the trial court proceeded to analyze the two prongs mandated by case law. In other words, the court applied the proper legal standard, contrary to Jasmine's argument. Br. Appellant, at 21-22. The court found Jasmine is not presently unfit, based on the evidence of Jasmine's participation in services offered to her during the 2012 dependency of her third child, J. CP 338. However, the court found

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<sup>7</sup> The statute also includes a standing requirement, which petitioners must establish by "declaring" either that the child is not in a parent's custody or that neither parent is a suitable custodian. RCW 26.10.032(1). That requirement here was met a finding that Jasmine was not a suitable custodian at the beginning of the case and S was not in the physical custody of parent (her father being deceased). CP 338. Finally, the statute includes an adequate cause requirement. RCW 26.10.032.

placement of S with Jasmine would be an actual detriment to S and would detrimentally affect her security, safety, and well-being. CP 339-340. In so finding, the court relied on the testimony of expert witnesses, specifically mentioning three mental health professionals who have worked with or assessed S: Susan Holden, Michele Leifheit, and Lyn Lang. CP 339-340. That evidence is reviewed above and below. See §§ III & IV.B(3). The finding is also supported by the report of the guardian ad litem and the testimony of lay witnesses in the case, including some members of Jasmine’s family. *Id.*

Properly, the court placed the greatest emphasis on the neutral experts, a reliance this court has endorsed as important “to help [the court] reach an objective, rather than subjective, evaluation of the issue.” *Stell*, 56 Wn. App. at 368. Here, the professionals helped the court understand not merely the facts of the multiple traumas experienced by S, but the significance of them to her well-being and her future and the related significance of stability and security in her placement. In that regard, this case very much resembles signal precedent, contrary to Jasmine’s effort to distinguish those cases. Br. Appellant, at 16-21. In fact, this case, like those, presents “extraordinary circumstances” justifying a nonparental custody decree.

In particular, four cases provide persuasive guidance in this case, including the nonparental custody statute's progenitor, *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981). There, the court declared a stepmother to be the primary residential caregiver where she, unlike the otherwise fit father, had maximized developmental opportunities for the hearing-impaired child, who was thoroughly integrated into the environment with his stepsiblings.

Similarly, where evidence indicated detriment would occur upon disruption of a child's relationship with his aunt, who had been his primary, consistent caretaker during a difficult childhood, the trial court abused its discretion when it failed to consider that evidence, even though the father was fit. *In re Custody of Stell, supra*.

Likewise, a child whose mental health was threatened by return to her legal parents, however fit, was properly placed with custodians. *Custody of R.R.B., supra*.

Finally, in a case closely resembling this one, the mother, a former drug addict, was not a proper placement, despite her present fitness, where the children would experience detriment if removed from the custody of their grandmother. *In re Mahaney*, 146 Wn.2d 878, 894, 51 P.3d 776 (2002). *See, also, Shields*, 157 Wn.2d at 150 (remanding for trial on the stepmother's nonparental custody petition under proper legal standard of



detriment and allowing for possibility that stepmother should continue in primary caregiver role despite fit mother).

Obviously, there is no “cookie cutter” for the fact-intensive inquiry structured by the nonparental custody statute. Rather, “[w]hether placement with a parent will result in actual detriment to a child's growth and development is a highly fact-specific inquiry, and “[p]recisely what might [constitute actual detriment to] outweigh parental rights must be determined on a case-by-case basis.” *B.M.H.*, 179 Wn.2d at 235 (citing *Shields*, 157 Wn.2d at 143 (quoting *Allen*, 28 Wn. App. at 649)). Still, these cases bear a close resemblance to the present case, particularly in how each focuses on the child and his or her circumstances, not on the parent’s fitness or unfitness. Specifically, even where no present parental unfitness is shown, “the court may take into consideration emotional and psychological damage from prior unfitness of a parent and the child's current special needs for treatment and care.” *Mahaney*, 146 Wn.2d at 894. That is, these cases, like the present one, involved children who are particularly vulnerable and, therefore, needing a special solicitude.

That is precisely what the trial court here recognized and acted upon, based on the substantial evidence from the professionals, the guardian ad litem, and others. Certainly, Jasmine, with her own trouble background, may not be able to recognize the life-altering consequence of

severing S's secure attachments, but the court could. In doing so, the court implemented decades of modern Washington policy regarding children, policy that recognizes "the fact that these impressionable and emotionally and psychologically fragile infants are not chattels or playthings or mere desiderata but have rights of their own which should be protected." *In re Clark*, 26 Wn. App. 832, 839, 611 P.2d 1343 (1980). The nonparental custody statute is one mechanism available to provide this protection. It allows the court to act where "kinship is not as important as stability of environment and care and attention to the child's needs." *Allen*, 28 Wn. App. at 648 (internal citation omitted). Here, based on the substantial evidence before the court, the statute, as interpreted, was properly applied to protect S from yet another trauma: the removal from her "forever family."

- 3) The evidence is substantial that the child's healthy growth and development demand the stability and security of her current placement.

In challenging the court's factual findings, Jasmine distorts the record, both by misrepresenting it and by cherry-picking from it the facts that she likes. Br. Appellant, at 22-28. However, it is the trial court's job to sort through the evidence, to determine what is credible and what is not, and to weigh that evidence for its persuasive value.

In her challenge to how the trial court assessed the evidence as to detriment, Jasmine complains the court “focused solely and expressly on the past, primarily relying on the testimony of Holden, Leifheit, and Lang, each of whom could criticize only Jasmine’s past behaviors.” Br. Appellant, at 22. The court did focus on the past, on S’s history, as constitutive of her vulnerability. *See Mahaney*, 146 Wn.2d at 894 (court may consider effects of past neglect). It seems obvious that evidence of what S has endured is critical to the detriment analysis, i.e., to the question of what she can endure in the future. Where Jasmine goes off the rails in her complaint is where she shifts the focus to her history, complaining the experts criticized her historical conduct. She misses the point. The experts were talking about S, not about Jasmine, and about the consequences to S of suffering yet another upheaval. That is, the experts, unlike Jasmine, had S in mind, not Jasmine, when considering what her psyche can withstand.

Jasmine complains specifically about Holden’s opinion (the school counselor) that it is outdated. Br. Appellant, at 22-23.<sup>8</sup> The court acknowledged Holden had not seen S since she finished first grade (June

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<sup>8</sup> It does not appear Jasmine thinks the same aging principle applies to the professional opinions she offered at trial in support of her recovery, which were based on information over a year old, i.e., during the dependency. See, e.g., RP 775 (no contact by couples counselor since 07/2012); 876 (counseling ended 10/2012); 1109 (no contact with family preservation counselor since 08/2012).

2012). However, the court determined that, even considering that “[s]ome things have changed,” it remains true that stability is “very important for [S] and her development and healing, ...” CP 339. This is a fair inference, since nothing had erased S’s history of multiple, complex traumas.

Moreover, this is precisely the kind of inference the court is entitled to draw. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003) (“trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence”). Certainly, Jasmine did not provide any evidence establishing any reason Holden’s concern should have evaporated. S continues to live with her history, including the loss of multiple caregivers, prominently, the loss of her father to suicide, from which she continues to heal. As Jasmine attempts to recover from her own long and unfortunate history, the ongoing and fragile nature of this process might be familiar to her.

Jasmine also attempts to undermine the court’s reliance on the testimony of Lyn Lang, S’s counselor. Br. Appellant, at 23-24. In this effort, Jasmine does a special disservice to the record, despite how the circumstances of this child’s life demand fidelity to the facts. For example, Jasmine attempts completely to efface any role she played in the sexual molestation S suffered, an effort at odds with Jasmine’s claims to accountability. She refers to the perpetrator as “Kyle’s friend Higgins,” as

if he was not also her friend and roommate, after she and Kyle had divorced, and as if she had not been the one to leave S in Higgins's care (and in his presence even after the abuse was revealed). She describes how S's counseling for that issue ended prematurely after "Lang and Jasmine lost contact," as if that was something not wholly within Jasmine's control. See RP 445-446 (Lang describing Jasmine no longer bringing S to counseling). She claims S "made no disclosures regarding concerns with Jasmine's home," as if that somehow negated the multiple eyewitness evidence of the horrific conditions in which Jasmine was then living with her children. See, e.g., RP 51-55; Exhibits 11, 19, 20, 23, 24. Certainly, Jasmine's complaints do nothing to lessen Lang's credibility, though they suggest some good reason the court might have had to question Jasmine's. See, e.g., RP 1188-1189 (explaining apartment was disordered because she was searching for driver's license); 1RP 54-55 (explaining apartment filthy because she was on medical leave).

Likewise, Jasmine burnishes the facts surrounding her contact with S after CPS removed the children from her care. Br. Appellant, at 23. Again, somehow, Jasmine becomes the focus of this story, not S, who because of Jasmine's neglect suffered anxiety and depression and fears of abandonment, compounded by having to worry about her mother whose irregular visits ceased altogether, because, as Jasmine explained to S, "bad

guys” were after the children. RP 446-449, 467. It beggars belief for Jasmine to describe S as “disappointed” and to observe “she reported no neglect by Jasmine.” Br. Appellant, at 24. Does this mean there was no neglect? See, e.g., RP 207-214, 249-250 (S describing dog feces on apartment floor and how she took care of B a lot because mommy slept a lot). That Jasmine’s home was not filthy, her children unkempt and endangered? RP 249 (S in ill-fitting and dirty clothes and shoes, not eating well, not bathed regularly); 385-389 (friend finding Jasmine unresponsive on floor and children trying to feed B whose diaper was really soggy, etc.) That S had not witnessed her mother strangled and ill and absent and engaged in the illegal sale of drugs? None of this has anything to do with Lang, per se, so it is not clear why Jasmine takes this self-regarding detour. What is true is that Kyle, like Jasmine, stopped bringing S to Lang for counseling, an unfortunate fact that Kyle is not here to address and one that merely underscores that S had not enjoyed an uninterrupted period of attention to her needs until no longer in the care of either parent.

Nevertheless, Jasmine continues her effort to somehow detract from Lang’s perspective on S’s needs. Br. Appellant, at 24-25, 27. The trial court noted Lang “did, perhaps at times lack some objectivity” (CP 340), which is hardly surprising from a person whose job is to care for her

patients, not simply to observe them.<sup>9</sup> Knowing what she knew, Lang took a cautious approach to reintroducing Jasmine to S in the aftermath of Kyle's death and after a 3.5 year separation, and a cautious approach to introducing S to another baby sister, especially in light of the evidence S had tried to assume responsibility for her sister, B, when her mother was neglecting them both. If this is partiality, it is the kind we typically demand of our medical providers. Indeed, in the adequate cause order, the court expressly delegated to Lang the responsibility for re-introducing Jasmine to S. CP 36-39. In any case, the trial judge did not, by any means, discount the whole of Lang's testimony. On the contrary, and properly, the court considered the evidence in its totality and took what it found persuasive, given Lang's "extensive ongoing contact with [S]." CP 340. Relying in part on this evidence, the court concluded S should remain with Nick and Laura.

In her challenge to this conclusion, Jasmine emphasizes some of the ways in which S has demonstrated her resilience. Br. Appellant, at 24-25. Then she argues she is responsible for only two of the traumas expressly mentioned by the trial court. Br. Appellant, at 25; see CP 339-

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<sup>9</sup> Jasmine seems to think the court's "objectivity" remark related to the contacts Lang had with the Careys. Br. Appellant, at 27. The court did not specify what it meant (i.e., whether alluding to Lang's interactions with the Careys or her client-centered approach). Lang, however, testified the contacts were therapeutically necessary and routine, helpful in assessing her patient's condition and setting a course of treatment. RP 1134-1139.

340. First, by specifying some traumas the trial court plainly did not signal a disregard for the other traumas in S's life; rather, the court emphasized that S "has experienced in her 9 years trauma that we hope no one would experience in the course of their entire lifetime..." CP 339 (C.4). The court was not concerned with who was to blame, but with the cumulative effect on S. In other words, this is not about Jasmine, but about S. Yet Jasmine discounts Lang's detriment analysis as unsupported by evidence. Br. Appellant, at 26. She accuses Lang of a "vague apprehension," which ignores S's "extraordinary resilience." Id. There is nothing vague about Lang's fears, which she, in fact, grounded in her expertise. See RP 434-436 (24 years experience, hundreds of traumatized children treated). What is sadly ironic about Jasmine's arguments is they belie her own experience. She seeks to explain or excuse her addiction and troubled life by describing the abuse and neglect she suffered as a child. See Br. Appellant, at 4-9. Would she argue an early, beneficent intervention might not have helped her chart a different course? Indeed not, since she relies on the extensive treatments she received during J's dependency as instrumental in making her presently capable of parenting. Br. Appellant, at 9 (turned her life around).

Here, the court could and did acknowledge S's improvement as support for not rocking the boat, similar to the conclusion reached in



*Custody of R.R.B.*, 108 Wn. App. at 615. There, despite the parents' fitness, the child's mental health had stabilized in the care of custodians and the child herself predicted harm if returned to her parents' care. *Id.*, at 606. These facts were sufficient to support placement with the custodians. With S's extraordinary history of losing one caregiver after another, and her own repeated affirmation of wanting to remain in her "forever home," the court rightly determined detriment would flow from another upheaval.

Jasmine also claims she would not sever the bonds between S and the family she claims as her own. Br. Appellant, at 26-27. Whether or not the court believed her testimony in this regard, the focus of the court's attention was elsewhere, i.e., on the evidence regarding what removal from the Careys' home would mean for S. Whether or not Jasmine continued to allow contact (questionable: see, e.g., RP 1367: cutting off contact between her aunt and J), the damage resides in yet another loss of primary caregiving attachment.<sup>10</sup> No amount of visitation would change the fact that Nick and Laura and their children were no longer the primary

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<sup>10</sup> Jasmine argues the Careys are hostile to her. Br. Appellant, at 13. She makes no effort to distinguish protectiveness from hostility, nor to acknowledge that she does not live in a glass house in this respect. See, e.g., RP 1384-1385 (incessantly calling and texting Janet Carey in the immediate aftermath of her son's suicide). In any case, the Careys have a record of complying with the court's orders, including facilitating visitation, which the parenting plan provides for Jasmine and S. The court urged the parties to cooperate for S's sake, which the Careys expressed a commitment to doing. See, e.g., RP 1050 (Janet took S to Jasmine's sister's house after Kyle's suicide to reassure them); 1072-1073 (allowing Jasmine to attend Carey family functions after divorce from Kyle); 1393-1394 (agreeing to keep frog Jasmine bought S); 1400-1401, 1406.

caregivers or that S would have one more reason never to trust again.

What the court here seeks to protect is something that apparently eludes Jasmine's understanding: S's ability to continue on a path to recovery without another traumatic disruption.

Jasmine also attacks the last of the experts expressly mentioned by the court, Michele Leifheit, who assessed S's attachment to the Careys shortly before trial. Br. Appellant, at 28; see Exhibit 36. Jasmine faults Leifheit as biased because she did not contact her. Again, Jasmine misses the point. Leifheit's assessment focused on S, as an aspect of the detriment case, not on Jasmine's unfitness. With years of experience in the importance of attachment and evaluating when it was present, Leifheit's testimony was important to any analysis of what effect removal of S from the Careys would have. That is, as our case law illustrates, the detriment prong focuses on the child, not the parent, and may require, for the child's sake, placement with custodians rather than a parent, albeit a fit one. Leifheit unequivocally endorsed how critical to S's future is maintaining her in the current stable and secure environment of her "forever home."

Because the evidence in support of the trial court's findings and conclusion is so substantial, Jasmine apparently argues some other standard applies. See, e.g., Br. Appellant, at 28 ("heightened standard").

She confuses the legal test with the factual one. On review, this court looks for substantial evidence, which here exists, as described above and as found elsewhere in the record (e.g., court also had evidence from guardian ad litem and lay witnesses). See, § III, above. That is, could a “rational fair-minded person” have reached the conclusion the judge did here? *Wenatchee Sportsmen*, 141 Wn.2d at 176. Jasmine fails to show otherwise. The question left is whether, from this evidence, the court properly derived its conclusions, a question addressed in the next section.

#### C. THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW.

Jasmine argues the evidence supporting the trial court’s decision is inadequate as a matter of law, and, alternatively, that any other holding by this Court violates the constitution. Br. Appellant, at 27-29. To challenge a judgment as a matter of law “admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn [from it].” *Faust v. Albertson*, 167 Wn.2d 531, 537-38, 222 P.3d 1208, 1212 (2009) (internal citations omitted). Then the court must be able to conclude, “as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). This is a similar test as reviewing the findings for substantial evidence, as done in the section immediately above. However, it is also pertinent to reiterate

that Jasmine’s complaint about the legal insufficiency of the evidence requires that decades of precedent be ignored: *Allen* and *Stell* and *Mahaney* and *R.R.B.* See § IV.B(2) above. All of these cases presented extraordinary circumstances similar to the circumstances here: a child whose special vulnerability requires placement with the caregivers proven able to maintain the stability and security essential to the child’s welfare. S is no less vulnerable than the children in those cases and needs just as much the remedy approved by the court in those cases.

Effectively, Jasmine asks this Court to find the nonparental custody standard unconstitutional, or, at least, the detriment prong. This same argument has failed before, for example, in *R.R.B.*, *supra*. Yet Jasmine makes the argument, apparently, that a fit parent is always entitled to custody, no matter the consequence to the child. Br. Appellant, at 29. That is not Washington law, which, however respectful of a parent’s constitutional right, is also solicitous of the child. Where, as here, it cannot serve both interests, the concern for the child prevails. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344, 1350 (1993) (where in conflict, child’s interests prevail over parent’s); *accord R.R.B.*, 108 Wn. App. at 619-620 (citing *Allen* for the proposition that “Washington courts have long recognized that there is a tension between

parents' rights and children's welfare, and that the state's interest in protecting children's welfare may outweigh parental rights”).

Jasmine further argues the statute is unconstitutional as applied because nonparental custody is temporary, meaning S will inevitably be removed from the Careys. Br. Appellant, at 29. In the face of all the evidence regarding the harm this would cause S, this argument can only raise doubts regarding whether Jasmine clearly understands S’s condition and her needs. Regardless, logically, this argument again seems to attack the detriment prong altogether. And it ignores the Washington law and policy protecting custodial continuity. *See, e.g.*, RCW 26.10.190; *In re Custody of B.R.S.H.*, 141 Wn. App. 39, 49, 169 P.3d 40 (2007) (parent must establish substantial change of circumstances to modify custody decree); *see, also, J.B.S.*, 123 Wn.2d at 12-13 (citing “legislative preference for placements that least disrupt a child's attachments and sense of stability”). *See* CP 1117 (court noting appropriateness of requiring a showing of a change of circumstances in the child’s life). The court’s order grants S the security and stability of the home she claims as her own for as long as she needs it.

In any case, Jasmine’s argument here ignores the entire crux of the evidence on which the trial court relied: that removal of S from the Careys would actually harm her. The solidity of this evidence contrasts

with the kind of speculation in which Jasmine engages, whereby at some point S will no longer need stability and security and will be immune to the sundering of yet another attachment to primary caregivers. If speculation is permitted, one can also worry that Jasmine and Sandberg might relapse and destabilize, with consequences to S, if she resided with them, that are really too awful to contemplate. The court did not speculate. It carefully evaluated all of the evidence, carefully applied the correct legal standard to the evidence, and exercised its authority to protect S here and now from the actual detriment she would suffer if forced to undergo yet another traumatic loss. The court was not wrong to declare this child has had enough trauma for one young life.

**D. THE TRIAL COURT HAS BROAD DISCRETION TO ORDER DECISION-MAKING AND OTHER PROVISIONS IN A PARENTING PLAN; IN ANY CASE, THE PARTIES AGREED AS TO THE “RELIGIOUS RITES” PROVISION.**

Jasmine challenges the parenting plan’s limitation on Jasmine’s ability to have S undergo “religious rites of passage.” Br. Appellant, at 21-22, citing CP 331. (She also complains about but neither assigns error to nor supports with argument and authority the award of major decision-making authority to the custodians.) As for the religious issue, the provision was agreed upon by the parties, according to Jasmine’s attorney

at the presentation hearing. CP 1123.<sup>11</sup> Specifically, Jasmine’s counsel said in open court: “it was agreed ... Jasmine could take [S] to church ... and that she wasn’t to engage in religious rights [sic] of passage.” Id. The parties then stipulated to clarifying language, i.e., that is S who is not to undergo rites of passage. Id., see CP 331. There does not seem to be a controversy on this issue. In any case, judgments by consent are not appealable. *Wash. Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126, 127 (1957) (absent fraud, mistake, or want of jurisdiction, a judgment by consent will not be reviewed on appeal).

#### V. CONCLUSION

For the reasons above, the Respondents respectfully asks this Court to affirm the trial court.

Dated this 2nd day of March 2015.

RESPECTFULLY SUBMITTED,

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<sup>11</sup> It appears Jasmine did not include this hearing in the verbatim report of proceedings she provided to the court, although she did not file a Notice of Partial Report of Proceedings. See RAP 9.2(c). The hearing was transcribed and Respondents will arrange for it to be filed.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

In re the Custody of:

S.F-T.C.,

Child

JANET CAREY

NICK CAREY

LAURA CAREY

Respondents

and

JASMINE ROSE CAREY, Mother

KYLE CAREY, Father (Deceased)

Appellant

No. 32367-6-III

DECLARATION  
OF SERVICE

Jayne Hibbing certifies as follows:

On March 25, 2015, I served upon the following true and correct copies of the Amended Brief of Respondents, March 9, 2015 Letter to Clerk, and this Declaration, by:

depositing same with the United States Postal Service, postage paid

Kari Hayles-Davenport  
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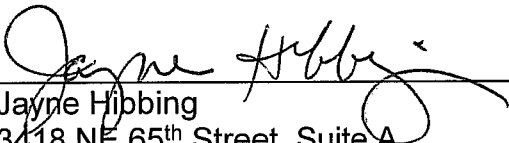
DECLARATION OF SERVICE

Page 1 of 2



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I certify under penalty of perjury that the foregoing is true and correct.

  
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