

**FILED**

**MAY 27 2014**

**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_**

**COURT OF APPEALS DIVISION III OF THE STATE OF  
WASHINGTON**

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In re

ARTHUR LERITZ AND )  
DESIREE MILLER )  
Respondents )

No. 31933-4-III

v. )

CHRISTOPHER DEBURRA )  
Appellant )

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Respondent's Brief

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## TABLE OF CONTENTS

	Page
A. STATEMENT OF THE CASE	1-3
B. ARGUMENT	3-13
C. CONCLUSION	13-14

## TABLE OF AUTHORITIES

Table of Cases:	Page
Bell v. City of Milwaukee, 746 F. 2d 1205, (1985).....	4
Cascade Valley Hosp. v. Stach, 152 Wn. App. 502, 507, 215 P.3 <sup>rd</sup> 1043 (2009)....	9
In re <i>Custody of E.A.T.W.</i> , 168 Wn.2d 335, 346, , 227 P.3d 1.284 (2010).....	8
In re Custody of Shields, 157 Wn. 2d 126, 136 P.3d 117 (2006).....	9
In re Custody of R.R.B., 108 Wn. App. 602, 31 P.3d 1212 (2001).....	7
In re Custody of Stell, 56 Wn. App. 356 , 783 P. 2d 615 (1989).....	7
Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884).....	4
Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).....	4
Statutes	
RCW 26.10.032.....	8

### Mr. Deburra's Issues

There are three issues listed by Mr. Deburra in his assignment of error. The first is the contention the trial court erred in entering an order granting non parental custody to the maternal aunt and uncle. (Appellant's brief, page 1). The second is the claim the Court erred in not granting a continuance to Mr. Deburra. (Appellant's brief, page 1). Finally, Mr. Deburra claims the Guardian ad litem failed to properly execute her duties as outlined in GALR Superior Court Rules. (Appellant's brief page 1).

### Statement of Facts

Christopher Deburra and Antoinette Shafer are the biological parents to Christopher Deburra (hereafter "Chris") (CP 48-51 and 42-47)

On April 24, 2012, Mr. Leritz and Ms. Miller, the maternal aunt and uncle to Chris filed a petition for non-parental custody alleging neither parent was a suitable custodian for the child and that Chris had not been in the physical custody of either parent since March, 2012. (CP 42-47)

On May 18, 2012, an adequate cause hearing, motion for temporary orders hearing and return of ex parte restraining order hearing were to be heard by Commissioner Michelle L. Ressa. (May 18, 2012 Interim Order CP designation forthcoming)

From that hearing, Gary Stenzel, then counsel for Mr. Deburra, proposed that a guardian ad litem be appointed to investigate whether adequate cause existed for the petition for non-parental custody to proceed. This proposal was accepted. (May 18, 2012 Interim Order) The order provides that by agreement, Chris would remain with his maternal aunt and uncle pending that process. (May 18, 2012 Interim Order)

Both of the biological parents were afforded contacts with the child under the supervision of the child's counselor. (May 18, 2012 Interim Order CP designation forthcoming)

A hearing on adequate cause was to occur on June 22, 2012. (May 18, 2012 Interim Order CP designation forthcoming)

On July 11, 2012, Dr. Barry Nyman, Phd, filed a report. (CP 22-25)

On July 12, 2012, an order appointing Laura Hughes as guardian ad litem was entered. (CP 26-33).

On December 20, 2012, the guardian ad litem issued a preliminary report. (CP 34-39).

On February 5, 2013, an order re adequate cause was entered finding adequate cause for the petition to proceed. (February 5, 2013 order re adequate cause CP designation forthcoming)

Subsequently, after the guardian ad litem was discharged, Mr. Stenzel sought to get discovery from the guardian ad litem and the guardian ad litem responded by filing a petition for instructions. Commissioner Ressa entered an order from that hearing. (May 21, 2013 Order on Petition for Instruction and Order Granting Fees, CP designation forthcoming).

On June 19, 2013, Gary Stenzel filed a notice of intent to withdraw. Mr. Deburra did not object to Mr. Stenzel withdrawing and in fact appears to have initiated the termination of the relationship, despite knowing a trial was set for July 22, 2013 before Judge Tari Eitzen.

On Monday, July 22, 2013 trial was to commence before Judge Eitzen. Mr. Deburra appeared on the day of trial and requested a continuance. The Court denied the oral request as untimely and proceeded to trial.

#### Legal Argument

##### 1. Court's Denial of Continuance Request

Mr. Deburra first contends the Court erred in declining to grant his motion to continue the trial and he contends his due process rights were violated. (Appellant's brief, page 6-7)

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary

exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894). Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved. *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884). One of the basic criteria used to establish if due process is satisfied is whether such procedure was historically required in like circumstance.

The appellant cites to *Bell v. City of Milwaukee*, but does not provide the name of the case in his brief as reliance. This case is either mis-cited or completely misunderstood. *Bell* involved application of Reconstruction period civil rights statutes regarding a police officer shooting and killing Mr. Bell. See *Bell v. City of Milwaukee*, 746 F. 2d 1205, (1985). The *Bell* case has nothing to do with the due process applying to parent child relationships. The only discussion of a parent-child relationship related to the administrator of Mr. Bell's estate filing a claim for the loss of relationship between Mr. Bell and his son. *Id* at 1242.

Mr. Deburra failed to ever file a motion to continue the trial date and will be unable to produce a copy of a continuance request.

Mr. Deburra was well aware of the trial date when he chose to terminate Mr. Stenzel as his counsel. Mr. Deburra cannot come to Court and claim his due process rights were violated when he chose to terminate

his counsel a month before trial and he further chose not to file a motion to continue the trial.

Mr. Deburra and his prior counsel had over a year to prepare for this case as it was filed in April 2012 and trial occurred in July 2013, or four months after the initial trial date set for March 4, 2013.

The record also supports that counsel for the Respondents emailed Mr. Deburra the trial management report for him to fill in his part, but he declined to respond. (RP 6-7)

## 2. Guardian ad litem

Appellant next challenge the conduct of the guardian ad litem. (Appellant's brief, page 8).

Appellant appears to be contending Laura Hughes failed to properly execute her duties in that she had a conflict of interest. (Appellant's brief, page 8).

It is true that after Ms. Hughes's issued her report, she filed a motion for instructions on February 6, 2013. (CP for Petition for Instructions will be supplemented). The petition for instruction discusses that a conflict arose after the filing of the report and was done in response to a request to take her deposition. (CP for Petition for Instructions will be supplemented). To quote the petition:

“ The guardian ad Litem had a limited scope of appointment, to recommend if adequate cause existed to move forward with the Non-parental Custody action. Investigation for this limited purpose was completed and a short interim guardian ad litem report was filed for this limited issue on December 20, 2012. All parties signed an agreed order for adequate cause on February 5, 2013. The guardian ad litem requested discharge due to completion of the limited appointment and due to a conflict that had developed after the report was filed. All parties agreed and signed the order for discharge.

The respondent, Chris Deburra has noted a deposition for the discharged Guardian ad Litem on May 2, 2013 at 1:30pm.”

On May 21, 2013, an Order on Petition for Instructions and Order Granting Fees was entered by Commissioner Michelle L. Ressa. (CP for Order on Petition for Instructions and Order Granting Fees will be supplemented)

Contrary to the claim of the Appellant, the guardian ad litem completed the scope of her investigation and Appellant’s attorney signed the Order finding adequate cause existed for the petition for non-parental custody to proceed. (February 4, 2013 Adequate Cause Order, Clerk’s Papers citation to be supplemented) The Appellant and his counsel could have contested the report of the guardian ad litem at hearing but they declined to do so.

For the Appellant to claim Ms. Hughes failed her duties due to a conflict of interest is absurd and made in bad faith. Appellant fails to disclose it was his attorney’s conduct towards the guardian ad litem after the issuance of the report as set forth in the order on petition for

instructions and order granting fees that caused the conflict. The Court awarded fees to Ms. Hughes against Mr. Stenzel.

### 3. Standards for Non-Parental Custody

In this nonparental custody case, the standard of review for the trial court is whether the biological parents are unfit or if they are otherwise fit, placing the child in their care would be countervailing to the child's actual growth and development. The actual detriment standard is constitutional. The State has a compelling interest in protecting children's welfare, *In re Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001) and the remedy is narrowly tailored to meet the State's interest. Under the heightened standard, a court can interfere only with a fit parent's parenting decision to maintain custody of his or her child if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development. The court in *Allen* rejected the "best interests of the child" standard because it did not provide proper deference to a fit parent. See *R.R.B.*, 108 Wn. App. 602 (holding that RCW 26.10.100, as modified by the *Allen* court, is constitutional because the State has a compelling interest in protecting children's welfare, that the statute recognizes the presumption that a fit parent will act in a child's best interest, and that the remedy is narrowly

tailored to further the State's interest); *Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989)

In 2003, the legislature amended the nonparental custody statute, requiring a threshold determination of adequate cause prior to a hearing on a third party nonparental custody petition. Under RCW 26.10.032:

- (1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.
- (2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

The facts supporting the requested custody order must show that the parent is unfit or that placing the child with the parent would result in actual detriment to the child's growth and development." *Custody of E.A.T.W.*, 168 Wn.2d 335, 346, 227 P.3d 1.284 (2010). "

The Shields Court confirmed the countervailing to the actual growth and development test:

"... under chapter 26.10 RCW, a court may award custody of a child to a nonparent in a proceeding against a parent if a parent is either unfit or if placement with that parent would result in actual detriment to the child. Under the detriment standard the nonparent has a heightened burden to establish that actual detriment to the child's growth and development will

occur if the child is placed with the parent, consistent with the constitutional mandate of deference to parents in these circumstances. *Custody of Shields*, 157 Wn. 2d 126, 136 P.3d 117 (2006).

The Appellant only challenges the Court's finding that he was an unfit parent. He does not challenge the court's finding that if he was deemed fit, it would be countervailing to the child's actual growth and development.

Washington case law has routinely stated that a party's failure to assign error to the lower court's findings renders the finding unchallenged. Unchallenged findings of fact are verities on appeal. *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 507, 215 P.3<sup>rd</sup> 1043 (2009). Appellant's failure to assign error to the Finding of Fact regarding it being countervailing to the child's actual growth and development to be placed in his care prohibits any challenge by him.

The Court issued findings and they are as follows:

1. The Court finds Christopher's growth and development would be detrimentally affected by placement with either parent.
2. The Court finds that if either of the parents would be otherwise fit, it would be detrimental to Christopher to be placed with either parent because of the severity of the harm that's been caused and his current

situation.

3. In the alternative, the Court finds there is no fit parent in this case.

4. The Court finds Christopher suffers from long-term physical and emotional abuse by both parents resulting in significant emotional disturbance as a result of the parental conflict, as a result of emotional battering by the father and possibly by the mother.

6. The Court finds that Christopher has improved significantly under the care of his aunt and uncle, and that continuing care with them is probably the only thing that's going to save Christopher.

7. The Court finds that the father has refused to believe in Christopher's disclosure of ongoing sexual abuse, and that the father did not protect him and that the father exposed him to further sexual abuse.

(CP 42-47)

The only finding that Appellant has challenged is the unfitness finding or the third finding of the Court.

Appellant did not challenge the finding of the Court that Christopher “suffers from long-term physical and emotional abuse by both parents resulting in significant emotional disturbance as a result of the parental conflict, as a result of the emotional battering by the father and possibly the mother.”( RP page 2, 21-25 July 23, 2013 oral ruling of Court, CP 42-47)

Appellant did not challenge the finding of the Court “The father has refused to believe in Christopher’s disclosure of on-going sexual abuse, and that the father did not protect him and the father exposed him to further sexual abuse.” (RP page 3, 8-11, July 23, 2013 oral ruling, CP 42-47)

Even if Appellant had challenged these findings, they are amply supported by the record and testimony of the experts.

Dr. Barry Nyman, the child’s counselor, observed both parents with the child and issued a report. CP 22-25. Dr. Nyman also testified. Among the testimony of Dr. Nyman were Christopher’s disclosures about his father. They include:

"Christopher has told me consistently that his father,Chris," quote, used -- this would be Christopher -- "as a punching bag, close quote.

"Christopher says that his dad pinched his ears, his legs, his arms, and called his bad names. He says that this type of treatment came upon him without any apparent cause, and not in response to something Christopher had done." RP 117, 10-17)

“Christopher said that he hadn't talked to previous counselors about his father's abuse because his dad threatened him with worse punishment if he ever told, including the assertion that he, Christopher's father, could take Christopher away from his mother, and Christopher would never see her again." (RP, 117, 20-21)

In the context of Christopher being sexually abused by a neighbor boy and his father knowing about it continuing to send him back over to that abuse, Dr. Nyman testified:

- . Q. And as part of your counseling, did you discuss a point of Christopher with an allegation of a sexual abuse?
- . A. The -- There was an allegation -- some allegation that

Christopher had abused his younger brother. And then in the -- Christopher told me that in the context of that, he had revealed that a boy who was a neighbor of his father's had abused him over a long period -- of two years, as a matter of fact -- a long period of time.

Q. Did Christopher share with you when he first told his father about this abuse from the neighbor boy?

A. He didn't tell me when, but he said that it had occurred, and his father kept making him go back. (RP 118, 1-12)

Dr. Nyman testified that Christopher threatened to run away if he was forced to return to his father's care. (RP 118, 18-25)

Dr. Nyman testified to his recommendation that Christopher should remain with his aunt and uncle and that "most egregiously his father has abused him physically as well as mentally." RP 119, 4-8)

Christopher was described by Dr. Nyman as very smart, very intellectual and that he is way beyond intellectually where is emotionally. (RP 122, 18-22)

Dr. Nyman testified that he believed actual detriment would come to Christopher's emotional health if he were forced to live with his father. RP 123-124) Dr. Nyman testified that Christopher disclosed he would run away and never go back to his father under no circumstances and would abort any attempt for him to be placed with his father. (RP 124, 4-10)

The biological mother of Christopher testified that she believed if Christopher were to be placed with Appellant, actual detriment would

come to him. RP 34, 8-13)

Laura Hughes also appeared and testified regarding her report. (RP 44). Ms. Hughes testified she had spoken with the biological father, biological mother, Dr. Nyman, the child's teacher and the child. (RP 48, 19-25)

Ms. Hughes testified to the child's reaction to having a supervised visit with his father. This included the child suffering physically, having diarrhea for two, three days afterwards. (RP 53, 21-24)

Ms. Hughes went on to testify the child "was completely frightened of his father." (RP 54, 5).

Ms. Hughes testified that the child stated: "I'd rather die; I don't want to be hurt; don't want to -- I'll die. I would rather die, and I'll run away." (RP 54, 10-14)

Ms. Hughes went on to testify "...this is a damaged child, and the parents need to recognize that. The mother did. And the father won't." (RP 57, 17-19)

Appellant himself submitted the declaration of Karen Winston. CP 1-2. This declaration does not help Appellant as within such, the child disclosed his father had physically assaulted him. (RP 105, 2-7)

The record amply supports the findings of the court.

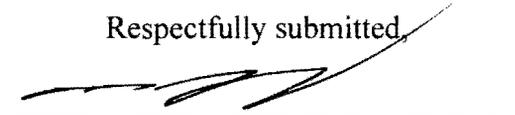
The record amply supports that it would be countervailing to the

child's growth and development to be placed in the care of his father. The record also supports the findings of the Court that the parents were unfit.

The Respondent requests the Court affirm the trial Court.

May 25, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Matthew Dudley', is written over a horizontal line. The signature is stylized and cursive.

Matthew Dudley, #24088  
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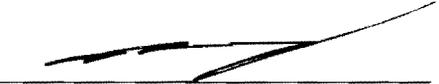
In re

CHRISTOPHER R. DEBURRA	)	
Petitioner	)	
	)	No. 31933-4-III
v.	)	
	)	
ARTHUR LERITZ and	)	
DESIREE MILLER	)	Certificate of Service
Respondent	)	

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I, Matthew J. Dudley, certify that on Sunday, May 25, 2014, I delivered a copy of Respondent's brief to Christopher DeBurra by leaving such at 3803 E. 18<sup>th</sup> Avenue, Spokane, WA 99223 at about 12:47 pm.

May 25, 2014

  
\_\_\_\_\_  
Matthew J. Dudley, #24088