
No. 32062-6-III

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

I

In re the Custody of: J.E., a Minor Child

Travis and Amy Page Eaton,

Appellants

v.

Luke and Kelly Culver,

Respondents

FILED

OCT 28 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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APPEAL FROM THE BENTON COUNTY SUPERIOR COURT

THE HONORABLE ROBERT SWISHER

Brief of Appellants

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I. INTRODUCTION

This matter comes before the Court on appeal from the Benton County Superior Court's award of partial custody to the Respondents of the child J.E. through a nonparental custody petition. J.E.'s parents, the Eatons, challenge the trial court's initial adequate cause determination, and its final custody decree on the grounds that the court made numerous errors of law, abusing its discretion in the process.

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II. ASSIGNMENTS OF ERROR

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- a. Insufficient evidence was adduced at trial to support certain of the court's Findings of Fact under Sections 2.6 and 2.7 of that document. Moreover, the trial court improperly made Findings related to an action that was not before it. Pgs. 6-13.
 - b. The Findings of Fact do not support the Trial Court's Conclusion that actual detriment would occur if J.E. is not permitted to live with the Respondents in a 50/50 arrangement. Pgs. 13-20.
 - c. The Trial Court erred in failing to keep full custody of J.E. with his biological parents where no special needs were alleged, and where none were found, in light of *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013). Pgs. 13-20.
 - d. The Respondents' petition failed to allege facts sufficient to demonstrate adequate cause as a matter of law, and the trial court abused its discretion in determining that adequate cause existed. Pgs. 20-24.
 - e. The Trial Court manifestly abused its discretion in awarding 50% custody to the Culvers while finding the Eatons to be fit parents, because nonparental custodians have no right to continue a relationship with a child once the parents are deemed fit. Pgs. 24-25.

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III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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1. Whether substantial evidence supports the trial court's findings of fact?
(Assignment of Error (a)).
 2. Whether the findings of fact support the trial court's conclusions of law?
(Assignment of Error (b)).
 3. Whether the trial court abused its discretion in this case?
(Assignments of Error (c) and (d)).
 4. Whether adequate cause existed in this matter where the Respondent's pleadings were insufficient as a matter of law?

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2 (Assignment of Error (e)).

3 5. Whether this Court should grant attorney fees?

4 **IV. STATEMENT OF THE CASE**

5 The above-entitled action came before the lower court as the result of nonparental
6 custody action under RCW 26.10 concerning the child, J.E. Clerk's Papers (CP) at 1-5. The
7 action was brought by the child's maternal uncle and aunt, Luke Culver and Kelly Culver
8 (Culvers), who had previously been appointed guardians of the child on August 7, 2009 under
9 Chapter 11.88 RCW by agreement of the parties. CP at 1, 3-4. The parents of the child are
10 Travis Eaton and Amy Page Eaton, (Eatons). CP at 2

11 J.E. began spending substantial amounts of time with Culvers in 2003. CP at 45.
12 Though there was variation in the amounts of time spent, it was undisputed that the child lived
13 primarily with the Culvers for nine years with his parents' consent. CP at 45. The parties
14 considered the Culvers the informal custodians of J.E. and his sister, K.E. CP at 45. There were
15 two primary reasons that Eatons allowed their children to live with the Culvers. First, Ms. Eaton
16 suffered from an undiagnosed condition of bi-polar affective mood disorder and, hence, was not
17 properly treated. Verbatim Report of Proceedings (VRP) at 980-87. Second, their other child, a
18 daughter since deceased, had severe medical issues in the form of uncontrolled epilepsy. VRP at
19 975-77. The combination of those two issues was simply overwhelming for the Eatons under all
20 of the circumstances. VRP at 980-87, 1208-09. The Eatons intended the situation to be
21 temporary. VRP at 1209-10.

22 While the children were in their care, the Culvers were taking the Eatons' daughter to
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1 medical appointments in Seattle and exercising authority under a Power of Attorney that had
2 been created for that express purpose. CP at 47. However, because the Power of Attorney was
3 not honored by the medical care providers to the extent that a guardianship would be, the Eatons
4 sought and obtained a guardianship under Chapter 11.88 RCW naming the Culvers as the
5 guardian of their son (and one naming them as guardians of their daughter). VRP at 1053-54.
6

7 The Eatons' daughter passed away in 2010. CP at 45. In the interim, Amy Page Eaton's
8 mental health situation and condition was fully stabilized. Indeed, it is undisputed she has
9 functioned at a very high level over the last several years, since at least 2007, when she gained
10 employment with her current employer. VRP at 993-5. This high functioning translated to the
11 care of Jared, as the parents had him for increasingly lengthy periods of time over the years, up
12 to the time when this dispute arose. Accordingly, the substantially simpler task of caring for a
13 single, healthy child, along with mother's resolution of her mental health issues combined to
14 remove any need for J.E. to live with Culvers. To that end, the Eatons attempted to work out a
15 transition with Culvers that would have gradually moved J.E. to their home a majority of the
16 time. VRP at 998, 1002, 1015. From their perspective, the Culvers refused to work with them
17 towards that goal. VRP at 995, 1003-6, 1197.

18 After attempts to arrange a transition were rejected, the Eatons advised the Culvers
19 during a time when Jared was with them during the summer of 2012 that they intended to keep
20 Jared in their custody, with liberal visits to the Culvers. VRP at 1181. In opposition to this, the
21 Culvers sought, and obtained, an *ex parte* order in the guardianship case to show cause, along
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1 with an immediate order that moved Jared back to their home and restrained all contact with the
2 Eatons. CP at 6. Notably, in their pleadings, the Culvers did not allege any actual detriment
3 would befall J.E.; rather, they merely insisted that they could not properly act as his guardians
4 absent custody. CP at 6.

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6 While under the temporary order, on July 19, 2012 the Culvers filed a nonparental
7 custody petition seeking custody of J.E. Notably, in the petition, no claim of parental unfitness
8 was made, nor did the Culvers allege actual detriment would befall J.E. if he were in his parents'
9 custody. CP at 1-5. Both are required by the standard forms.¹ Rather, the reasons given for the
10 petition were largely based upon J.E.'s relationship with the Culvers and their family. CP at 1-5.
11 On July 20, 2012 the Honorable Carrie Runge entered an order in the guardianship case
12 terminating the temporary order. She ordered:

13 [The] restraining order be and the same is hereby terminated and the status quo
14 ante is reinstated meaning that the child be returned to [the Eatons] pending
15 hearing on the non-parental custody case, 12-3-00632-7.

16 CP at 7. Based solely on what they believed to be in their son's best interest and not under any
17 compulsion of the court, the Eatons agreed on July 20, 2012 to a temporary order in the non-
18 parental custody case allowing Culvers two overnight visits of two nights each and two other
19 visits with J.E. until this matter could be heard on July 31, 2012. CP at 7.

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21 ¹ The Eatons request that the Court take judicial notice that form WPF CU 01.0100, along
22 with the other forms referenced herein, are the publically-available required standard forms
23 required by statute in a nonparental custody action. They are available on the Court's Web site
at: <http://www.courts.wa.gov> (last visited October 23, 2014).

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2 At the July 31, 2012 adequate cause hearing, the Eatons challenged the petition on the
3 grounds that the Culvers lacked standing, and that there was no actual detriment to be shown by
4 a return of J.E. to his parents. Superior Court Commissioner Joseph Schneider found that
5 adequate cause existed, though his ruling also made clear that the court's intention was to
6 transition J.E. home to the Eatons.² CP at 13-14, 15-19; VRP at 39-41. In the interim, however,
7 the court returned J.E. to the Culvers' custody, and ruled that the parties would utilize a
8 counselor, Doug Loree, to help facilitate visitation schedules. VRP at 46. Subsequently, a GAL,
9 Tami Driver, was also appointed, though in the limited capacity that she was only to investigate
10 allegations between the parties as to undue influence regarding J.E.'s wishes, and assist in
11 transitioning him back to the Eatons' care and custody. CP at 15-19; VRP at 218. She also took
12 over assisting with scheduling the visitation schedule from Doug Loree. VRP at 218.

13 The parties were unable to reach a settlement, and trial commenced on April 10, 2013.
14 VRP at 5. At trial, for the first time, the Culvers attempted to argue an additional, unpleaded
15 theory – that they were the *de facto* parents of J.E., and this argument occurred only *after* the
16 Culvers had rested their case-in-chief, and the Eatons had moved to dismiss. VRP at 643-69.

17 Following Trial, Judge Robert Swisher ruled that the *de facto* parentage doctrine was
18 inapplicable, that J.E. would reside with both parties 50% of the time, and that the Eatons would
19 have decision-making authority. VRP at 1346-1363. Findings, conclusions, and a final decree
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21
22 ² Indeed, a review of the transcript from that hearing indicates that the court plainly
23 intended to do the right thing (i.e. return J.E. to the Eatons care in a sensitive manner), but

1 were entered. CP at 43-5 Notably, the court made no findings that the Eatons were unsuitable;
2 in fact the court found that they plainly were suitable, as it subsequently decreed that 50%
3 custody of J.E. remained with his parents, as did their decision-making authority. 1346-63; CP
4 102-105. As to actual detriment to JE, the few findings purporting to state an actual detriment
5 were all centered on the relationship of J.E. with the Culvers, and did not state with specificity,
6 any particular detriment that would affect his long term growth and development. CP at 43-51.
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8 Subsequently, both parties timely filed motions for reconsideration – the Culvers on the
9 *de facto* parentage ruling, and the Eatons based upon the grant of partial nonparental custody to
10 the Culvers. CP at 66-70, 71-101. The trial court denied both motions. CP at 124-27. This
11 appeal timely followed. CP at 52.

12 V. ARGUMENT

13 A. Substantial evidence does not support the trial court's findings of fact, nor do the, 14 court's conclusions of law flow from its findings.

15 1. Substantial evidence does not support the trial court's Findings of Fact.

16 It is axiomatic that a trial court's findings are reviewed for substantial evidence. *In re*
17 *Custody of A.F.J.*, 179 WN.2d 179, 185, 314 P.3d 373 (2013). Substantial evidence is any quantum
18 of evidence that would persuade a rational, fair-minded person of the truth of the premise. *Id.*
19 When reviewing findings, this Court views all evidence in the light most favorable to the prevailing
20 party, and deference is given to the fact-finder, who must resolve conflicting testimony. *In re*

21 executed it incorrectly by granting adequate cause, presumably to buy time for the transition
22 process to occur. VRP at 39-41.

1 *Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997); *In re Marriage of Burrill*, 113
2 Wn. App. 863, 868, 56 P.3d 993 (2002). Findings and conclusions will be reviewed by this Court
3 as they truly are, regardless of label. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006).
4 Unchallenged findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d
5 801, 808, 828 P.2d 549 (1992). Where a finding is required, but the trial court does not make one,
6 it is presumed equivalent to a finding against the party with the burden of proof. *In re Welfare of*
7 *A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

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9 In turn, conclusions of law must flow from the findings, and are reviewed *de novo* by this
10 Court. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

11 Here, there is no substantial evidence to be found in the record that would support the trial
12 court's findings/conclusions that placing J.E. with his parents full-time would be "actually
13 detrimental to his long-term growth and development" as required by Chapter 26.10 RCW.
14 Accordingly, the findings relevant to supporting this conclusion must be stricken, and the
15 unsupported conclusion reversed as a matter of law.

16 *Challenged Findings Under 2.6*

17 In section 2.6 of the Findings of Fact/Conclusions of Law, the following is stated under the
18 "Actual Detriment" headings:

19 The petitioners further alleged it would be actually and substantially detrimental to
20 the child's longer term growth and development if he was placed with the [Eatons],
given the history and extraordinary circumstances of this case.

21 CP at 45. Insofar as this finding utilizes the term of art "actual detriment," the Petitioners failed to
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2 allege any facts that constitute an actual detriment, as discussed below. Critically, at no point in the
3 proceedings below did the Culvers allege any harm that would constitute an actual long-term
4 detriment to J.E. long term by returning him to his parents' care as the term of art is used in case
5 law. To the extent that the trial court found that such an allegation was made, it was in error.

6 Next, the court states under section 2.6

7 The Petitioners further alleged the Eatons were not suitable parents at the time the
8 action was filed given their relatively limited involvement as parents. The parties
9 disputed the reasons for this limited involvement but for the purposes of establishing
10 adequate cause it does not matter why their involvement was limited. Additionally
11 the Eatons' conduct had a substantial detrimental effect on [J.E.] when they refused
12 to return [J.E.] after a visit, telling him he would not be seeing the Culvers for awhile
13 [sic].

14 CP at 45. There are multiple issues with this finding, and to the extent there are portions of
15 which statement which constitute conclusions they are challenged below. However, at the
16 outset, the Court erred in finding/concluding that the putative limited involvement of the
17 Eatons as parents was a factor in establishing adequate cause. It is not, nor does the record
18 establish that the court looked at such a factor in establishing adequate cause. See VRP at
19 39-47. Further, to the extent that the court finds that the Eatons' conduct had a substantially
20 detrimental effect on Jared, there is no evidence in the record that would support such a
21 finding, as the term "detriment" is a term of art, and as argued below, the information
22 adduced at trial fails to meet that standard as a matter of law. Such a finding cannot be
23 sustained.

///

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2 *Challenged Findings Under Section 2.7 – Non-Expert*

3 In finding #1, the Court states that J.E. “is a part of the Culver family.” This is clearly
4 untrue, and unfounded by the record, as it is undisputed that he is a child of the Eatons. CP at 1-5.
5 To the extent he may have bonded with the Culvers, such does not make him a part of the Culver
6 family for purposes of conferring any particular rights as may be gained by being part of their
7 family. To the extent this term is meant in a technical sense, the finding cannot be sustained and
8 should be stricken by this Court.

9 *Challenged Findings Involving Doug Loree*

10 In Finding #19, the Court stated:

11 One of [J.E.]’s biggest fears was being taken away from the Culvers. [J.E.] made it
12 clear to Mr. Loree he wanted assurances (guarantees) he would not be taken out of
the Culvers’ home more than half the time. It would be actually detrimental to his
long-term growth and development if he did not have this assurance.

13 CP at 47. While it is true that Mr. Loree testified regarding a half-time custody plan, he did not
14 testify that J.E. wanted assurances he would not be taken from the Culvers’ home more than half the
15 time. On the contrary, he stated the following on direct examination:

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17 My client at one point would have advocated for a 50/50 split, a joint custody kind
18 of arrangement like what happens in dissolutions sometimes.

19 I think one of the reasons he was advocating for that is – it may have been generated
20 from the Culvers – but he was advocating for it, I believe, because he felt that would
21 give him some guarantee that he would always have contact with the Culvers and
maybe, you know, at age 12, get everybody to settle down and maybe work together
a little bit more pleasantly because he’s aware of some of the – some of the
difficulties between the two sets of parents.

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2 Q. You mentioned he advocated for it at one point, the last time the discussion came
3 up, about what he wants in terms of his future. What were his wishes expressed then,
4 and when was that, if you could give us an approximate date?

5 A. Boy, that changes kind of from week to week, but a general thing has been there
6 and kind of run all the way through, and that is that he wants to be guaranteed that he
7 has regular ongoing contact, you know, with the Culvers. And if I turn around and
8 say, "You know, you know, do you want to lose contact, you know, like with the
9 Eatons," he doesn't want to do that Eatons, so he wants contact with both sets of
10 parents.

11 VRP at 45-46.³ Accordingly, it is manifest that, contrary to the finding, Mr. Loree did not testify
12 that Jared told him he wanted to be guaranteed no less than a 50/50 arrangement. On the contrary,
13 what he stated was that at one point J.E. had been in favor of such an arrangement, but that the
14 common thread was that the child wanted "regular ongoing contact" with the Culvers. VRP at 46.
15 Thus, the finding cannot stand in terms of the child's wishes regarding a 50/50 "guarantee."

16 Given the obvious absence of the putative "guarantee," it is equally manifest that the
17 finding cannot stand regarding any "actual detriment," and must be overturned due to a lack of
18 substantial evidence in the record to support it. Even if, *arguendo*, such a guarantee could be found
19 to been communicated by J.E. to Mr. Loree, there is nonetheless no evidence in the record to
20 support any type of actual detriment finding flowing from its absence. Indeed, the only testimony
21 by Mr. Loree was that J.E. would be negatively affected, or have "a lot of difficulty" making a
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3 On redirect, Mr. Loree reaffirmed upon questioning from counsel that J.E. had at one point advocated for 50/50 custody, but that it had been withdrawn. The counselor then went on to speculate that J.E. would likely prefer more than 50 percent of the time to be spent with the Culvers. VRP at 59-60. However, at no time did he affirmatively state that J.E. had expressly informed him that he either wanted a guarantee as to 50/50 custody or still wished for such an arrangement *at the time of trial*, which is of course, the relevant inquiry.

1 transition to his parents home. VRP at 49. In the absence of any particular testimony/evidence that
2 states a specific, actual detriment Jared would suffer to his long-term development absent these
3 assurances, the court's finding cannot stand.
4

5 In Finding #20 The Court stated:

6 It was hard on Jared to be away from his siblings (the Culver children). Jared was
7 especially concerned about his little brother, Aidan Culver. His strong bond with
8 Aidan (the Culver's oldest child) was a major part of his life and he relished the big
brother role. If that relationship were to be severed or minimized, it would be
devastating to Jared. In the short and long term. His growth and development
would be detrimentally affected.

9 CP at 47. Once again, there is no information in the record that would support a finding that an
10 actual detriment would befall J.E. if he were to be placed with his parents, the Eatons. In the first
11 instance, there is no evidence that the Eatons would, if given custody of their son, sever or minimize
12 the relationship.⁴ While the finding certainly appears to state that it would be actually detrimental if
13 J.E.'s relationship with his cousins is minimized, there is no expert testimony or evidence from
14 which the trial court could have determined that an actual detriment would be suffered by Jared if
15 placed with his parents. Indeed, as discussed more thoroughly below, this finding runs contrary to
16 established law that holds that where a trial court grants custody to a non-parent to protect a
17 relationship that is important to the child, it fails to meet the actual detriment standard. *In re*
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19
20 ⁴ Indeed, such a finding is not only unnecessarily speculative, but contrary to well-
21 established law that presumes a parent acts in his or her child's best interest. *B.M.H.*, 179 Wn.2d
22 224, 235, 315 P.3d 470 (2013) (citing *Parham v. J.R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61
L.Ed.2d 101 (1979)). Thus, presuming that it is in J.E.'s best interest to have an ongoing
23 relationship with the Culvers, or more particularly, Aidan, the trial court should have presumed

1 *Custody of B.M.H.* 179 Wn.2d 224, 315 P.3d 470 (2013) (reversing the trial court’s determination
2 that adequate cause existed in a nonparental custody petition based largely on the fact the trial court
3 found that it was important to protect the child’s relationship with the former stepparent).
4 Accordingly, this finding cannot stand.
5

6 *Findings Involving Tami Driver*

7 In Finding #27 the Court found:

8 She believed that it was in [J.E.]’s best interest to spend no less than half the time
9 with the Culvers and that if that were not to occur, it would cause actual and
substantial detriment to [J.E.]’s long-term growth and development if her [sic] were
to be placed with the Eatons.

10 CP at 48. While it is true that Ms. Driver testified that she believed that actual detriment would
11 occur to Jared if he were removed from the Culvers’ care, the term “actual detriment” is a legal
12 standard to which Ms. Driver was not qualified to testify. Accordingly, relying upon Ms. Driver’s
13 testimony regarding a legal conclusion to support a legal conclusion is simply erroneous. More
14 importantly, her testimony lacked any specificity as to what “actual detriment” J.E. would suffer.
15 As with the other findings regarding “actual detriment,” this finding cannot stand.

16 *Findings Related to De Facto Parentage*

17 In its findings, the lower court included a section regarding *de facto* parentage – an issue
18 that was not properly before it. Specifically, the Court states the following in relevant part:

19 The Culvers assert they may have standing as *De Facto* parents. There was no
20 dispute the Eatons consented to and fostered the parent-like relationship; [J.E.] lived

21 as a matter of law that the Eatons would act to foster this relationship. Any finding to the
22 contrary simply cannot stand.

1 with the Culvers for a substantial period of time; The Culvers assumed virtually all
2 obligations of parenthood without expectation of financial compensation; and the
3 Culvers have been in the parental role for a length of time sufficient to establish with
[J.E.] a bonded, dependent relationship that is parental in nature.

4 CP at 50. The nature of the action before the trial court was a nonparental custody action; to the
5 extent the Court made findings at related to the *de facto* parentage argument raised by the
6 Culvers for the first time after resting their case in chief, such findings were improper because
7 the issue was neither pleaded nor tried consensually. Civil Rule 15; CP at 1-5; *See also*, VRP at
8 643-69. As a result, the matter was not properly before the trial court and findings related
9 thereto improper. They should be struck by this Court as they have no relation or relevance to a
10 nonparental custody petition.

11 2. The Conclusion of actual detriment does not flow from the findings.

12 Absent those findings challenged above, it is manifest that the Court's conclusion that J.E.
13 would suffer an "actual detriment to his long-term growth and development" simply cannot stand,
14 as there remain insufficient findings of fact that would permit the trial court to conclude that an
15 actual detriment would befall J.E. if he were not placed entirely in his parents' custody. This is
16 particularly apparent when the actual detriment standard is viewed in light of *B.M.H.* as discussed
17 below, and in light of the non-divisible nature of the remedy sought by the Culvers.

18 Even if, *arguendo*, this Court maintains any or all of the trial court's challenged findings,
19 when viewed as a whole, the findings in this matter nevertheless demonstrate that the court erred by
20 failing to properly apply the "actual detriment" standard, instead applying an amalgamation of the
21 "actual detriment" and "best interests" standards to the matter, and by so doing, failed to properly
22

1 protect the Eatons' constitutional rights as parents. As discussed below, this is amply demonstrated
2 by the court's oral ruling, and the skewed nature of the findings towards J.E.'s interests, and J.E.'s
3 desires regarding the Respondents.
4

5 *Actual Detriment Standard After B.M.H.*

6 It is well-settled that in order to prevail on a non-parental custody petition pursuant to
7 Chapter 26.10 RCW, the Respondents were required to demonstrate that "actual detriment" to
8 J.E.'s "long term growth and development" would occur if J.E. were returned to his parents'
9 custody. *E.g., In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981); *In re Custody of*
10 *Shields*, 157 Wn.2d 126, 142-43, 136 P.3d 117 (2006). Generally, appellate courts are reluctant
11 to disturb a child custody determination because of the trial court's unique position from which
12 to observe the parties. *In re Custody of Stell*, 56 Wn. App. 356, 366, 783 P.2d 615 (1989).
13 Accordingly, custody dispositions will not be disturbed absent a manifest abuse of discretion. *Id.*
14 A trial court abuses its discretion when its decision is based upon untenable grounds or reasons.
15 *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

16 When considering a nonparental custody petition, it is an abuse of discretion for the trial
17 court to consider a non-parental custody petition under the "best interest of the child" standard
18 because that standard does not adequately protect a parent's constitutional right to privacy. *In re*
19 *Custody of S.C.D.-L.*, 170 Wn.2d 513, 516-17, 243 P.3d 918 (2010). Rather, the "actual
20 detriment" standard is to be used. *Id.* Here, the effect of the trial court's determinations was that
21 it failed to properly apply the actual detriment standard as clarified in the Supreme Court's
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1 decision in *B.M.H.*, and instead applied a lower standard that appeared more akin to the best
2 interest of the child standard in its findings, conclusions, and oral ruling. This constituted a
3 manifest abuse of discretion, and requires reversal. *Shields*, 157 Wn.2d at 126.

4
5 In *B.M.H.*, a child’s mother was planning to move away from a former stepparent who
6 had a close relationship with the child. 179 Wn.2d at 230. The child’s father had died before the
7 child was born, and the stepfather had always maintained a parental relationship with the child.
8 *Id.* The mother was planning to move to a location which would interfere with his relationship
9 with the child. *Id.* In light of this, the step father sought non-parental custody of the child, or,
10 alternatively, *de facto* parentage. *Id.* at 230-31. The trial court found that if it did not grant
11 adequate cause to proceed in the matter, the mother’s move would “cause actual detriment to the
12 minor child’s growth and development if the relationship between the minor child and the
13 petitioner is not protected,” and the trial court also had “concerns that the mother may withhold
14 visitation in the future.” *Id.* at 233. Division II of this Court affirmed the trial court on appeal.
15 *Id.* at 234. The Supreme Court accepted review, and ultimately reversed in part and remanded in
16 part. *Id.* at 245.

17 In its opinion, our Supreme Court made plain that even a finding of genuine bonding
18 between a child and a non-parent is insufficient to demonstrate that the absence of that
19 relationship would work an actual detriment to the child. *Id.* at 235-39. Specifically, the court
20 stated “The concern that Ms. Holt *might* interfere with Mr. Holt and B.M.H.’s relationship is
21 insufficient to show actual detriment under *Shields*. . . “. *Id.* at 239 (emphasis supplied). In so
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1 ruling, the court pointed out that each of its previous decisions on point relied upon “*significant*
2 special needs” of the child that *would not* be met if the child were in the custody of the parent.
3 *Id.* at 239 (emphasis supplied). Such special needs included a deaf child whose father was
4 unable to communicate with the child, and an extremely disturbed child who needed extensive
5 therapy that the parent could not provide.⁵ *Id.* at 239. Thus, what *B.M.H.* confirms is that
6 something in addition to the bonding of a child to a nonparent is necessary in order to support a
7 trial court’s conclusion that actual detriment would occur if a child is placed with an otherwise fit
8 parent. This conclusion is largely based in the presumption that a parent will act in his or her
9 child’s best interest, and if nurturing a strong relationship with a nonparent is in the child’s
10 interest, the trial court must presume that the parent will do so. Thus, it is readily apparent that
11 one way in which the appropriate legal standard could be described is as “bonded relationship
12 plus,” inasmuch as there must be some special need of a child that *cannot* be met by the parent
13 that would create an actual detriment to the mental or physical needs of the child if he or she
14 were placed with otherwise fit parents.⁶
15

17 ⁵ *In re Marriage of Allen*, 28 Wn. App. 637 (1981); *In re Custody of Stell*, 56 Wn. App.
18 356 (1989).

19 ⁶ *B.M.H.* serves to clarify an important point that was previously made in *Shields*. In
20 that case, a stepmother filed a nonparental custody petition against the biological mother,
21 following the death of the child’s biological father. Following trial, the court granted custody of
22 the child to stepmother and reinstated the biological mother’s visitation rights. The biological
23 mother appealed, and this Court affirmed. 120 Wn. App. 108, 84 P.3d 905 (2004). The Supreme
Court accepted review.

In its opinion, the court stated that it was improper to place “extraordinary weight” on
the child’s preference. *Shields*, 157 Wn.2d at 149. The court went on to clarify: “This [actual
detriment] test is not a balancing of all the aspects of each household and on [the child’s] wishes;

1
2 *Application of Actual Detriment Standard to This Case*

3 Here, it is readily apparent from the record that the trial court was primarily concerned
4 that J.E.'s relationship with the Respondents and their children would be severely affected if J.E.
5 was returned to his parents' custody. VRP at 1348-63, CP at 43-51. That this improper
6 consideration was an unreasonably integrated focus of the proceeding can be readily observed
7 through the initial petition, testimony related to J.E.'s wishes, the court's oral ruling, and the
8 findings and conclusions. VRP at 1348-63; CP at 1-5, 143-51, 155-160, 167-172, 173-78. In
9 weighting the wishes of J.E. so heavily in its decision making, the Court made 2 errors of law:
10 (1) It failed to properly apply the presumption that a parent acts in his or her child's best interest;
11 (2) It relied far too heavily upon a consideration that is appropriate under the "best interest of the
12 child" standard, but is insufficient to ensure constitutional protections to the parent under the
13 actual detriment standard, similar to the errors made by the trial courts in *Shields* and *B.M.H.*

14 Critically, here, as in *B.M.H.*, additional "significant special needs" were not alleged,
15 and the result in this case should have been the same – return of the child to the parents.
16 Importantly, the findings entered by the trial court all center upon a finding that "alteration"
17 J.E.'s relationships with the Culvers would be actually detrimental to J.E. CP at 43-51. That

18 it is a focused test looking at *actual detriment to the child if placed with an otherwise fit parent.*"
19 157 Wn.2d. at 149-50 (emphasis supplied). The Court then subsequently overruled the trial
20 court since it was readily apparent from the record before it that the trial court in that case
21 applied the best interests of the child standard rather than the actual detriment standard. *Id.*
22 Thus, by clarifying through *B.M.H.* that the existence of bonded relationships between
23 petitioning nonparents and children is insufficient to meet the actual detriment standard absent
special needs, the Supreme Court completed the logic enunciated in *Shields*.

1 language/posture is nearly identical to that language/posture overturned in *B.M.H.* That the trial
2 court here elected not to do so upon reconsideration in light of *B.M.H.* is an abuse of discretion
3 requiring this Court to vacate the trial court’s custody order, as it is manifest that the trial court
4 did not apply a strict enough standard to merit depriving the Eatons of their constitutional right.
5

6 This reasoning was previously stated by this Court in *In re Custody of T.L.*, 165 Wn. App.
7 268, 268 P.3d 963 (2011), wherein a mother battling substance abuse acknowledged that she was
8 unable to properly care for her child, and willingly gave custody of the child to the child’s
9 grandparent, who raised the child for the majority of its life – a term of years. *Id.* At 271. The
10 mother intended the arrangement to be temporary, despite the length of time it endured. *Id.*
11 Nevertheless, when the child was six, the grandmother filed a nonparental custody petition, which
12 the mother joined. *Id.* After some time, the trial court entered a final residential schedule, findings
13 of fact, conclusions of law, and a nonparental custody decree in favor of the grandmother. The
14 decree granted the petition for nonparental custody. *Id.* Importantly, the facts appeared to have
15 been entered upon agreement, rather than the result of trial. *Id.*

16 Nearly one year later, the mother sought a modification of that decree and residential
17 schedule on the ground that she had improved her life, and that her child’s life quality had
18 deteriorated in the grandmother’s care. *Id.* at 272. The petition was denied by a court
19 commissioner for failure to demonstrate adequate cause. *Id.* at 272-73. The mother appealed the
20 commissioner’s ruling to no avail, and subsequently appealed to this Court. One of the arguments
21 raised by the mother was that the trial court, by affirming the denial of her petition to modify, failed
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23

1 to take into consideration her liberty interest in the care and custody of her child because her liberty
2 interest was not protected in the initial custody action, which was completed by agreement. *Id.* at
3 279-83. This Court agreed that the mother’s rights as a parent had not been adequately protected by
4 the initial process. Critically, in reversing and remanding, this Court noted the following:

5
6 The findings on “best interest” drafted by Pamela and entered by the court were not
7 clearly adopted by Tia. Nor, for that matter, do they establish actual detriment. They
8 state that “[T.L.] has been with Pamela Link for most of his life and is secure and
9 safe. He is currently emotionally and mentally stable. And happy and healthy.” CP at
10 15. They further state that T.L. has not been in Tia's physical custody since January
11 2006 because “Tia Link has not been stable or responsible enough at this time to
12 meet [T.L.'s] needs.” *Id.* Finally, they state that Tia is not a suitable custodian
13 because “Tia Link agrees that she is unable to care for [T.L.] at this time.” CP at 16.
14 The fact that a parent has relinquished a child's care to grandparents for an extended
15 period of time, by agreement, does not establish that returning custody to the parent
16 will result in actual detriment to a child. *See In re Custody of E.A.T.W.*, 168 Wn.2d
17 335, 227 P.3d 1284 (2010); *and see In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 66,
18 109 P.3d 405 (2005) (holding that visitation statute presuming grandmother's
19 visitation was in child's best interest was facially unconstitutional, notwithstanding
20 that grandparents had raised child for much of her life, with father's agreement).

21 *Id.* At 283-84.⁷ Here, as in *T.L.*, the parents gave temporary custody of J.E. to relatives because
22 they were unable to care for the child. Here too, the findings entered below in support of the decree
23 rely largely upon the relationship between J.E. and the Culvers, and the length of time that he has
lived with them. Although this Court’s statement in *T.L.* could arguably be considered *dicta*, this

20 ⁷ Arguably, this statement is *dicta*, as the Court was not directly called upon to determine
21 whether the findings were sufficient to support a conclusion that actual detriment would occur
22 for purposes of satisfying the nonparent’s burden. Nevertheless, this Court should find it
23 persuasive, as it was made in factual circumstances very similar to the facts at issue in this case,
and this reasoning was subsequently reiterated by the Supreme Court in *B.M.H.*

1 reasoning was subsequently confirmed by the Supreme Court in *B.M.H.* under remarkably similar
2 facts, and should be found persuasive by this Court.

3
4 A plain reading of *B.M.H.*, *Shields*, *T.L.*, and those decision relied upon by those courts
5 makes it readily apparent that what is required for purposes of meeting the difficult “actual
6 detriment” standard is a showing that a child has some compelling special need that an otherwise
7 fit parent cannot meet. Importantly, it is manifest that the fact a child is bonded to its caregivers
8 is insufficient to overcome the parent’s rights for purposes of permissible state interference in the
9 family unit absent some additional special needs. Here, there has been no such finding of special
10 needs, and the record reflects that none was even alleged. In the absence of this finding, it is
11 manifest that the trial court erred by: (1) failing to properly apply the rigorous actual detriment
12 standard; and (2) concluding that an actual detriment to J.E.’s long term health and development
13 would befall him if he were fully returned to his parents because it would cause injury to the
14 bonded relationship with the Respondent’s family. Thus, the trial court certainly abused its
15 discretion in awarding partial custody to the Respondents. Accordingly, the trial court’s custody
16 order must be vacated, and full custody awarded to J.E.’s parents, the Eatons.⁸

17
18 ⁸Critically, when its error was brought to its attention in a motion for reconsideration, the
19 trial court declined to reverse itself. Thus, the trial court’s decision must be reversed by this
20 Court as a matter of law. Indeed, in its oral ruling, the trial court expressed a great deal of
21 concern about J.E.’s wishes and his best interest, particularly in light of the bond that existed
22 between J.E., the Petitioners, and their family. VRP at 1348-63. This concern was reiterated in
23 the Court’s written findings. CP at 43-51. While such concern is of course, properly placed as
to the child’s welfare, it must nonetheless be considered in light of the law, particularly *B.M.H.*
and *Shields*. When viewed in the appropriate light, the trial court’s determinations in this case
must be found wanting.

1
2 **B. The trial court erred by finding adequate cause existed to pursue the petition
when in fact, the pleadings were simply deficient as a matter of law.**

3 As an initial matter, it has not been plainly established which standard of review applies
4 to this Court's review of an adequate cause hearing under Chapter 26.10 RCW. *See B.M.H.*, 179
5 Wn.2d at 239 n.1. Appellants urge that the *de novo* standard ought to apply, because this Court
6 is seeking to determine whether, as a matter of law, the facts pleaded through the petition and
7 accompanying affidavits were sufficient to warrant a finding of adequate cause. There is no
8 weighing of credibility from affidavits that cannot be done by this Court, and as a result, this
9 Court can readily place itself in the same position as the trial court for purposes of making a
10 determination as to whether the appropriate legal standard was satisfied.⁹ Here, as discussed
11 below, the Respondent's pleadings below were insufficient as a matter of law, and adequate
12 cause ought to have been denied, regardless of the standard of review this court applies.¹⁰

13 Any analysis of whether adequate cause exists in a nonparental custody matter must first be
14 reviewed within the proper context of Chapter 26.10 RCW. RCW 26.10.020 identifies that civil
15 practice is to govern litigation involving non-parental custody actions. An additional
16 requirement, however, is that the mandatory court forms must be used. RCW 26.10.015. The
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18 ⁹ Even if, *arguendo*, the abuse of discretion ought to apply as alluded to by the Court in
19 *B.M.H.*, the result in this case would be the same since a trial court abuses its discretion when it
20 fails to properly apply the law to a case, or bases its ruling upon an erroneous view of the law.
E.g., State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Such is the case here.

21 ¹⁰ It is no barrier that the Eatons did not challenge the adequate cause determination
22 below. *See e.g., S.C.D.-L.*, 170 Wn.2d at 517 (overturning an affirmation of an adequate cause
23 determination in a nonparental custody matter where the parties had completed trial, but initial
pleadings were insufficient as a matter of law).

1 mandatory forms utilized in both seeking and resisting a petition for non-parental custody track
2 the statutory requirements. See e.g. WPF CU 01.0100; WPF CU 01.0250; WPF CU 01.0300;
3 WPF CU 02.0100; WPF CU 02.0200; WPF CU 01.0450; WPF CU 01.0500.
4

5 The following preconditions must be met in order for a petitioner to commence a
6 nonparental custody action: First, the filing must be by one other than a parent. RCW
7 26.10.030(1). Next, the filing must be in the county where the child resides, or, in the event that
8 the allegation is that the child's parents are unsuitable or that the child is not in their custody,
9 then the filing is to occur in the county where the child is found. RCW 26.10.030(1). The court
10 must make inquiry as to whether the child is the subject of a dependency action. *Id.* The
11 petitioners must set forth facts that detail that the child is not in the physical custody of one of its
12 parents or that neither parent is a suitable custodian. RCW 26.10.032. The petitioners must also
13 address whether the ICWA applies. RCW 26.10.034. For the initial petition, the form WPF CU
14 01.0100 is to be used, which substantially tracks these statutory requirements and attendant case
15 law incorporating the standard found in *Allen* and its progeny.

16 After filing, the Petitioners then schedule a hearing to determine adequate cause. In
17 reviewing this request, there exists a *presumption* that the superior court will deny the motion for
18 an order to show cause; such a presumption can be overturned only with the petitioners'
19 affidavits demonstrating adequate cause. RCW 26.10.032. An adequate cause hearing occurs
20 thereafter. *Id.*

21 The relevant substance of WPF CU 01.0100 reads as follows:

22 **1.13 Adequate Cause**

1 I have valid reasons to ask for custody of these children:

2 (*Check at least one box*)

3 The children are not living with either parent. The children have been living with
(name/s): _____ since (date): _____.

4 Neither parent is a suitable custodian.

5 **And:** (*Check at least one box for each parent*)

6 Parent/s (name/s): _____ is/are
unfit.

7 The children will suffer actual detriment (harm) to their growth and development if
they live with (parent/s name/s): _____.

8 Give facts that support the statements you checked above:

9 Here, the record demonstrates that the Respondents used the standard form in filing their
10 petition for non-parental custody. CP at 1-5. However, it is notable that at paragraph 1.13 in
11 support of their adequate cause allegation, the Petitioners stated only that: (1) The child has not
12 been in the physical custody of either parent since 2003; and (2) neither parent is a suitable
13 custodian for the child because the mother and father have had limited contact with the minor
14 child for the past 9 years. CP at 4. Although a required part in the standard forms, the
15 Petitioners did not allege either that the parents were unfit *or* that the child would suffer actual
16 detriment if the petition were not granted. CP at 4. This is a minimum requirement in order to
17 proceed through the adequate cause hearing, and later, to trial. *E.A.T.W.*, 168 Wn.2d at 348.
18 That these requirements were not pleaded is merits reversal, even after trial. *S.C.D-L.*, 170
19 Wn.2d at 514-517. This Court should reverse on this basis alone.

20 Additionally, the very fact that the Respondents used the standard form is of great
21 import, as they would have had to manually delete the latter portion of the section involving
22 actual detriment. Moreover, they likewise would have had to manually delete the last portion of
23 the paragraph requiring specific facts supporting the conclusory allegations. By intentionally

1 failing to describe such allegations and deliberately removing the claim of harm or detriment, the
2 petition failed as a matter of law to even allege the requirements of adequate cause.¹¹ *S.C.D-L.*,
3 170 Wn.2d at 514-517.
4

5 Moreover, the supporting affidavits allege nothing that would constitute an actual
6 detriment to J.E.'s long term growth and development under the appropriate standard expressed
7 in B.M.H., discussed above. CP at 155-160, 167-172, 173-78. Rather, the affidavits are merely
8 a rambling discourse that largely discusses the bonded nature of J.E.'s relationship with the
9 Culvers' family, his devotion to his religion,¹² and a fair amount of mudslinging with regard to
10 the factual history of the case. CP at 155-160, 167-172, 173-78. The minimum requirements
11 were simply not met as a matter of law, and adequate cause should have been denied as a matter
12 of law under the same reasoning discussed above under *Shields, T.L., and B.M.H.* That the trial
13 court made a determination that adequate cause existed was error, and this Court should vacate
14 the subsequent orders and return J.E. to his parents' custody.

15 ///
16

17 ¹¹ Our state is, of course, a notice pleading state. *E.g., Champagne v. Thurston County*,
18 163 Wn.2d 69, 84, 178 P.3d 936 (2008). Elsewhere in the petition there are vague references to
19 the best interest standard and to actual detriment. However, those are at best, extremely vague
20 and conclusory, whereas the petition plainly contemplates specificity and facts. At worst, the
21 allegations placed elsewhere in the petition and affidavits apply to other factors, such as the best
22 interest standard, as J.E.'s desires and feelings are discussed at great length. Even taking into
23 account the more lenient standard afforded by notice pleadings, these pleadings were insufficient
under *S.C.D-L.*

¹² Importantly, J.E.'s devotion to his religion is shared by his parents, who are members
of the same religion.

1
2 **C. The trial court abused its discretion in awarding split custody to fit parents and nonparents**

3 By its very nature, nonparental custody is a temporary and uncertain right; if and when a
4 biological parent becomes fit, the nonparent has no right to continue a relationship with the child. *In*
5 *re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008); accord *In re Custody of A.F.J.*,
6 179 Wn.2d 179, 186, 314 P.3d 373 (2013); *In re Parentage of J.B.R.*, No. 31703-0-III, slip op. (Wn.
7 App. filed October 23, 2014). The temporary and uncertain nature of this custody necessarily
8 contemplates that the goal is reunification of a child with his or her parent(s) once the parent(s)
9 become fit. Simply put, nonparental custody is not a thing to be split between *fit* parents and
10 nonparents.

11 Here, the trial court expressly acknowledged that the Eatons were fit parents through its
12 grant of 50% custody and failure to find them unfit. CP at 43-51, 102-105; *A.B.*, 168 Wn.2d at 927.
13 Moreover, the Culvers at no point challenged their fitness at the time of trial. CP at 1-5, 51.
14 Accordingly, the trial court manifestly abused its discretion by awarding 50% custody of J.E. to the
15 Culvers in a permanent residential plan, since any custody awarded the Culvers under the
16 nonparental custody petition must necessarily cease once the Eatons were fit - which they were from
17 the outset of the decree's entry. This Court should find that the lower court abused its discretion,
18 vacate the order, and return J.E. to his parents' full-time custody.

19 **D. This Court should grant attorney fees to the Eatons because of the insufficient**
20 **nature of the pleadings, and because the relevant statute permits the award of**
21 **attorney fees on appeal.**

22 RCW 26.10 states in pertinent part:
23

1
2 Upon any appeal, the appellate court may, in its discretion, order a party to pay
3 for the cost to the other party of maintaining the appeal and attorney's fees in
4 addition to statutory costs.

5
6 The court may order that the attorney's fees be paid directly to the attorney
7 who may enforce the order in his or her name.

8
9 RCW 26.10.080. Here, as discussed above, the petition filed by the respondents was wholly
10 insufficient to meet the legal standards required of it. Though obviously the Respondents met
11 with some success below, it is manifest that this should not have been the case given the
12 intentionally deficient nature of the pleadings. The Eatons have sustained substantial costs in
13 defending their constitutional right to their only remaining child, and have necessarily had to
14 deplete their finances to do so. Equity urges that this Court grant attorney fees for the costs of
15 having to pursue this appeal in order to restore J.E. to his parents, and the Eatons respectfully
16 request the same pursuant to statute and the applicable RAPs.

17 18 VI. CONCLUSION

19
20 At no point throughout the entire proceedings below did the Respondents ever allege, let
21 alone demonstrate, that the rigorous standards related to a nonparental custody petition were met
22 in this case. The trial court erred first by determining that adequate cause existed to proceed,
23 then by concluding that an actual detriment would befall J.E. if he were to be in his parents' sole
custody, and finally, by awarding joint custody to nonparents and fit parents alike. A proper
view of the law makes readily apparent that the trial court abused its discretion on numerous
occasions, and its errors merit vacation and dismissal by this Court, along with a return to the

1 Eatons full custody of J.E. Because of the insufficient nature of the Culvers' pleadings, and the
2 fact that the Eatons were forced to defend their constitutional rights to the detriment of their
3 ability to provide for their son, this Court should award attorney fees under the applicable law.
4

5 RESPECTFULLY SUBMITTED this 29 day of October, 2014.

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7 JOHN JULIAN, WSBA #43214
8 Co-Counsel for Respondents
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed via U.S. Mail postage prepaid this *Brief of Appellants* as follows to the following individuals:

Mason Pickett, Attorney at Law
830 N. Columbia Center Blvd. Suite A1
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Further, on this date, I mailed via US Mail postage prepaid the *Brief of Appellants* to the following individuals:

Travis and Amy Eaton
3317 W. 3rd Ave.
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24 day of October, 2014, at Walla Walla, Washington

sign: 
print name: Morgan Carter