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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 32062-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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

Travis and Amy Page Eaton,

Appellants

v.

Luke and Kelly Culver,

Respondents/Cross Appellants.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

	<u>Page No.</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1-2
A. Appellant’s Assignments of Error.....	1-2
B. Respondents/Cross-Appellants Assignments of Error.....	2-3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3-5
A. Appellant’s Assignments of Error.....	3-4
B. Respondents’/Cross-Appellants Assignments of Error.....	4-5
IV. STATEMENT OF THE CASE.....	5-36
A. Adequate Cause (pretrial).....	5-7
B. Trial, Testimony and Evidence.....	8-33
C. Entry of Findings and Conclusions.....	33-35
D. Motions for Reconsideration.....	36
V. ARGUMENT.....	36-44
A. Standard of Review.....	37-38
B. Issues Presented.....	38-44
1. The Court did not err in finding adequate cause.....	38-39
2. The evidence presented at trial proved Actual Detriment.....	39-40

3. The trial court erred in finding that the Respondents/Cross Appellants did not have standing to bring their De Facto Parentage action.....40-43

4. The Respondents/Cross Appellants should be awarded Attorneys Fees and Costs.....43-44

VI. CONCLUSION.....44-45

TABLE OF AUTHORITIES

Page No.

Washington Cases

In re Custody of A.F.J.,
179 Wn.2d 179, 314 P.3d 373 (2013).....33, 45

In re Custody of B.M.H.
179 Wn.2d 224, 315 P.3d 470(2013).....35, 40, 42, 45

In re Custody of E.A.T.W.,
168 Wn.2d 335, 227, P.3d 1248(2010).....38

In re Custody of Shields
157 Wn.2d 126, 136 P.3d 117 (2006).....39

In re Custody of Stell
56 Wn. App. 356, 783 P.2d 615 1219 (1989).....40

In re Marriage of Allen,
28 Wn. App 637, 626 P.2d 16 (1981).....39, 40

In re Marriage of Kovacs,
121 Wn.2d 795, 801, 854 P.2d 629 (1993).....37

In re Marriage of Wicklund.,
84 Wn.App 763, 770, 932, P.2d 652 (1996).....37

Parentage of JBR.,
336 P.3d 648 (2014).....2, 41, 42

Perry v. Costco Wholesale, Inc.,
123 Wash.App. 783, 792, 98 P.3d 1264 (2004).....37

State v. Camarillo,
115 Wash.2d 60, 71, 794 P.2d 850 (1990).....37

State v. Graffius,
74 Wash.App. 23, 29, 871 P.2d 1115 (1994).....38

<i>State v. Rundquist</i> , 79 Wash.App 786, 793, 905 P.2d 922 (1995).....	37
<i>State v. Solomon</i> 114 Wn. App. 781,789 (2002). review denied, 149 Wash.2d 1025, 72 P.3d 763 (2003).....	37

Other Authorities

CR 15.....	2,3, 44
RAP 18.1.....	1, 43
RCW 26.10.030.....	38
RCW 26.10.080	1, 43
RCW 26.10.032.....	38

I. INTRODUCTION

This case involves multiple parties and witnesses who share common last names; therefore, they are referred to by first names in this Brief. It is done for clarity and no disrespect is intended.

The petitioners when referred to collectively are “the Culvers”; the respondents, when referred to collectively are the “Eatons”. The minor child at issue is Jared Eaton.

The Respondents/Cross-Appellants, (the Culvers) ask this court to affirm the trial court’s decision granting nonparent custody and equal residential time. Additionally/Alternatively they are cross-appealing the decision they lacked standing to request De Facto Parentage, and ask this court to find they are de facto parents.

They are also appealing certain findings that were supported by the evidence, relevant to the court’s decision, but stricken by the trial Judge.

Finally, they are requesting an award of attorney’s fees/costs for this appeal, pursuant to RCW 26.10.080 and RAP 18.1. The court’s decision is supported by fact, and justified by law. This appeal is not well-taken and arguably frivolous.

II. ASSIGNMENTS OF ERROR

A) Appellant’s (the Eatons’) Assignments of Error.

The Eatons' argue there was insufficient evidence to: 1) support the initial "adequate cause" determination; 2) the initial nonparent custody Petition was procedurally defective; 3) there was insufficient evidence to support certain findings and conclusions; 4) there was insufficient evidence to prove "actual detriment"; 5) the court failed to find the child has "special needs"; 6) and nonparent custody was unjustified because the Culvers have no right to a continuing relationship.

B) Respondents'/Cross-Appellants' (the Culvers') Assignments of Error

The trial court abused its discretion when excising proposed findings 29-34. (CP 48). Testimony supported the Culvers' allegations the Eatons' intent was to marginalize their relationship with Jared. These facts support actual detriment.

The trial judge erred when he found/held the Culvers lacked standing to request de facto parentage because there were two living parents, especially in light of the new case *Parentage of JBR*, 336 P. 3d. 648 (October 23, 2014).

The Eatons raised procedural objections because de facto parentage was not formally pled; however, any procedural defects should be deemed waived and/or tried with the Eatons' consent, pursuant to CR

15. They did not object to the amendment, the trial court made substantive rulings and there was no prejudice to the Eatons.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A) Appellants' Assignments of Error

They challenge the original petition's sufficiency on procedural grounds. The Petition alleged Jared was not in the Eatons' physical custody, neither parent was a suitable custodian at the time, given their limited parental roles, and they alleged it would be "extremely detrimental" to the child if he changed homes (CP 4). Those allegations are sufficient to establish standing.

Substantively the evidence before the trial court proved "adequate cause" to justify a full-blown hearing. The parents (Eatons) were not unfit at the time of trial; however the overwhelming evidence proved denial of the nonparent petition would be "actually detrimental" to JE's long-term growth and development.

Their challenged findings of fact are supported by the evidence, and those findings in turn support the trial court's conclusions of law. Additional evidence in the record, which may not have been considered by the trial judge support the decision as well.

The Eatons challenge the court's de facto parentage findings because they allege that issue was not before the court. The court may make decisions based on issues that may not have been pled; unpled issues can be tried based on consent of the parties, there was no prejudice to the Eatons and if there was any procedural irregularity, the Eatons waived that challenge by failing to properly object. The uncontroverted evidence proved they were de facto parents.

B. Respondents'/Cross-Appellants' Assignments of Error

The Culvers raised de facto parentage after they rested. The Eatons did not make procedural objections. The Culvers raised the issue during closing arguments, and again, no procedural objections were made.

The Culvers' proposed Findings of Fact and Conclusions of Law included de facto parentage findings/conclusions. There was a contested presentment hearing and the Eatons did not raise procedural objections.

The Culvers filed a Motion for Reconsideration, post-trial, asking the court reconsider denial of de facto parentage. The Culvers did not object to the court's ultimate decision (equal residential time) and the de facto parentage doctrine simply gave the trial court an additional basis for its award. Case law decided after trial, but before the Decree was entered, justified reconsideration.

The Culvers prepared written proposed Findings of Fact and Conclusions of Law. The trial court struck some of those findings even though they are supported by the testimony. They were relevant to the decision and those findings support actual detriment.

The only parties who should be awarded attorney's fees and costs are the Culvers. The court should deny the Eaton's request for fees/costs.

IV. STATEMENT OF CASE

A) Adequate Cause (pretrial).

In July of 2012, the Culvers filed a nonparent custody Petition, requesting custody of Jared Eaton. (CP 1-5). Luke is Jared's biological maternal uncle; Kelly is his wife. Travis and Amy Culver are Jared's biological parents.

The petition alleged Jared was not in the physical custody of either parent; neither parent was a suitable custodian because of the limited contact they had with the child; and a change of custody would be "extremely detrimental" to the child. (CP 4).

Jared had not been in the "physical custody" of either parent since 2003. (CP 45). He resided primarily with the Culvers, with the Eatons' consent (CP 45).

In June 2009 the Culvers were awarded guardianship of Jared, until he reached 18, with the Eatons' consent. (CP 45). Declarations were filed in support of the motion.

During the adequate cause hearing, the Culver's alleged it would be actually detrimental to Jared to remove him from his home of 9 years so abruptly and without the court proceeding with the benefit of a Guardian ad Litem investigation and some professional guidance. (RP 9, ln. 20-25).

The Culvers specifically alleged "disruption of the family unit" for Jared, taking him away from his parents (the Culvers), his siblings (the Culvers' children and Jared's cousins), and that moving him from his church would be "substantially detrimental." (RP 17, Ln 4-10). This was a unique case, given the history of the Culvers involvement and parenting of both the Eatons' children (they also took custody of Jared's sister, Katy who tragically passed in 2010).

Commissioner Joseph Schneider presided at the adequate cause hearing. (RP 1-48). He found adequate cause, and ordered that Jared be returned to the Culvers; he granted visitation to the Eatons. (RP 36-48). A written order was entered. (CP 13-14).

This was an "extremely unique" case. (RP 36). The Commissioner commended the Eatons' decision to place Jared and Katy

with the Culvers but, the Eatons “must have known” Jared and his sister would become integrated into the Culvers’ home. (RP 37).

There would be “trauma” to the child to abruptly remove him from the Culvers’ home, especially because of the way the Eatons acted before the case was filed. (RP 37). He was particularly sensitive to the developmental level of a 12 year old. (RP 38).

The Commissioner recognized that non-parent cases are based on the premise the child will ultimately be returned to the parents. (RP 39). However, his immediate and primary concern was how to craft a transition plan that would not “detrimentally affect” the child. (RP 39).

There was evidence Jared was acting out, with aggressive and clinginess behaviors. (RP 39). The Eatons were basically fit parents; however, their behavior showed a “certain lack of parenting skill.” (RP 40).

The court, with the parties consent, appointed local counselor, Doug Loree to assist Jared and the parties. (RP 46-47). A written order appointing Mr. Loree was entered. (CP 36). The Eatons’ counsel signed both without objection. No motion for reconsideration, motion for revision, nor appeal was taken.

B) Trial, Testimony and Evidence

The trial commenced on April 12, 2013 (RP 5). All parties testified. The following non-parties testified: Guardian ad Litem, Tami Driver; Counselor Doug Loree; the Culvers' third party witnesses, Mindy Hoffman, David Presley, and Kinnie Gerrard; and the Eatons' third-party witnesses, Gerald Eaton, Todd Hibbs, Jennifer Culver, Douglas Culver, Debbie Culver, and Gloria Eaton.

DOUG LOREE

He is a mental health counselor with approximately 14 years of full time experience. (RP 33). He was appointed by the court in 50-100 cases in the past. (RP 34).

He first counseled Jared on August 7, 2013. (RP 36). He met with Jared and each set of parents on an equal basis. (RP 36). He met with Jared almost weekly. (RP 38). He submitted written reports while the case was pending; they were admitted as exhibits. (RP 37).

Jared was given input regarding the visitation schedule. (RP 38). He spent a substantial amount of his time with Jared trying to figure out the visitation schedule. (RP 40). Mr. Loree wanted to "empower" Jared and give him the chance to have input. (RP 40).

Mr. Loree was trying to increase the time with the Eatons, if possible and without causing “consternation” to Jared. (RP 41). Jared had “difficulty losing time with the Culvers.” (RP 41, line 25). He also wanted to spend time with the Eatons. (RP 42).

Jared is a bright young man, who is “pretty sensitive to what’s going on around him.” (RP 43). He was aware of the court action and the conflict. (RP 43). Mr. Loree discussed Jared’s future with him at every meeting. (RP 44).

Jared did not have problems spending time with the Eatons; however, Jared “has difficulty with time away from the Culvers, and, time away from his siblings (the Culvers’ other kids).” (RP 44, line 20-22). Jared was concerned with how this case was affecting his younger brother, Aiden, and wanted his little brother to be ok. (RP 45).

Mr. Loree made it *very clear* that Jared, “at one point would have advocated for a 50/50 split, a joint custody kind of arrangement.” (RP 45, line 21-23). Jared believed that arrangement would “give him some guarantee that he would always have contact with the Culvers.” (RP 46, line 1-3). Jared also wanted everyone to settle down and work together a little bit. (RP 46).

Jared’s wishes changed from week to week; however, there is one general theme: “he wants to be *guaranteed* that he has regular ongoing

contact” with the Culvers. (RP 46, line 14). At one time he was ok with 50/50, but he had “backed off on that a little bit.” (RP 47). Jared was having “difficulty increasing time” with the Eatons, who were having extended weekend visits at the time. (RP 47). He had problems expanding visits beyond that. (RP 51).

Mr. Loree was asked specifically what the effect would be on Jared if he did not live with the Culvers. (RP 49). Jared “would have a lot of difficulty with that.” (RP 49). One of Jared’s primary concerns is losing regular contact with the Culvers, and that means “several times every week.” (RP 56). Jared did not want to be extradited from the Culvers’ home. (RP 56).

In order for Jared to adjust to a 50/50 schedule, Jared “would *have to be given* that kind of a guarantee.” (RP 56, ln. 14-15). Jared has a strong commitment to family. (RP 56). It was possible Jared was only proposing an equal split to solve the conflict. (RP 60).

TAMI DRIVER

Ms. Driver was appointed in December 2012. (RP 219). She has a Bachelor’s Degree, and has had Title 26 GAL training. (RP 217). She worked for the CASA/Guardian Ad Litem program for approximately 3

years, supervised approximately 50 cases, and has handled approximately 35 of her own. (RP 217).

Her appointment was limited by the terms of the order. (RP 218). She was to assist the transition and also try to help the parties resolve their differences outside of court.

She met with the Culvers and Eatons on three occasions. (RP 247). An agreed resolution would have been best for Jared. (RP 248). She thought they had reached an agreement on one occasion (RP 249).

She thought the parents had agreed to equal time, and she discussed this with Jared. (RP 251). Jared was a little hesitant. However, when he heard the agreement would be in writing, would be temporary, they could “go backwards if he was not dealing well, and he would be guaranteed not to lose any time with the Culvers,” he accepted it. (RP 251).

She investigated the allegations that one or both sets of parents were pressuring Jared. She said “I have full confidence that Jared has told me exactly what he wants and what he *is able to handle*.” (RP 252, ln 19-20).

Jared was just trying to “make peace” with everyone by saying he would agree to an equal time. However, the more she discussed with him, the more hesitant he was with the 50/50 arrangement. (RP 253).

She would sit down with Jared to discuss adjustments to the visitation schedule (i.e. adding time for the Eatons). (RP 257). He was “not happy”

but once it was explained they could go backwards if need be, Jared was ok with it. (RP 257). His worry was almost always losing time with the Culvers. (RP 261).

He views the Culvers as his parents, and he trusts them. (RP 262). He can be open and honest with them. (RP 262). He does not have that same level of openness with the Eatons. (RP 262).

If Jared spent less than half the time with the Culvers “it would be extremely detrimental to [Jared]”. (RP 262, ln 23). Again, Jared, wants guarantees, in writing this will occur. (RP 263). It would be a very negative impact on him if he did not receive these guarantees. (RP 263).

She did not want to stay on the case after trial, if the matter was dismissed, because she did not want to “pick up the pieces” or try to explain to Jared what happened. (RP 329). She thought when she was appointed visitation would move at Jared’s pace. (RP 329). She thought the trial was premature and should be postponed. (RP 329).

It was detrimental to Jared if he had to worry about his brother Aiden. (RP 334). Jared did not have the typical “big brother” relationship/role. (RP 335).

She had no doubt Jared's expressed wishes here his true feelings. (RP 335). This was true for his feelings toward the Culvers and the Eatons. (RP 336).

The Culvers were the primary influence on Jared's life. (RP 338). Jared models himself after them. (RP 339). He is the person he is today because of them. (RP 339).

Jared wouldn't be happy with an open-ended visitation schedule at the Eatons' discretion. (RP 342). The Culvers never resisted any suggestion she made about expanding visitation. (RP 343). She did not think, given the limited scope of her appointment, that she could recommend Jared spend less than 50 percent of the time with the Eatons. (RP 342).

Luke Culver

Jared was an integral part and a member of the Culver family. (RP 369). Taking him away from that would cause havoc. (RP 369). It caused a major disruption when they lost Katy. (RP 369).

Jared became a permanent fixture in their home three years after he moved in. (RP 375). The Eatons could not parent the kids. (RP 375). Jared started calling them mom and dad. (RP 376). Everyone (the extended Culver and Eaton family) acknowledged this and did not object. (RP 378).

If the petition was dismissed the Eatons would try to alter his status with Jared to “uncle.” (RP 385). The Eatons would remove Luke from Jared’s life until he was just another uncle. (RP 385). Their refusal to agree to anything formal justified his suspicions. (RP 387).

The Eatons told him they wanted to transition to a 70/30 residential time split by December 2013. (RP 418). The Eatons wanted to move away from having counselors and GAL’s involved. (RP 419).

Jared responded negatively when the Eatons kept him before the case was filed. (RP 421). He was scared, frustrated, had anxiety, nose bleeds, and anger issues. (RP 421). He also had mood swings. (RP 421).

Luke told the Eatons in October and again in December 2012 the Culvers would agree to an equal schedule. (RP 427). He agreed to relinquish decision-making regarding education and health care in March 2013. (RP 428).

Jared was integrated into his home; removing him as an integral part would “crush” Jared. (RP 124). It would be “very detrimental” to him. (RP 124). He did not believe it was in Jared’s best interests to have a 50/50 schedule; however, he gave the Eatons his word he would agree to that. (RP 127-8).

Katy received medical coupons and SSI but that went to Amy and Travis. (RP 141). Occasionally the Eatons gave money. (RP 141). That

changed once the state found out the funds were going to the Eatons. (RP 141). The Culvers did not ask for money. (RP 142).

Jared was “crushed” when he found out Kelly had a miscarriage. (RP 150). He was looking forward to it and was excited. (RP 150). He still prayed to that day he was going to meet his brother, Gavin. (RP 150).

Aiden was born 10 months later. (RP 150). He and Jared are very close. (RP 150). Aiden won’t sleep by himself when Jared is gone. (RP 150). Jared was very protective of Katy growing up and the Culvers taught him this. (RP 151). Luke prepared Jared to defend his sister by “whatever means necessary.” (RP 151,ln. 15).

Jared had some issues emotionally at school. (RP 186). He did not feel he “fit in” very well. (RP 186). He did not like it but did well academically. (RP 186). He is a quiet kid who feels he does not necessarily fit in. (RP 187).

The Guardianship was filed in 2009. (RP 157). The Eatons paid for it. (RP 157). It was supposed to remain in effect until the kids (Jared and Katy) turned 18. (RP 157). It did say there would be a 36 month review. (RP 157).

Jared was not the same kid as he was before the case started. (RP 197). He was more reserved. (RP 197). He’s withdrawn and doesn’t want to talk to Luke as much. (RP 197). Hes’ more “grumpy.” (RP 197).

Luke told Jared he would stop all of this, if Jared wanted him to. (RP 198). Jared told Luke no and that he wanted to remain a part of the Culver family. (RP 198). Aiden was having problems, started to see a counselor, and Jared worried about him. (RP 198-9). Jared was afraid of losing the Culvers. (RP 203).

Kelly Culver

The Culvers have three other children: a son, age 6 and two daughters, ages 4 and 2, at the time of trial. (RP 438). Jared came to live with them the majority of the time in 2003. (RP 460). The Eatons had sporadic visitations. (RP 460).

Amy asked Kelly to have the kids call Kelly mom, but originally Kelly resisted. (RP 460). For the first few years, the parties discussed expanding visitation but the Eatons did not request return of the children. (RP 460).

The Eatons marriage was unstable at times and even told Jared at one point they were divorcing. (RP 77). The Eatons moved back together permanently in 2011; however, within the preceding year prior to trial, Travis posted his marriage status was “complicated” on his Facebook page. (RP 481).

The Eatons gave the Culvers Power of Attorney over Jared (and his sister Katy) in 2007. (RP 484). The Culvers had problems with the Power of attorney (regarding medical and education decisions); therefore, they discussed Guardianship with the Eatons. (RP 486). The Eatons agreed to pay for the Guardianship. (RP 486).

The Eatons provided medical insurance for Jared at various times. Kelly investigated state medical insurance but was told the state would seek child support. (RP 487). The Eatons never volunteered to pay support. (RP 487). The Culvers never asked for financial support. (RP 487).

The Culvers could have sought SSI benefits, to help with housing, but they turned it down. (RP 490). The Eatons were actually receiving the SSI benefits, and would share small amounts at various times. (RP 490).

Kelly was pregnant with a son in 2005 (RP 502). Jared became attached, when he learned she was pregnant, and he was very excited he was going to have a brother. (RP 502). She miscarried and Jared still talked about his lost brother. (RP 503).

Katy and Jared were very close. (RP 503). They tried to prepare him for her imminent passing by discussing death many times. (RP 503).

Jared learned he was responsible to care and “stick up” for his sister. (RP 504).

Jared was ecstatic when he learned the Culvers were going to have a son (Aiden). (RP 505). He is very close to Aiden and they share a room even though the Culvers’ house has another bedroom. (RP 504-5). Jared did not want to leave his brother even if he was going to visit his grandmother. (RP 505). Katy’s passing was very hard on Aiden as well. (RP 507). Jared would comfort him when he would cry. (RP 507).

The Eatons showed a “dramatic increase” in their desire to spend time with Jared after Katy passed. (RP 514). It was not until Katy’s passing that the Eatons started saying Jared’s living with the Culvers was “temporary.” (RP 516). The Eatons asked medical decision-making while the case was pending. (RP 526). The Culvers agreed and relinquished. (RP 526).

Jared was “broken...a different kid” when he came home in the summer of 2012 (right before the case started). (RP 530). He started breaking out (acne). (RP 530). He had dark circles under his eyes and started having nose bleeds. (RP 530). He cried all the time. (RP 531). He would grab ahold of Kelly and begged her to make sure the Eatons did not take him again. (RP 530). The Eatons had told him he was not going to see the Culvers again. (RP 530).

For the first time in years Jared referred to the Culvers as “Luke and Kelly.” (RP 531). The Eatons had told Jared he would eventually see the Culvers but not for a long time. (RP 531). Kelly later told Amy this, and that it had broken Jared’s trust. (RP 538).

The Culvers made sure Jared wanted them to pursue the nonparent case. (RP 534). He made it clear he wanted them to and became upset with Kelly after she asked him this. (RP 534).

Kelly did not think 50/50 was in Jared’s best interests, but it was better than the continued fighting. (RP 536). It was “the lesser of two evils.” (RP 536, ln. 14).

It would “emotionally crush” as it did the past Summer if he went to live with the Eatons. (RP 540). He started having emotional issues and that would only get worse if he was taken from the Culver home. (RP 540). Jared was very concerned he would not be part of the Culver family anymore. (RP 541). The Eatons could not/would not recognize the damage they caused Jared. (RP 541).

The Eatons failed to recognize Jared had his own, independent emotions. (RP 541). The Eatons did not/could not acknowledge Jared was having emotional problems. (RP 543). She was concerned they would ignore any of Jared’s emotional problems in the future. (RP 543).

Kelly was not aware of the breadth of Amy's emotional/mental health issues until she saw her psychological evaluation right before trial. (RP 542). It concerned her given her suicide attempt history (twice) and her history with anxiety. (RP 542). She was not aware Amy had suicidal thoughts within the past 5 years. (RP 603). Travis was in denial about these problems. (RP 542). Travis himself lost a brother to suicide. (RP 542).

Kelly believed the Eatons offered visitation after the Guardianship hearing because of the pending nonparent case. (RP 556). If the Eatons did not fear repercussions, they would cut the Culvers out of Jared's life. (RP 588). The Eatons had broken their "moral" commitments in the past. (RP 589).

The Eatons told the Culvers they did not want them having a parental role in the future. (RP 624). They wanted the Culvers to be "aunt and uncles. (RP 624). It would be detrimental to Jared to force him to live, against his wishes, without the Culvers. (RP 626). She had raised concerns about how the transition would affect Jared if he went to live with the Eatons and they responded kids would be ok if you tell them they will. (RP 633).

The Culvers' Witnesses

The witnesses who testified for the Culvers all say the same kind of things and share the same opinions. Obviously Luke and Kelly testified it would be contrary to Jared's long-term growth and development if he were placed with the Eatons.

Amy Page Eaton

In 2009, she and Travis decided they "wanted to be the ones to file the [Guardianship] paperwork to show that it was a joint decision between" the Eatons and the Culvers. (RP 1054). Jared was staying in the Culver home the majority of the time, and the Culvers were primarily responsible for his growth and upbringing. (RP 1070).

She testified about the Eatons' decision to refuse to return Jared before any legal action was filed. (RP 1066). She thought that decision was "the best at the time." (RP 1066). Even with the benefit of hindsight, the "only regret" she had was it affected some family time with a visiting Grandparent. (RP 1066).

They deferred and/or shared parenting responsibilities by agreement. (RP 1076). She and Travis offered money and the Culvers declined; the Culvers said buy things for Jared and they did not want money. (RP 1086).

Her expectation for the future was to transition so that the Eatons were his “primary” persons responsible and he would visit the “Culver home on a regular basis and maintain [Jared’s] healthy, loving and close relationship.” (RP 1093, 12-15).

She was questioned about the effects of severance or substantial minimization of Jared’s relationship with the Culvers. (RP 1140). She “object[ed]” to the idea it would be detrimental to his “long-term growth and development” and “object[ed] it would ever happen. (RP 1140-41).

She thought Jared “could adapt” if he lost contact with the Culvers. (RP 1141). It would not be in Jared’s best interests. (RP 1141). Jared would be “upset for a while but would recover” if he left the area. (RP 1141). He would recover if every member of the Culver family died. (RP 1141).

She was questioned about visitation specifics. (RP 1142). She was noncommittal but acknowledged Jared “would be there a smaller percentage of the time.” (RP 1142). She said it was “not necessarily true” her plans were to transition to an every other weekend type schedule. (RP 1142). If she and Travis had disputes over the Culvers’ contact, Travis’s opinion would prevail. (RP 1149).

Jared was close with the Culver children and that if the bond between JE and his brother in particular were compromised, it would cause actual,

long-term detriment. (RP 1154). However, she then backtracked on that statement.

He consented to the parent-child relationship between Jared and the Culvers. (RP 1249-50). Jared lived with the Culvers for at least 6 years. (RP 1250). The Culvers never asked for money. (RP 1250). He signed a consent to treatment of the children in December 2005 and a power of attorney in 2007. (RP 1265). Jared was living with the Culvers prior to signing the consent to treat. (RP 1266). He voluntarily signed the Guardianship documents. (RP 1219).

He supported the Culvers taking care of Jared. (RP 1200). They did a “great job.” (RP 1201). He never asked the Culvers to return the children prior to Katy’s passing. (RP 1203). He agreed Jared should stay with the Culvers as well. (RP 1203).

The Eatons allowed Jared to remain with the Culvers after Katy’s passing so he could grieve and to “regain and recover.” (RP 1213). The Culvers were primarily responsible for helping Jared through the grieving process. (RP 1215). It was reasonable to assume Jared would have concerns about losing other important people in his life. (RP 1216). However, he did not think Katy’s passing was affecting Jared in a negative way. (RP 1216).

He had been married for 18 years and separated for three or four years. (RP 1186). The last time was from 2007 to 2010. (RP 1186). He and Amy “came together” after Katy passed. (RP 1175). Their marriage has been on “firm standing” for about two and a half years at the time of trial. (RP 1175). They had discussed divorce in the past. (RP 1175).

Travis had “issues” at the beginning. He suffered from depression and sought mental health treatment. (RP 1176-7). He was trying to help his wife and encourage her. (RP 1177). Amy started abusing alcohol and he “pretty much said alcohol should not even be looked at nor touched.” (RP 1177, ln. 22-24). Amy is no longer self-medicating and it’s an “enjoyable experience” to have a drink here and there. (RP 1178, ln. 1-2).

Travis did not think it was necessary in the beginning for the Culvers to take custody of the children. (RP 1186-7). He had other family in town that could have done it. (RP 1187). Because of his wife’s issues, he “didn’t have a problem” with the kids going with the Culvers. (RP 1187). He had “no idea” why he didn’t take care of the kids by himself. (RP 1190).

The Eatons asked to see the kids from the beginning, when Luke and Kelly took the kids. (RP 1176). Their time was limited because the Culvers decided it should be. (RP 1176). The parties would agree to visits and the Eatons did not follow through. (RP 1195).

He does not refer to the Culver children as Jared's brothers and sisters, and does not refer to Luke and Kelly as mom, dad, aunt or uncle. (RP 1180). He calls everyone by their first name. (RP 1180). Jared views the Culvers as his parents. (RP 1208). Jared had the "right to have two sets of parents" and Travis believed that is what should happen. (RP 1208). Jared had the "right" to call the Culvers mom and dad. (RP 1210).

Jared told Travis he did not want him to do what Luke and Kelly had done to Travis and Amy. (RP 1182). Travis was surprised when Jared said this. (RP 1182). He believed Jared needs time with both the Culvers and the Eatons. (RP 1183). He never wanted Jared taken away from the Culvers, and did not intend for him never to see them. (RP 1183). However, it was "going to be different than what it has been, in the sense that he will be spending less time "with the Culvers. (RP 1183).

He "probably" did not object to court-ordered visits with the Culvers, but thought it was unnecessary. (RP 1184). They had been part of Jared's life since he was born. (RP 1184). He would not take the position Jared should be returned to him if he thought it would be detrimental. (RP 1184). Travis said Jared was still going to have time with the Culvers. (RP 1221). Jared already told him he did not want an "every other weekend" schedule with the Culvers. (RP 1222).

When the action was filed the Eatons were having visitations every Saturday from 1:00 p.m. to 7:00 or 8:00 p.m. (RP 1233). They also had one overnight weekend a month. (RP 1233).

He hadn't even thought about what would happen with Jared if the court dismissed the case. (RP 1236). He, after much questioning, said he would follow Doug Loree's hypothetical plan for reunification no matter how long it took. (RP 1241). He finally admitted it would be actually detrimental to Jared if the Culvers were ultimately marginalized to aunt and uncle. (RP 1243).

He felt Doug Loree was neutral and was a "good guy." (RP 1228). He would not have a problem if the court accepted Doug's recommendations. (RP 1229). However, he did not remember Mr. Loree's testimony. (RP 1231).

Gerald Eaton

Gerald is Travis' father. (RP 674). He believed Jared would be better off with "anybody but Luke and Kelly." (RP 681, ln. 7). The Culvers were "not a good influence for [Jared]" (RP 681); and Jared is "better off being away from them." (RP 681). He felt the Culvers were "emotionally tormenting [Jared] by making him think that something that he has done is causing this rift and it's wrong." (RP 686, ln 11-13).

Todd Hibbs

He is Travis' brother (RP 721). He had no doubt Jared loved the Culvers. (RP 730). Jared "loves the other kids (the Culvers other three kids) and wants to continue that relationship." (RP 731, ln 1).

Losing his sister (Katy) was devastating for Jared. (RP 756). Losing a sibling is an "extraordinary circumstance" with long-term effects. (RP 757). Luke and Kelly, along with the congregation were Jared's primary support network. (RP 757).

Jared would suffer at least short-term detriment if he did not live with the Culvers. (RP 775). He knew of Kelly's miscarriage and how Jared still felt like he lost another sibling. (RP 777). He did not think Jared would be harmed long-term since he is "flexible and has dealt with an awful lot." (RP 776).

He was aware of the Eatons' plans. (RP 785). The Eatons (especially Amy) "always acknowledged that Luke and Kelly will, in reality, will be, have a closer relationship to Jared than, for example, us [he and his wife] because they've obviously had that history." (RP 785, ln. 21-22. However "it definitely would be a little closer to aunt and uncle than mom and dad." (RP 785, ln. 23-24).

He was asked if the Eatons' expressed and ultimate desire was to have the Culvers treated as aunt and uncle. (RP 786). His answer was "well, that is the reason why Luke and Kelly came here to do that." (RP 786). He believed the Eatons want to have Jared as much as possible, yes." (RP 786, ln. 15-16).

Jennifer Culver

She is married to Luke and Amy's brother. (RP 788). There is a genuine parent/child relationship between Jared and the Culvers. (RP 813). The Culvers' schedule revolved around their children and they rarely needed care. (RP 802). However, they are "his aunt and uncle, not his mom and dad." (RP 811, ln. 23-24).

The Culvers other children are much more than cousins. (RP 813). Jared calls them his brothers and sisters. (RP 818). He is especially close with his brother, Aiden and talks about him all the time. (RP 818). She did not think it would be detrimental if Jared did not live with him. (RP 818).

Given his life history, Jared was uniquely vulnerable to the idea of losing siblings. (RP 817). Jared was in an extraordinary circumstance. (RP 817). It would be absolutely detrimental for him to suffer any more loss of loved ones. (RP 817).

The Eatons long-term plans would allow Jared to see the Culvers “whenever he wants to see them.” (RP 820). Her belief that Jared would be fine long-term with the Eatons was dependent on them being a couple. (RP 826).

The Eatons have the “right” to have their son back. (RP 812). They are a “family unit and they deserve to have” Jared back in their home. (RP 830, ln. 19-20).

The Eatons’ marriage was not always stable. (RP 826). They separated for as long as a year at a time. (RP 826). They were separated more than once. (RP 826).

Douglas Culver

He is Luke and Amy’s father. (RP 835). Jared was raised to believe and accept he had a responsibility for looking after siblings. (RP 848). Jared views the Culvers’ other children as his brothers and sisters. (RP 849).

Any to change Jared’s perception of his relationship to the Culvers, (i.e. parents and siblings) would be detrimental. (RP 855). It would be unquestionably harmful. (RP 856). If either side broke the promise to foster Jared’s relationship with both sets of parents, it would be harmful. (RP 868).

Destroying the family unit would also be devastating. (RP 868). Both the Culvers and the Eatons were his family units. (RP 869). He believed, based on scripture that the legal parents should have custody of their child. (RP 870).

Deborah Culver

She is Luke and Amy's mother. (RP 876). Jared loves the Culvers and he calls them "mommy and daddy." (RP 880, ln. 25). He calls the Eatons that as well. (RP 881). She thinks Jared should "go back to his real parents." (RP 889, ln. 6-7). However, he "needs both families." (RP 895). It was her personal opinion that "a child has the right to be raised by his own parents." (RP 895, ln. 19).

He calls the Culver children his brothers and sisters, but they are his cousins. (RP 898). It would be "very hard" on Jared if he did not have a regular and meaningful relationships with the Culver kids. (RP 898). It would be detrimental to his long-term growth if Jared did not have meaningful time with his cousins. (RP 899).

Gloria Eaton

She is Travis' mother. (RP 929). Jared has been through extraordinary tragedy during his life. (RP 949). She wanted to eventually

see things transition so that Jared treated and viewed the Culvers as aunt and uncle. (RP 949).

She wanted Jared to change the way he viewed the Culver children; she wanted Jared to view them as cousins and not brothers and sisters. (RP 951). She acknowledged Jared's wishes should matter. (RP 955). It would be devastating to Jared if he lost the continuing relationship he had with the Culvers. (RP 956).

Her son Travis has a scriptural responsibility to raise his son. (RP 957). Travis's wishes were that eventually Jared would spend 30% of his time with the Culvers. (RP 958).

Her primary motive was to help her son pursue his scriptural duty. (RP 963). She believed the Eatons "would like to go back to what a normal family is, even though they would be a special aunt and uncle." (RP 967, ln 5-7).

Anyone who tried to sever or minimize the bond between Jared and his siblings (i.e. cousins) and would cause Jared deep and permanent emotional pain." (RP 965). She thought the Culvers were extremely disrespectful to the Eatons when they allowed Jared to call them mom and dad. (RP 965).

Motion to Amend the Pleadings

The Culvers' made an oral motion to amend the pleadings during closing arguments. (RP 1296). The Culvers met the elements of de facto parentage, and the only question was standing. (RP 1296). The amendment conformed to the evidence. (RP 1296).

Counsel acknowledged two living parents (based on case law at the time) affected their standing to assert de facto parentage. (RP 1313). But later stated they had standing. (RP 1314).

The trial judge gave an oral ruling. (Starting on RP 1346). Jared viewed the Culvers as his mother and father. (RP 1352). Its only logical Jared would want that given his age and stage in life. (RP 1352). He also knows the Eatons are his parents. (RP 1353). Travis "turned over" the kids to the Culvers in the beginning. (RP 1353).

Jared was intelligent, sensitive, and did not want to hurt the Culvers or the Eatons. (RP 1354). He is caring, cares about his family members, and has been through some "terrible tragedies." (RP 1354). Losing his sister, in particular. (RP 1354). Jared considers the Culvers' 3 children as his siblings. (RP 1354). It would be another tragedy for him to lose Aiden and the girls. (RP 1354).

The Eatons have constitutional rights. (RP 1355). The Culvers have a heightened burden of proof. (RP 1355). They have to prove the circumstances are detrimental to Jared long-term. (RP 1355).

The criticism of the GAL, even though she was not an expert, was not warranted. (RP 1355). Doug Loree was an expert. (RP 1356). Mr. Loree testified Jared wanted guarantees. (RP 1356).

The judge ordered entry of an equal parenting plan by the beginning of the 2013-14 school year. (RP 1356). He granted the Eatons decision-making. (RP 1356).

Jared should be permitted to call the Culvers (and Eatons) mom and dad, and their children his siblings. (RP 1356). To do anything different would be like taking Katy away from him. (RP 1356).

The parties needed to “bury their feelings”, stop the fighting and let Jared live in peace. (RP 1358). To do otherwise would hurt Jared. (RP 1358). He instructed the attorneys to draft findings. (RP 1358).

The court rejected the de facto parentage argument. (RP 1360). He did not believe the doctrine applied to this case. (RP 1360). He did not reject the argument on procedural grounds. (RP 1360). Nonetheless Jared was to reside at least half of his time with the Culvers. (RP 1362).

Entry of Findings and Conclusions (August 14, 2013).

There was a hearing on August 14, 2013 regarding entry of the Findings/Conclusions (August 14, 2013 VRP, page 1-56). Petitioners' counsel mentioned the "invited error doctrine" in the context of requesting clear findings. (RP 6). Respondents' counsel was given the opportunity to address them. (RP 7).

Judge Swisher made it clear his decision did not "turn on one specific finding...it's a cumulative-type" situation. (RP 9). The Culvers voluntarily relinquished decision-making. (RP 16).

The Eatons' counsel addressed the "de facto parentage" findings. (RP 17-18). He did not raise any procedural challenges (i.e. de facto parentage was not before the court). He objects based on claims they were not in the proper section of the documents. (RP 18). He even suggested only the "First sentence and the last sentence" are all that is needed. (RP 8/14/ 13 RP 19).

The Culvers' counsel made it clear why lengthy and specific findings, even on undisputed facts, were important. (RP 21). Again, the "invited error" doctrine was mentioned, since the Eatons were attempting to minimize the written findings. (RP 22).

The Eatons' counsel referred to his own proposed findings. (RP 30). Even the Eatons proposed a finding that Jared "considers both

petitioners and the respondents to be his parents. The child has a sibling relationship with the Petitioners' youngest children." (RP 30, 19-23).

The Eaton's counsel addressed the third-party witness findings. (RP 31-2). He emphasized their importance. The court took the matter under advisement.

On October 15, 2013 the court signed and filed modified Findings of Fact and Conclusions of Law. (CP 43-51). The Decree was not entered until February 20, 2014. There was a short hearing, and the Motions for Reconsideration were noted for a special setting on March 14, 2014. (see February 20, 2014, RP p.1-5).

There was a contested hearing on March 14, 2014, regarding the parties' respective Motions for Reconsideration. (RP 308). The Culvers' Motion regarding de facto parent standing was based on the new case law that came out after the trial. (RP 310).

The Culvers' counsel addressed with specificity the Eatons' procedural challenges to de facto parentage (RP 313). The Eatons' counsel responded. He said "with respect to the de facto parentage argument, I know that's not going to change, but we certainly disagree with Mr. Pickett and the Culvers on their *argument* regarding de facto parentage." (RP 313, ln. 10-13) (Italics added). He then argued the substance of the standing claim.

Motions for Reconsideration

Both parties filed post-trial motions for reconsideration. A contested hearing occurred on April 18, 2014. (RP 308). The Culvers' counsel pointed out the Eatons did not object or raise the amendment of pleadings prior to this hearing. (RP 309). Counsel argued and applied the cases decided post-trial: *Custody of BMH*, 315 P. 3d. 470 (2013) and *Custody of AFJ*, 314 P. 3d. 373 (2013).

The Eatons responded to the de facto claim. (RP 313). Their counsel said "with respect to the de facto parentage claim, I know that's not going to change, but we certainly disagree with Mr. Pickett and the Culvers on their issue, or their argument regarding de facto parentage." (RP 313, ln.10-13). He then argued the two parent theory. (RP 313).

The Eatons argued that "special needs" of the child had to be proven to establish actual detriment. (RP 314). They acknowledged the Culvers alleged "special needs." (RP 314, ln. 14-15). The Culvers argued there was not arbitrary requirement that "special needs" be proven. (RP 317).

V. ARGUMENT

A. Standard of Review.

A trial court's parenting plan decisions are reviewed for abuse of discretion. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Wicklund*, 84 Wash.App. 763, 770, 932 P.2d 652 (1996). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Kovacs*, 121 Wash.2d at 801, 854 P.2d 629; *Wicklund*, 84 Wash.App. at 770 n. 1, 932 P.2d 652.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995).

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789 (2002). *review denied*, 149 Wash.2d 1025, 72 P.3d 763 (2003). The fact finder measures witness credibility, and appellate courts

do not review that determination on appeal. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

Unchallenged findings of fact are verities on appeal. *Perry v. Costco Wholesale, Inc.*, 123 Wash.App. 783, 792, 98 P.3d 1264 (2004). The findings must support the conclusions of law. *State v. Graffius*, 74 Wash.App. 23, 29, 871 P.2d 1115 (1994). Even when mislabeled as findings of fact, the appellate courts review conclusions of law de novo. *Willener v. Sweeting*, 107 Wash.2d 388, 394, 730 P.2d 45 (1986).

B. Issues Presented

1. Adequate Cause Finding

RCW 26.10.030 requires the filing of a Petition alleging neither parent was a suitable custodian and/or the child is not in the “*physical custody* of one of its parents.” (*Italics added*). Jared was in the physical custody of Petitioners when they filed. They alleged the parents were not fit at that time, and that a change of custody would be “extremely detrimental.” (CP 4).

In order for a party to meet the threshold, that party must prove that a parent is unfit or that placement of the child with the biological parent would result in actual detriment to the child. RCW 26.10.032(1); *In re Custody of E.A.T.W.*, 168 Wash.2d, 335, 338, 227 P.3d 1284 (2010).

The Culvers had statutory standing for the reasons stated above. They raised a prima facie case for nonparent custody. The unique and tragic history of this case, along with the Eatons' own actions were sufficient to prove actual detriment and/or they were unfit to parent their son when the petition was filed. There was no error.

2. Sufficiency of Evidence to Support Actual Detriment.

The “best interests of the child” standard essentially compares the merit of the prospective custodians, and awards custody to the better of the two. *Marriage of Allen*, 28 Wn. App. 637, 645 (1981). “Actual detriment is the more stringent balancing test required to award nonparent custody. *Marriage of Allen*, 28 Wn. App. 637, 645 (1981).

The Washington State Supreme Court addressed the burden of proof for nonparent custody cases in *In re the Custody of Shields*, 157 Wn. 2d. 126 (2006):

[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. *Shields*, at 128. (*Italics added*).

Whether actual detriment is proven is highly fact-specific and what might constitute actual detriment is to be determined on a case-by-case basis. *Custody of BMH*, 315 P.3d 470, 476 (2013). Courts should, if necessary, speculate about future possibilities when deciding domestic relations cases. *BMH*, at 477. Concern about the future is not necessarily impermissibly speculative. *BMH*.

In *BMH* the petitioner alleged and the court found the parent “*might* interfere” with the nonparent’s relationship. *BMH*. at 477. The Supreme Court distinguished *Allen* and *Stell* had ‘more extreme and unusual circumstances.’ *BMH* at 477. The court did mention “special needs” but they did not create an arbitrary rule special needs must exist.

The evidence presented at trial proved this was an extraordinary and unique case. The experts, lay witnesses, and even the testimony of the parties proved the Eatons intentions were less than pure; their intentions were to marginalize Jared’s family ties to the Culvers. That, among other things proved actual detriment to his long-term growth and development.

3. De Facto Parentage

The Eatons argue de facto parentage should be ignored because it was not initially pled. Pursuant to CR 15(b),

“When issues not raised by the **pleadings** are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the **pleadings**. Such **amendment** of the **pleadings** as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the **pleadings**, the court may allow the **pleadings** to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.”

The Culvers made an oral motion after their case in chief, during closing arguments, at the contested presentation hearing, and in a motion for reconsideration. The Eatons did not object on procedural grounds, or even respond to the request to amend pleadings. Therefore, it was tried with their express or implied consent.

There was never any dispute the Eatons did not meet the de facto factors (see below); the only issue was standing. The evidence and testimony would have been substantially the same, if it had been pled from the outset. There is no prejudice to the Eatons.

A de facto parent stands in legal parity with an otherwise legal parent. *Custody of JBR*, 336 P.3d. 648 (2014). A Petitioner must show:

- (1) The legal parent consented to and fostered the parent-like relationship;
- (2) the petitioner and the child lived together in the

same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner must have been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. *JBR*.

The de facto parent doctrine incorporates constitutionally required deference to parents by requiring that the biological or legal parent consent to and foster the parent like relationship. *Custody of BMH*, 315 P. 3d. 470 (2013). Once consent is proven, “the State is no longer interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to de facto parents.” *JBR*, at 651, citing *Custody of BMH*, 179 Wn. 2d. 224, 241 (2013).

It is undisputed the Eatons consented, Jared lived with the Culvers for yeras, they assumed all parenting obligations without financial compensation, and they parented Jared for a period of time sufficient to establish a bonded relationship. They meet the criteria and are de facto parents.

Custody of JBR, was decided on October 23, 2014. The ruling clarified the law regarding non-parent custody. They made it clear a party (in that case a step-parent) could petition even though the child had two living parents. Additionally, a statutory gap is also not an element. *JBR* summarizes the relevant cases.

Our trial court ruled otherwise, and concluded the Culvers lacked standing, to bring the action. The trial court should be reversed, as to the conclusion de facto parentage should not apply. The Culvers have standing even though there are two living parents. However the ultimate decision (equal residential time) should not be disturbed.

Attorneys Fees and Costs

“If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or costs.” *RAP* 18.1(a). The party must devote a section of the brief to the request for fees or expenses. *Id.* (b). The Culvers will be submitting the requisite affidavit of financial need.

Pursuant to RCW 26.10.080,

“The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith...[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.”

The Culvers prevailed at trial. The Eatons challenged facts that were supported by substantial evidence. They raised hyper-technical

procedural challenges (like not using mandatory forms) that are not well-taken.

They invited error by not objecting to amendment of pleadings. They have not even argued prejudice. CR 15 is clear and they did not even cite any other legal authorities to support this claim.

The net effect of the Culvers' position is the equal schedule should be upheld under either theory. By filing this appeal, the Eatons forced the Culvers to cross-appeal to accomplish this objective. They should be awarded fees/costs.

VI. CONCLUSION

The Culvers' Petition was sufficient to convey standing. They alleged neither parent was suitable, they were unfit at the time of filing and it would be "extremely" detrimental if nonparent custody were not granted. Any complaints about the form of the Petition should fall on deaf ears.

This was an extremely unique case, and the evidence presented clearly showed actual long-term detriment to Jared if the Petition were denied. Jared was a unique child, who had been through much tragedy, and the particular facts of this case made him particularly vulnerable. The

Eatons would not act in his best interests (by their own admission) and the presumption they would act in Jared's best interest was rebutted.

The trial court properly allowed for an oral amendment of the petition, the Eatons did not object to the requested amendment, and the evidence and case law (which were decided after trial) confirmed the Culvers had standing. The Eatons did not argue prejudice nor is there any.

This appeal is not well-taken. The filing of this appeal pre-dated the two landmark cases, *Custody of BMH* and *Custody of AFJ*. Once those opinions were issued, this appeal should have been abandoned. Attorneys fees and costs should be awarded to the Culvers, upon presentation of the cost bill.

Dated this 13th day of January, 2015.

Defoe Pickett Law Office

By:

Amy B. Conner ^{WSBA} #48137
for Mason Pickett, WSBA #27818
Attorney for Respondents

CERTIFICATE OF SERVICE

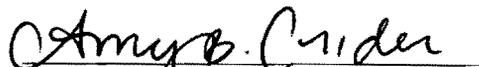
I do hereby certify that on the 13th day of January 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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