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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**SUPREME COURT
OF THE STATE OF WASHINGTON**

IN RE THE MATTER OF ANGELO FLORES-CORK

DAVID NAGEL & ANITA BANGERT
Respondents

V.

HOLLY MARIE CORK
Appellant

NO. 79938-5

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STATE OF WASHINGTON
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RESPONDENTS NAGEL/BANGERT SUPPLEMENTAL BRIEF

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ISSUES PRESENTED ON REVIEW

- I. Did the Washington courts, rather than the Montana courts, have subject matter jurisdiction in this matter?
- II. Was there substantial evidence that Holly Cork was not a suitable custodian for Angelo and that placement of Angelo with Holly Cork would detrimentally affect Angelo's growth and development, and did the court properly use this standard rather than a psychological parent basis being advanced by the appellant?

ARGUMENT

- I. THE WASHINGTON COURTS HAVE SUBJECT MATTER JURISDICTION IN THIS MATTER.

The Appellant's claim that Montana was the home state or had jurisdiction in this matter is in error. Washington and Montana's codification of the UCCJEA are essentially identical in content and thus the RCW citations are used herein. The UCCJEA does confer matter jurisdiction to the home state, if such a home state exists. The issue of home state is defined by RCW 26.27.201(a) which provides that:

a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to reside in that state;

A better argument can be made that Angelo resided in Washington for six months before the filing of the action. The Nagels filed their petition on October 29, 2002, alleging at section 1.4 that the child resided in this State for six months prior to commencement of this action, and that Washington

is the home state. CP 1-8.

On January 3, 2003, Holly Cork filed her response, admitting that Washington was the home state and that the child had resided in this state for six consecutive months. CP 9-11, page 1 section 1.4. Holly Cork was in the best position to know when Angelo moved to this state. Ms. Cork argues that Montana documents required her presence in that state, but there is no evidence in the record to show that she complied with such requirements or when she departed Montana for Washington.

Averments in a pleading to which a responsive pleadings is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. CR 8(d). A matter which is not denied or which is expressly admitted is considered to be established for the purpose of the case, and no further proof on that issue or element is required or permitted. See Neilson v. Vashon Island School District, 87 Wn.2d 955, 958 (1976) (statement of fact made by a party in a pleading is an admission that such fact exists, and is admissible against such party in favor of his adversary). The trial court was entitled to rely on this admission. CP 459-467.

Ms. Cork argues that pursuant to the UCCJEA, Montana was the home state, had exclusive continuing jurisdiction, and that Washington was without subject matter jurisdiction. Regardless of this Court's determination of Washington home state status, under RCW 26.27.201 it is impossible to confer home state jurisdiction to Montana.

RCW 26.27.201(a) provides that:

a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to reside in that state;

Angelo was not residing in Montana at the time this action was filed. CP 9-11. Thus, the only basis for finding that Montana is a home state would be if a parent or person acting as a parent continues to reside in that state. The father of Angelo Cork is deceased. CP 459-467. Holly Cork resided in Washington at the time the petition was filed. CP 9-11.

Ms. Cork now argues that either the Nagels or the State of Montana qualify as a parent. The UCCJEA, RCW 26.27.021 (13) provides:

**(13) "person acting as a parent means a person, other than a parent, who:
(a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
(b) Has been awarded legal custody by a court or claims a right to legal custody under the laws of this state.**

While the Nagels meet the requirements of subsection (a), the statute by using the word "and" requires that both subsections be met in order to qualify as a person acting as a parent. Subsection (b) is not met. The Nagels were never awarded legal custody by any Montana court. The Nagels have made no claim that they have a right to legal custody under the laws of the State of Montana, nor has Holly Cork presented any evidence that such rights were available to the Nagels.

Ms. Cork argues that the State of Montana, being a "government" was

a person for purposes of the statute. While such is true, the result does not change from the above analysis with the Nagels. While subsection (a) of the statute could arguably be met, subsection (b) cannot. Exhibit R111, signed by District Judge Dorothy McCarter on April 19, 2002, is the order of dismissal which dismissed every aspect of the actual court case. Given such, Montana could not possibly claim a legal right to custody. Under any possible interpretation, there was no person acting as a parent in Montana for purposes of invoking continuing jurisdiction.

Similarly, Ms. Cork argues that Montana had continuing jurisdiction because of the entry of a prior order making a custody determination. The argument is curious given that Ms. Cork provides no such order and none exists. After the Montana Supreme Court reversed the dependency case, the State chose to operate under a Temporary Investigatory Authority (TIA), Exhibits R110, R111, R112. The TIA is not a court order, but an agreement between the Respondent Cork and CFS.

Exhibit R111, the order of dismissal, is proof certain that the entire action was dismissed. Although a dependency action is defined as a child custody proceeding for purposes of the UCCJEA, RCW 26.27.021(4), as noted above, the action was dismissed. Even if Holly Cork had actually produced any such order, or assuming *arguendo* that the order of dismissal or the TIA was a custody determination order, said order would be completely irrelevant in Washington's determination of jurisdiction.

Montana's retention of exclusive continuing jurisdiction to modify its

orders would be governed by RCW 26.27.211 which provides that:

(1) Except as otherwise provided in RCW 26.27.231, a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the state.

The key in this determination is the word "or" between subsections (a) and (b). If either condition exists, a state (Montana) does not have continuing jurisdiction. Here, it is indisputable that subsection (b) is not met. As addressed in this brief above, neither Angelo, Holly Cork, or a "person acting as a parent" resided in Montana. Because subsection (b) cannot be met, Montana could not possibly have continuing jurisdiction even if a prior custody determination order actually existed.

This statutory requirement for a finding of continuing jurisdiction was fully addressed and decided in the seminal case of In re Marriage of Greenlaw, 123 Wn.2d 593 (1994). Greenlaw states, "The state in which an initial child custody decree was entered retains exclusive jurisdiction to modify the initial decree so long as: 1) The decree was entered in compliance with statutory requirements; 2) one of the parents or other contestants continues to reside in the state in which the decree was entered; and 3) the child continues to have more than slight contact with the state in which the decree was entered. Id. at 604-605. As Holly Cork cannot meet such

requirements, her claims of continuing Montana jurisdiction are without any merit under any circumstance.

Respondent Cork next argues that Washington lacked a significant connection to the minor child, the standard where no home state exists. RCW 26.27.201(b). Under this standard, Washington properly exercised jurisdiction as there existed a very significant connection to both Ms. Cork and Angelo. Conversely, no significant connection existed in Montana.

Angelo attended school only in Washington. EX 2, RP 190, and numerous other citations. Angelo's kindergarten teacher is in Washington. RP 190. The school counselor is in Washington. RP 160. Both the teacher and counselor witnessed the child's emotional acting out in school and his emotional deterioration while in the care of Holly Cork and were the exclusive sources of such information to the Guardian ad litem and Court. RP 160 and RP 190.

The mother's live-in boyfriend, and father of her other child Chester, resided with her exclusively in Washington. EX 2, RP 91, line 11. Mr. Rich provided daycare for Angelo. RP 95, lines 5-11. There are substantial issues regarding Mr. Rich's adverse effect on Angelo. Mr. Rich's felony and misdemeanor criminal history and records of incarceration are in Washington. RP 94, line 1; RP 93, lines 16-25. Evidence of Mr. Rich's use of marijuana and Angelo's exposure to it are located exclusively in Washington. RP 173, line 15; RP 186, line 1.

Additionally, all evidence of Holly Cork's frequent residential moves

and personal instability while caring for Angelo is located in Washington. RP 78, line 8 through RP 80, line 13.

Evidence of the mother residing with a convicted felon on home monitoring (possession with intent to deliver cocaine and 3 degree assault) is located exclusively in Washington. RP 86, line 21 through RP 88, line 18. Evidence of significant police activity at and/or involving Holly Cork's residence (while caring for Angelo) is located exclusively in Washington. RP 84, line 6. Evidence of CPS involvement with Ms. Cork while caring for Angelo is in Washington. RP 283, line 9; RP 734.

While Holly Cork now argues that Washington lacks a significant connection to Angelo, she admitted to these facts in her response to petition. CP 9-11 (page 1, admission to section 1.4 of the petition). Such claims are barred under the previously cited CR 8(d) and supporting cases.

Furthermore, Holly Cork's prior filed declaration entirely supports the fact that the pertinent, relevant witnesses are located exclusively in Washington. In this prior declaration, Holly Cork states, "I moved to Washington because I have family ties in Washington and would get family support in Washington that I would not get in Montana." RP 509-512 (page 2, lines 1-3).

Importantly, the custody petition was filed pursuant to RCW 26.10.03 0(1) which requires in pertinent part that "neither parent is a suitable custodian." There is no relevant information regarding Holly Cork's current, "suitable" parenting of Angelo in the State of Montana. Her prior problems

with Montana DFS/court would have no relevance to her ability at the time the petition was filed to parent Angelo.

Further, RAP 5.2(a) requires that a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed. On February 9, 2004, the trial court entered an order denying Holly Cork's motion to dismiss for lack of subject matter jurisdiction, significant contacts and/or inconvenient forum. CP 439-442. This was a final order. No appeal was taken until April 21, 2004. CP 478. As the 30 day requirement is not met, Holly Cork's appeal is barred on any jurisdiction issue.

II. THERE WAS SUBSTANTIAL EVIDENCE THAT HOLLY CORK WAS NOT A SUITABLE CUSTODIAN FOR ANGELO AND THAT PLACEMENT OF ANGELO WITH HOLLY CORK WOULD DETRIMENTALLY AFFECT ANGELO'S GROWTH AND DEVELOPMENT, AND THE LOWER COURT PROPERLY USED THIS STANDARD RATHER THAN A PSYCHOLOGICAL PARENT BASIS BEING ADVANCED BY THE APPELLANT.

Custody of a child may be awarded to the nonparent upon a showing that placement with the parent will result in actual detriment to the child. In re Custody of Shields, 157 Wn. 2d 126 (2006). The decision of the lower court in this matter was in absolute conformity both to the decision set forth in Shields but also in conformity to the cases cited with approval by the Shields court in its decision and the facts of this case are remarkably similar

to those in the cited cases. See Shields at 141 citing to the cases of In re Marriage of Allen, 28 Wn. App. 637 (1981), In re Custody of Stell, 56 Wn. App. 356 (1989), and In re Custody of R.R.B. 108 Wn. App. 602 (2001).

In the Allen case, an otherwise fit father was not awarded custody because of his failure to sufficiently involve himself in his deaf child's sign language program. In the R.R.B. case, the nonparent met the burden of establishing actual detriment in the case of a suicidal child suffering from bipolar stress disorder and post-traumatic stress disorder. The child required extensive therapy and stability at the level the parents could not provide. In Stell, the non-parent met the burden of establishing actual detriment in the case of a child who had been physically and sexually abused while young. This child required extensive therapy and stability at the level the parent could not provide. Shields at 145.

From here the application to the instant case begins. Angelo was a child with a significant need for counseling. As early as October 1997, CFS began receiving referrals from relatives regarding educational neglect, physical neglect, and emotional abuse of Angelo by Holly Cork. EX 2, page 3-4.

Because of Angelo's traumatic life experiences which centered around the substantial abuse by Ms. Cork, Ms. Cork was repeatedly advised during the re-integration process that Angelo was in *need* of counseling. She was advised by Angelo's Montana therapist Cheryl Ronish that she needed to get Angelo involved in counseling. RP 282, line 1, RP 291, line 1. Holly

Cork promised to do so. RP 291, lines 9-12. Ms. Cork never did. RP 282, lines 18-24, RP 291, line 21. This continued counseling for Angelo was an expected component of the dismissal of the TIA. RP 513 line 14 through RP 514, line 3.

Holly Cork was also involved with psychologist Dr. Robert Page during the TIA process. Dr. Page performed a psychological evaluation of Ms. Cork. RP 710, line 1. Ms. Cork was also advised by Dr. Page that she would need both personal individual counseling as well as parental support and group involvement following her return to Spokane. RP 724, line 22 through 725, line 8.

After returning to Washington, Holly Cork was again advised by a Washington CPS worker of the need to get Angelo in counseling (RP 283, line 9) and that problems would occur if she did not do so. RP 294, line 15. Ms. Cork never sought counseling after being so advised. RP 283, line 19. She made promises to do so, but never did. RP 296, line 8.

Ms. Cork was also referred to counseling by Angelo's school psychologist. RP 283, line 15; RP 177, line 4. In fact, Ms. Cork never sought counseling for Angelo until required by court order in this matter. RP 77, line 10. CP 51-53. These facts could not be more on point with those in R.B.B. and Stell. This was a child that was in extreme need of counseling and Ms. Cork's refusal to provide it (along with personal conduct), resulted in adverse effects on Angelo cited below.

In the instant case, the trial court specifically considered the

requirements of Shields. CP 459-467, Finding of Fact 2.5(3). While the Court of Appeals decision was reversed, the trial court specifically focused on the showing of actual detriment/the mother was not a suitable custodian finding "its very clear that continued placement with the mother would detrimentally affect Angelo's growth and development." CP 459-467, Finding 2.5(57); In re Custody of Shields, 157 Wn. 2d 126, 144-145 (2006). The trial court, as required by Shields, specifically disavowed the best interests of the child standard. CP 459-467, Finding 2.5(1). As required by Shields the trial court properly recognized the heightened protections afforded to a parent as opposed to a non-parent. CP 459-467, Finding 2.5(2)

Extensive findings at section 2.5(17) through section 2.5(59) documented the severe detrimental effect of Ms. Cork's parenting on Angelo. RP 459-467. The degree of Angelo's suffering while in Ms. Cork's care goes well beyond the detrimental effect on the child in the Shields case. Angelo's counselor Carol Thomas discussed the serious detriment to Angelo of living with Holly Cork at length in her testimony . Her testimony, as to her observations of Angelo, begin at RP 383.

Angelo expressed anxiety in his interaction with his mother as manifested through the distancing and the lack of social interaction. RP 391, line 6. Angelo did not feel free or safe to express his emotions with his mother. RP 393, line 3. Angelo stated that he was angry with his mother and disclosed that his mother yelled at him and spanked him. Angelo described feelings of being unloved and unwanted and disclosed his feeling of

loneliness and sadness. He described fighting between his mother and Josh Rich and talked about emotionally being frightened by this and very scared. RP 405, lines 10-25.

Ms. Thomas found that one of the themes of Angelo in expressing fear is that Holly Cork was consistently yelling at him. RP 407, line 9. Ms. Thomas found Angelo's reports to be credible. RP 407, line 14. Contrast these findings with Ms. Cork's denial of such conduct which are also entirely consistent with Ms. Cork's claims that she was witnessing no problems with Angelo that would have required counseling. RP 408, line 2-9.

The Shields court found that a non-parent will meet the actual detriment test only in "extraordinary circumstances". In re Custody of Shields, 157 Wn.2d 126, 145 (2006). Such extraordinary circumstances are overwhelmingly present here. Ms. Thomas found that Angelo consistently expressed hatred, anger and rejection towards Ms. Cork. RP 408, lines 10-16. Angelo disclosed that Ms. Cork 'just does bad, bad, bad stuff to me.' "My mom says don't tell anybody or talk about it or they will tell the Judge." RP 409 line 9 through 410, line 19.

Angelo also disclosed that the mother's live-in boyfriend Josh Rich spanked him hard and yelled at him. Ms. Thomas testified that Angelo's relationship with Mr. Rich did not appear healthy and that Angelo was fearful of Mr. Rich's anger. RP 411, lines 6-25.

Ms. Thomas testified that Angelo stated that "It's like being killed" living with his mom, and that this statement was his way of expressing that

he was in despair living with them, with very little hope. RP 413, lines 1-5. See also CP 459-467, Finding of Fact 2.5(30). Ms. Thomas testified that Ms. Cork did not have a healthy relationship with Angelo. RP 413, line 23. Ms. Thomas found it very disturbing that Angelo had such a negative sense of self while in Ms. Cork's care and that it manifested through his anger and his aggression. Angelo described himself in counseling as a bad kid. RP 414, lines 10-22.

Ms. Thomas concluded that Angelo's relationship with Holly Cork was basically characterized by lack of emotional connection and minimal social interaction. She found that Angelo was very distant and detached from her and found no evidence of a parent/child bond. Angelo did not use his mother as a source of care, comfort, security, nurturing, or emotional support. He felt unloved by his mother and expressed extreme hatred for his mother. Angelo was unable to tell Ms. Thomas anything positive about his mother or any positive experiences that he had with his mother. RP 415, line 10 through RP 416, line 15. See also CP 459-467, Finding of Fact 2.5 (27), (28), (29), (30), (32), (35).

The Shields requirement for actual detriment was further addressed in Ms. Thomas' testimony. She testified that if Angelo were not returned to the Nagels, she would be very worried about increasing depression in Angelo, very concerned about his detachment and withdrawal, concerned about his rebellion and his possibility of self-destructive behaviors and continued violence towards others. RP 419, lines 8-13. Ms Thomas defined her

concern over self-destructive behaviors to arise from Angelo's negative sense of self and anger. RP 419, lines 16-18. She testified that these self-destructive behaviors could include drugs and alcohol, running away behaviors, putting themselves in risky situations where they could be physically harmed. As kids get older, risks could include carving on themselves, cut their bodies up, and eating disorders. RP 419, lines 16-25.

In prior briefs, Ms. Cork claims that these concerns raised by Ms. Thomas are only speculative and that there is no showing of current actual detriment to Angelo. Ms. Cork's mis-reads the language of Shields which held that the stepparent has standing to have the petition considered by the court, and that custody of the child may be awarded to the stepparent upon a showing that placement with his mother will result in actual detriment to the child..." In re Custody of Shields, 157 Wn.2d 126, 127 (2006). The context of "will result in actual detriment to the child" considers not only the current detriment being suffered by the child, but also considers the future detriment the child would suffer if left in the parent's care. To read this language in any other way would result in an absurd result.

Even if we were to look only at current actual detriment, this standard has been more than met. Ms. Thomas noted that Angelo was already showing some behaviors where he was already assaulting children, but testified that if he had not been returned to the Nagels, there would be a great increase in those behaviors. RP 420, lines 1-8. (Angelo was placed with the Nagels by temporary order on August 29, 2003, about 5 1/2 months before

trial. CP 138-142.) See also CP 459-467, Finding of Fact 2.5(37) which provides "Ms. Thomas indicated that these behaviors were already occurring as was also indicated by the evidence in this case. Angelo made a comment to Ms. Thomas that he was going to slice and kill people, including cops."

Ms. Thomas testified that if the trial court were to return Angelo to Holly Cork, she would have concerns of increased depression, excessive rebellion, detachment, self-destructive behaviors, and aggressive violent behaviors toward others. RP 424, lines 14-17. She testified that Angelo would be at risk for totally detaching from everybody and everything and not willing to be in social and emotional connections with relationships with anyone. CP 424, lines 17-25. With regard to Ms. Thomas' testimony, see CP 459-467, Findings of Fact, section 2.5 (30), (31), (32), (33), (34), (35), (36), (37), (38).

Ms. Thomas found that Angelo was very happy after placement with the Nagels under the temporary orders and that there were many positive changes. RP 420, line 12 through 424, line 20. These findings were further supported by Angelo's Montana teacher who testified that his school performance and behavior rapidly improved and he became "right up there on top of his class" and was one of the teacher's better performers. RP 309, line 14; RP 310, lines 9-13; RP 315, line 17. The child's Montana counselor Rob Dickey noted similar progress in Angelo's behavior. RP 330 line 19 through RP 331, line 15.

Contrast this remarkable improvement with Angelo's functioning

while under Ms. Cork's care. He was labeled as a child in crisis by his teacher and school counselor. RP 176, line 23; RP 176, line 12; RP 166 line 14; RP 170, line 12; RP 187, line 19; RP 195, line 1; RP 195, line 8; RP 196, line 12; RP 197, line 15; RP 198, line 3. See generally RP 60-207. Angelo's behavior escalated to the point where he was screaming at the other children and was very aggressive. He was out of control at school and was hiding under a table in the kindergarten classroom. He was sent home on two occasions where he became so disruptive that the teacher couldn't handle him and the other children were totally disrupted. Angelo was having fits, was yelling, was running, was throwing things, and he was arguing. CP 459-467, Findings of Fact section 2.5 (18), (19), (20), (21), (22), (23), (24). All of these observations of the teacher and school counselor speak to the issue of actual detriment. It is remarkable that the mother did not seek counseling given the serious emotional issues that Angelo was facing.

The trial court observed "The court listened to the testimony and watched Ms. Cork. It appeared that, from the testimony anyway, that Ms. Cork's general attitude toward the situation with regard to Angelo is, at best, casual." Findings of Fact section 2.5 (45). Such observations are within the discretion of the trial court and should be afforded great weight on appellate review. Such observations are also highly supported Ms. Cork's almost complete lack of effort to even contact Angelo after he was placed with the Nagels under temporary orders.

After Angelo was placed with the Nagels in August 2003, Holly Cork

made almost no efforts to see or even talk to her son. From August 2003 through February 2004, she called Angelo once. RP 370, line 22. In fact, she intentionally threw Angelo's phone number away. RP 371, line 4. She didn't call Angelo's school or try and talk with his counselor. Her lack of effort to contact her child continued up until trial. See RP 370-378. Again, this provides ample evidence that an actual detriment to Angelo existed.

The guardian ad litem testified to Ms. Cork's multiple moves in Washington while caring for Angelo, the police activity at one of her homes, that she resided with an individual on home monitoring following a conviction for felony drug distribution (cocaine) and third degree assault, and that she began living with her boyfriend Josh Rich after his release from prison on a burglary conviction. RP 78, line 8 through RP 80, line 13; RP 84, line 9; RP 86, line 21 through 87 line 21; RP 93, line 16.

There was evidence of Washington CPS involvement with Ms. Cork while caring for Angelo. RP 283, line 9; RP 734. There was evidence of Mr. Rich's (Holly Cork's live-in boyfriend) use of marijuana and Angelo's exposure to it. RP 173, line 15; RP 186, line 1. The court was justified in its findings of home instability. CP 459-467, Findings of Fact section 2.5 (55). These show actual detriment.

An appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610 (1993). A trial court's custody disposition will not be disturbed on appeal absent a manifest abuse of discretion. Schuster v.

Schuster, 90 Wn.2d 626, 632 (1978). The lower court applied the proper standard established in Shields, required a heightened showing of detriment by the Nagels, and based its decision on the substantial evidence of actual detriment that was before the court.

Contrary to the current claims of the Appellant, the court did not base its custody determination on a finding that the Nagels were the psychological parents of Angelo. While the court did make this finding, CP 459-467, Finding of Fact 34,3 8, and 58, such findings did not impact or factor into the court's determination that continued placement with the mother would detrimentally affect Angelo's growth and development. The court specifically found that "This is a non-parental custody proceeding and the court is applying a non-parental custody standard. The court has not viewed this case under a best interests standard which is used in dissolution matters." CP 459-467, Finding of Fact 1. The court went on to find that "The issue is whether or not placement of the child with Ms. Cork would detrimentally affect Angelo's growth and development, and the court is very cognizant of Ms. Cork's rights in this matter. Only if the detriment to Angelo outweighs Ms. Cork's rights can the court find that the allegations of the petition have been satisfied." CP 459-467, Finding of Fact 2. Ms. Cork's own conduct, in failing to seek counseling and her personal conduct cited above in this brief, was the justification for the court's determination of said detrimental affect and is more than sufficient to support this determination.

The trial court's reason for addressing the home situation of the

Nagels is obvious from the requirements of the third party custody statute. RCW 26.10.030 gives standing to file the petition for third party custody to an individual if the child is not in the physical custody of one of its parents or if the petition alleges that neither parent is a suitable custodian. Certainly, a court would not move the child from one unsuitable home to another. See also 26.10.100. The court is required to make a determination that placement with the petitioning party would meet the child's needs and interests after a determination is made that the parents are unsuitable.

Accordingly, information on the Nagels home, their bond with Angelo, their willingness to place Angelo in counseling and continue his needed therapy, and his remarkable improvement upon enrollment in his Montana school were appropriately considered by the court and noted in the court's findings. RP 309, line 14; RP 310, lines 9-13; RP 315, line 17. RP 330 line 19 through RP 331, line 15. RP 420, line 12 through 424, line 20.

This case has never been pled as a de facto parent case by the Nagels, no request for custody/visitation based on a de facto parent status has been made, nor was a de facto parent standard considered or even addressed by the trial court. Ms. Cork attempts to blur the issues by repeatedly referring to the Nagels as the foster parents in her briefs and warning the Court that this case will open up biological parents to claims for custody by former foster parents. She cites to the language in In re Parentage of L.B., 155 Wn.2d 679, 712 (2005) but this reference is mis-placed.

If the Nagel's basis for custody was that they had a better bond with

Angelo than Ms. Cork, they would clearly have no basis for custody. As noted above, such a claim has never been pled or raised. Instead this case resulted because Ms. Cork chose to ignore Angelo's need for counseling, exposed him to multiple moves and provided an unstable home, resided with a felon on home monitoring for cocaine and 4th degree assault convictions, moved in with her boyfriend after his release from prison on a burglary conviction, allowed her child to be exposed to the boyfriend's marijuana use, and exposed the child to yelling and fights resulting in a severe psychological detriment to the child. See page 20, above, for citations to record. This case does not infringe on the holdings of L.B. in any manner.

Washington properly exercised jurisdiction in this matter. In making the custody determination, the lower court properly applied the standards enunciated by this court in Shields. Any reference to a de facto parent consideration is mis-placed and non-existent in determination of this case. The decision of the lower courts should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers.

That on the 4th day of January, 2008, he served, via Spokane Messenger Service, a copy of the Respondent's supplemental brief to the persons hereinafter named at the places of address stated below which is the last known address.

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