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SUPREME COURT
OF THE STATE OF WASHINGTON

No: 59494-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VITO & YASUKO GRIECO

Petitioners,

vs.

SACHI T. WILSON

Respondent.

PETITION FOR REVIEW

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW OFFICES OF
CYNTHIA B. WHITAKER

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

By: Cynthia Whitaker
WSBA No. 7292

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1200 Fifth Avenue, Suite 2020
Seattle, WA 98101
(206) 382-0000

Attorneys for Petitioners

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A. Identity Of Petitioners.

Vito and Yasuko Grieco, the maternal grandparents of Elliot (now age 18 and no longer the subject of this action) and Evan (age 13) were the respondents in the Court of Appeals, and are the petitioners in this Court. They ask this Court to accept review of the Court of Appeals' published decision designated in Part 2 of this petition.

B. Decision Below.

The Court of Appeals filed its decision reversing the superior court's order finding that the grandparents established adequate cause for a hearing on their third party custody petition and dismissing the petition on June 2, 2008. (Appendix A) The Court of Appeals decision is published at __ Wn. App. __, 184 P.3d 668 (6/2/2008). The Court of Appeals denied the grandparents' timely motion for reconsideration on July 1, 2008. (Appendix B)

C. Issues Presented For Review.

1. RCW 26.10.032 requires that a third party seeking to establish adequate cause for a third party custody action submit "an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order." Were the

grandparents required to prove more than the fact that their grandsons had lived with them for the past three years with the consent of the children's father after the children's mother died to establish adequate cause for their third party custody petition to proceed to trial?

2. If an appellate court determines that adequate cause was established for a third party custody action to proceed to trial using the wrong legal standard, should the court remand to allow the trial court to determine adequate cause using the proper legal standard, or can the appellate court dismiss the action outright based on a de novo review of the facts alleged to establish adequate cause?

D. Statement Of The Case.

1. The Father Left The Family Home In 2002. The Children Have Lived With Their Maternal Grandparents Since 2003.

The father Sachi Wilson (formerly known as Thornton Arnold Wilson) and JoAnn Grieco married and had two children – Elliott, born in 1990, and Evan, born in 1995. (CP 4, 35, 72) The petitioners, Vito and Yasuko Grieco, are JoAnn's parents and the Wilson boys' maternal grandparents. (CP 3-4) The Wilson boys

have resided with the Griecos since 2003; the Griecos commenced this third party custody action in October 2006. (CP 3, 6)

JoAnn was diagnosed with breast cancer in 1995; by 2000 her cancer had metastasized. (See CP 72-73) Wilson began taking female hormones in early 2002, and left JoAnn and the boys by August 2002 in order to begin living as a woman. (CP 75-76, 88-89) JoAnn and the children remained in the family home in Seattle. (CP 21) During the summer of 2003, JoAnn's illness became disabling, and her parents moved in with the family to help care for her and the boys, then ages 13 and 8. (CP 22, 45-46) Wilson moved to California in September 2003 and began a new relationship with Claire Ramsey. (CP 22, 77)

The parents never divorced; the children were not subject to a parenting plan. (See CP 22) On September 15, 2004, JoAnn executed a Will asking that in the event of her death the children remain with her parents. (CP 22) On October 29, 2004, JoAnn died. (CP 4) The Griecos continued to care for the boys, then ages 14 and 9, in the family home where the children have lived since Evan's birth in 1995. (CP 22, 46, 88)

2. The Father Signed Three Documents Authorizing The Maternal Grandparents' Care Of The Children After The Mother's Death In 2004.

Wilson is a lawyer. (CP 73) On November 22, 2004, Wilson executed an "Authorization for Medical Care" giving the Griecos authority to "make any and all health care decisions" for the boys "to the same extent as if they, or either of them, were [the] children's parents." (CP 10) On February 3, 2005, Wilson executed an "Authorization for Schools and Activities" that acknowledged that the Griecos were the "physical custodians" of the children and authorized them to have access to information from their school. (CP 13)

Wilson executed a further "Agreement Regarding The Welfare And Residential Placement" of the boys on February 2, 2006, 15 months after JoAnn's death. (CP 16-20) In the February 2006 Agreement, Wilson acknowledged that "it [is] in the Children's best interests, under the present circumstances, that Children continue to reside with their Grandparents." (CP 16) Wilson also agreed that the Griecos "shall have full authority with regard to the children's health care . . . and their education." (CP 17) In the same Agreement, the Griecos "accept[ed] the responsibility for the Children's daily needs, both physical and emotional, and further

acknowledge[d] that they are in a parental role.” (CP 17) The Griecos agreed to advise Wilson in advance and to “consider his input prior to making” “major education or medical decisions.” (CP 17)

The parties had signed the February 2006 Agreement “as a mutual commitment to the Children’s best interests.” (CP 18) However, based on his “legal right” to take immediate custody of the children, Wilson thereafter rebuffed the Griecos’ attempts to establish a regular schedule for contact with the children. (CP 90) In October 2006, the Griecos filed this petition for third party custody under RCW ch. 26.10 and a petition to establish *de facto* parentage under ***Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 126 S.Ct. 2021 (2006), in order to formalize the parties’ written Agreement. (CP 3-7, 22)

3. A Family Court Commissioner Found Adequate Cause Based On The Potential Harm To The Children If They Were Removed From The Grandparents, Their Sole Caregivers For The Past Several Years.

RCW 26.10.032 requires a threshold hearing to determine adequate cause before a third party custody action can proceed to trial. In an attempt to maintain family harmony, if possible, the Griecos chose to meet adequate cause with the indisputable fact

that their grandsons had resided with them for over three years, and exclusively for the past two years, and that removing the boys from their care at this point would be detrimental to them. (See CP 21-24, 45-46, 85) Wilson objected to an order establishing adequate cause on the Griecos' petition not because he wanted custody, but in order to retain "legal control:"

My desire to retain legal custody over my children is not because I intended to pick them up and move them to San Diego against their wishes or interests, but because they need a father, and with legal control I can better ensure that they will have a father. Without legal control, I am likely to have no place in their life.

(CP 81)

On January 12, 2007, Family Law Court Commissioner Lori K. Smith found that the Griecos had established adequate cause to pursue their statutory third party custody action. (CP 64) The commissioner found that children were not in the physical custody of either parent, that they were in the "physical custody of the grandparents and have been for a few years," and that the Griecos had asserted facts to support their petition that "it would be detrimental to remove [the children] from the grandparents' care."

(CP 64)

4. The Trial Court Denied The Father's Motion For Revision, But At His Urging Its Order Noted That The Custody Alone Supported Adequate Cause.

Wilson moved for revision to King County Superior Court Judge Suzanne Barnett ("the trial court"). (CP 54, 60) The trial court denied Wilson's motion for revision, noting in its written order that the "Court only needs to find, under RCW 26.10, that children are not in the custody of parents to find adequate cause." (CP 60-61) The trial court's order on revision also recited that "Court cannot determine issues based on written materials; trial is necessary." (CP 61)

After Division One granted Wilson's motion for discretionary review of the trial court's adequate cause determination, Judge Barnett clarified her ruling that the grandparents' showing supported the family court commissioner's finding that adequate cause was established. The trial court confirmed that it had intended to affirm the commissioner's finding that adequate cause was established because it would be detrimental for the children to be removed from their grandparents' care:

[The commissioner] specifically found that the affidavits were sufficient to establish detriment. . . . Commissioner Smith said that she finds adequate cause . . . for hearing the petition is based on the fact that the children are in the physical custody of their

grandparents and have been for a few years. And it would be detrimental to remove them from the grandparents' care. . . . I didn't revise the Commissioner's finding of adequate cause. I sustained the Commissioner's finding of adequate cause.

(RP 19-21)

In clarifying its determination regarding the need for a trial, the trial court confirmed that the "absence" of a parent meets the threshold for adequate cause in this case because the grandparents had made a showing of detriment if the children were removed from their care. (RP 21) The court made clear that its recital that "trial is necessary" was intended to recognize that whether a move actually would be detrimental must be left for trial:

[W]hether a move would be detrimental is a finding of fact and that I could not make that finding on the basis of competing affidavits. That is the ultimate issue for trial. . . . I said that absence under the statute was enough to meet the threshold and that whether this absence or a change would be detrimental was what we would have to decide at trial. Commissioner Smith had already found that there was a sufficient prima facie case of detriment. And I didn't revise that.

(RP 20-21)

5. Division One Reversed And Dismissed The Grandparents' Third Party Custody Action.

In a published decision, Division One reversed and held that the superior court erred in deciding that the "[c]ourt only needs to

find, under [chapter] 26.10 [RCW], that children are not in the custody of parents to find adequate cause.’ In reaching this conclusion, the superior court ignored the requirement that the petitioner must set forth facts that, if proved, would establish either Wilson was an unfit parent or actual detriment to the boys if they were placed with him.” **Grieco**, ¶ 25. Division One rejected the Griecos’ argument that the superior court adopted the commissioner’s finding of detriment when it denied the father’s motion for revision. **Grieco**, ¶ 28. Division One held that the superior court’s order denying the motion for revision “supersedes the commissioner’s findings, conclusions, and order,” and that although the “court denied the motion to revise the commissioner’s decision. . . the court entered a separate and distinctly different order clearly stating the decision to deny the motion to revise was based on the court’s interpretation of the statute.” **Grieco**, ¶ 28.

Division One struck the report of proceedings from the later hearing clarifying the earlier written order of adequate cause, on the grounds that “the superior court entered a written order that is not incomplete and does not need clarification. . . The order denying Wilson’s motion to revise the commissioner’s decision of adequate cause to proceed to trial in the nonparental custody action is

unequivocally based on the court's independent finding that the children were not in the father's custody and that the [c]ourt only needs to find under [chapter] 26.10 [RCW], that children are not in the custody of parents to find adequate cause.' The court's statements, six months after its order in the context of denying the motion to make addition[al] findings have no final or binding effect."

Grieco, ¶ 17.

Division One summarily dismissed the statutory third party custody action, denying the Griecos' request on reconsideration that it instead remand to the trial court for redetermination of adequate cause under the standard established in the court's decision. The Griecos seek review.

E. Argument Why This Court Should Grant Review.

- 1. Division One's Decision, The First Published Interpretation Of RCW 26.10.032, Presents An Issue Of Substantial Public Interest And Constitutional Import That Should Be Determined By This Court, RAP 13.4 (b)(3) and (4), And Is In Conflict With An Unpublished Decision Of Division Three. RAP 13.4(b)(2).**

RCW 26.10.032 was enacted in 2003 to establish a threshold adequate cause requirement before a third party custody case can proceed to trial. See House Bill Report on HB 1720, 58th Legislature, Regular Session (Wash. 2003); Final Bill Report on HB

1878, 58th Legislature, Regular Session (Wash. 2003). The statute requires a third party seeking to establish adequate cause for a third party custody action to submit “an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order.” Only if adequate cause is found can the third party action proceed to trial, where the standard requires proof of detriment to the child if custody is not awarded to the third party petitioner. ***Custody of Shields***, 157 Wn.2d 126, 150-51, ¶ 60, 136 P.3d 117 (2006).

Here, the Griecos submitted an affidavit presenting undisputed facts that the children were not in the physical custody of either parent, and had not been since 2004 when their mother died. (CP 21-22, 45-46) This alone should have been sufficient to meet the adequate cause threshold requirement in RCW 26.10.032. However, Division One, in the first published decision addressing the requirements of the statute, held that more is required. Division One held that “in addition to showing either that the child is not in the physical custody of a parent or that neither parent is a suitable custodian, the petitioner must set forth factual allegations that if proved would establish that the parent is unfit or

the child would suffer actual detriment if placed with the parent.”

Grieco, ¶ 24.

In this holding, Division One ignored the potential detriment that would result from removing the children from the care of their grandparents, with whom they have lived for the past five years, instead improperly requiring that any detriment be the result of a noncustodial parent’s deficiencies. Division One’s holding mischaracterizes the nature and source of parental rights underlying the requirement that detriment be shown before custody is awarded to a third party:

Where the reason for deferring to parental rights – the goal of preserving families – would be ill-served by maintaining parental custody, as *where a child is integrated into the nonparent’s family*, the *de facto* family relationship does not exist as to the natural parent and need not be supported.

Marriage of Allen, 28 Wn. App. 637, 648, 626 P.2d 16 (1981) (emphasis added); see also **Custody of Stell**, 56 Wn. App. 356, 369, 783 P.2d 615 (1989) (reversing award of custody of child to father when child had lived primarily with his aunt and there was evidence that removing child from her care would be detrimental to child).

Under the circumstances of this case, where petitioners made a showing that they had had physical custody of the children for a significant period of time, with the parents' consent, and that removing the children from the only home they have known could cause harm regardless of the lack of detriment in the father's home, the trial court did not abuse its discretion in finding that the grandparents made a prima facie showing that warranted trial on their third party custody petition under RCW 26.10.032. This Court should accept review under RAP 13.4(b)(3) and (4) because Division One's decision, the first published interpretation of RCW 26.10.032, presents an issue of substantial public interest and constitutional import that should be resolved by this Court.

That Division One's published decision raises an issue of substantial public interest is demonstrated by the fact that Division One's interpretation of the statute is in conflict with the interpretation of RCW 26.10.032 by Division Three in an unpublished decision decided less than two months before this

case. *Custody of BJB (Barrett)*, 2008 WL 1875890 (Div. 3) (4/29/2008).¹ In *Barrett*, Division Three rejected the use of case law interpreting RCW 26.09.270 as a means to interpret RCW 26.10.032, and held that the intent of RCW 26.10.032 can be derived from the statutory language itself:

Adequate cause under RCW 26.10.032 exists if the affidavits supporting the motion show the child is not in the custody of either parent or that one or both of the parents is not a suitable custodian. . . Thus, the court can enter a finding of adequate cause if the affidavits establish either alternative.

Barrett, *2. Because, as in this case, it was undisputed that the children were not in the custody of either parent in *Barrett*, Division Three held that this “gave rise to an undisputed basis to find adequate cause under the statute.” *Barrett*, *3. This Court also should accept review under RAP 13.4(b)(2) because Division One’s decision is in conflict with a decision of Division Three.

¹ *Barrett* is an unpublished decision. A motion to publish the decision is pending. Petitioners are not relying on *Barrett* as authority, but to demonstrate that the proper interpretation of RCW 26.10.032 is an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4), and that this decision conflicts with another decision of the Court of Appeals under RAP 13.4(b)(2).

The statutory subsection at issue in this case and in *Barrett* reads in its entirety as follows:

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

RCW 26.10.032(1). At its most simplistic, the issue here is whether the final dependent clause of the first sentence of RCW 26.10.032(1) modifies only the second means of proving adequate cause, “that neither parent is a suitable custodian,” (as the lack of a comma would suggest), or modifies *both* means of proving adequate cause, including cases where, as here, the children with the parents’ consent have been in the custody of non-parents for a significant period of time. The ability of the courts to act to protect children who are not in the physical custody of either parent, and the manner in which these sensitive issues will be resolved, depends upon whether Division One or Division Three has properly interpreted the language of RCW 26.10.032(1).

Division Three’s interpretation flows naturally from the statute’s language. Division One’s interpretation will lead to

incrimination, intimidation, and legally incognizable extended family relationships that will not protect children from harm, as intended by the third party custody statutes. Lawyers, litigants, and the lower courts need direction from this Court as to the proper interpretation of RCW 26.10.032. This Court should accept review under RAP 13.4(b)(2), (3) and (4).

2. Division One's Decision Fails To Give The Trial Court The Required Deference In Adequate Cause Determinations, In Conflict With This Court's Decisions in *Jannot* And Shields The Court Of Appeals' Decision In *Van Guilder*. RAP 13.4 (b)(1) and (2).

This Court has held that a trial judge "stand[s] in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan:"

[B]ecause adequate cause determinations are fact intensive, we recognize that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review.

Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003).

This Court concluded in ***Jannot*** that "a trial judge is in the best position to assign the *proper weight* to each of the varied factors raised by the submitted affidavits in a particular case." 149 Wn.2d

at 127 (emphasis in original). Here, even while applying by analogy cases such as *Jannot* addressing modification of parenting plans, Division One ignored the deference given trial courts in family law matters by dismissing the Griecos' third party custody action without remand for the trial court to apply the legal standard established by Division One.

By dismissing the Griecos' third party custody petition outright, Division One improperly usurped the role of the trial court, determining that the fact that the children had not been in the physical custody of either parent for nearly four years by the time it issued its decision was of insufficient weight to allow a hearing on the grandparents' petition. Having determined that the trial court used the wrong legal standard in finding adequate cause, Division One instead should have remanded to allow the trial court to apply the proper standard, not outright dismissed the action. *Custody of Shields*, 157 Wn.2d 126, 149-50 ¶¶ 58, 59, 136 P.3d 117 (2006), (remanding for trial court to apply correct legal standard when trial court used best interests standard in third party custody action).

In dismissing this action, Division One also ignored the family law court commissioner's finding that because the children have been in the physical custody of the grandparents for a "few

years [] it would be detrimental to remove them from the grandparents' care," (CP 64) even though the trial court affirmed this finding by denying the father's motion to revise the commissioner's ruling. ***State ex rel. J.V.G. v. Van Guilder***, 137 Wn. App. 417, ¶ 9, fn. 4, 154 P.3d 243 (2007) (when the trial court denies a motion for revision, "it adopts the commissioner's findings, conclusions, and rulings as its own") (*citing* RCW 2.24.050; ***Estate of Larson***, 36 Wn. App. 196, 200, 674 P.2d 669 (1983), *rev'd on other grounds*, 103 Wn.2d 517, 694 P.2d 1051 (1985)). Division One's determination that the trial court's order denying the motion for revision "superseded" the commissioner's findings, conclusions, and order is in conflict with its earlier decision in ***Van Guilder***. Because motions for revision under RCW 2.24.050 are particularly common in family law practice, this Court also should accept review to provide guidance to trial court judges as to when or if it is necessary to make "new" findings when declining to revise a court commissioner's decision.

Allowing trial courts rather than appellate courts to weigh the factors to be considered in determining adequate cause addresses the concerns expressed below that interpreting RCW 26.10.032 as it is written would allow any nonparent to seek third party custody of

a child who was not in the physical custody of a parent for only a brief time. For example, a trial court could determine that the fact that a child had been with his grandparents for three *weeks* was not of sufficient weight to allow a nonparent to seek custody, but that the fact that a child was left in his grandparents' care for three *years* might be of sufficient weight to warrant a hearing. As this Court held in ***Jannot***, the trial court, not the appellate courts, should make that determination. 149 Wn.2d at 127. Division One's dismissal of this third party custody action, without regard to the commissioner's findings, as clarified and adopted by the trial court, and without giving the trial court the opportunity to make an adequate cause determination using the standard announced by the appellate court, is in conflict with ***Jannot***, ***Shield***, and ***VanGuilder***. This Court should accept review under RAP 13.4(b)(1) and (2).

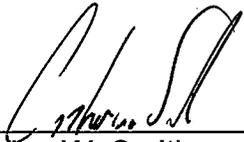
F. Conclusion.

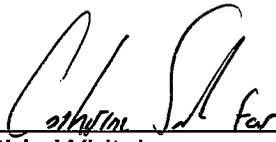
This Court should accept review and provide a definitive interpretation of the adequate cause requirements of RCW 26.10.032.

Dated this 28th day of July, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW OFFICES OF
CYNTHIA B. WHITAKER

By: 
Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

By: 
Cynthia Whitaker
WSBA No. 7292

Attorneys for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 28, 2008, I arranged for service of the foregoing Petition For Review, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Patricia Novotny Attorney at Law 3418 NE 65th Street, Suite A Seattle, WA 98115	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Nancy Hawkins Attorney at Law 6814 Greenwood Avenue N. Seattle WA 98103	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Cynthia B. Whitaker Attorney at Law 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

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COURT OF APPEALS DIV. #1
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DATED at Seattle, Washington this 28th day of July, 2008.



Carrie O'Brien

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

VITO AND YASUKO GRIECO,
Respondents,

v.

SACHIT. WILSON,
Appellants.

No. 59494-0-1

PUBLISHED OPINION

FILED: **June 2, 2008**

SCHINDLER, C.J.—Under RCW 26.10.032, in order to establish adequate cause to proceed in a nonparental custody action, the party seeking custody must establish that the child is not in the physical custody of one of the parents or that neither parent is a suitable custodian. In addition, RCW 26.10.032 also requires the party seeking custody to set forth specific facts that if proved would show that either the parent is unfit or placement with the parent would result in actual detriment to the child. In this nonparental custody action, the father contends the trial court erred in determining that the grandparents established adequate cause based solely on the fact that the children are not in his physical custody. Because the trial court erroneously

interpreted the requirements of RCW 26.10.032, we reverse and dismiss the grandparents' request to establish nonparental custody under RCW 26.10.032.¹

JoAnn Grieco and Sachi Wilson married and had two children, E.A.T.W. and E.Y.W. Their first son, E.A.T.W. was born in 1990. When their second son was born in 1995, JoAnn was diagnosed with breast cancer and underwent surgery and treatment. After the cancer returned in 2000, JoAnn underwent additional surgery and treatment. In August 2002, JoAnn and Wilson separated. Wilson moved out of the family home but continued to have contact with the boys and stayed involved in their lives. In 2003, Wilson began a relationship with a woman he had known for a number of years, Claire Ramsey.

In the summer of 2003, JoAnn's parents, Vito and Yasuko Grieco, moved in with JoAnn in order to take care of her while she went through cancer treatment and to help take care of the boys. According to Wilson, after JoAnn's parents moved in, he was rarely able to spend time with the boys. After JoAnn recovered from the treatment and her parents moved out, JoAnn and Wilson reached an agreement that allowed him to spend more time with the boys.

In September 2003, Wilson and Ramsey moved to San Diego, California. In the summer of 2004, Wilson filed for dissolution of the marriage. When JoAnn had another recurrence of cancer, Wilson decided to not pursue the dissolution. JoAnn's parents moved back in with JoAnn in order to take care of her and the boys.

¹ The grandparents' petition also seeks custody of the boys on an alternative de facto parent theory. Our decision does not affect that claim.

Thereafter, Wilson tried with limited success to make arrangements with JoAnn and her parents to spend time with the boys. In late October 2006, JoAnn died.

In her will, JoAnn included a specific provision stating it was her desire that her parents raise the boys and authorizing the payment of legal fees.

I understand that if my husband survives me, he would normally be the Guardian of my children. I believe that he has already abandoned my children, and it is my strong wish that he decline to have custody of my children and allow my chosen Guardians to serve. If he does not decline to serve, then it is my strong wish that the court find that he is not fit to have custody of my children, and that it is in the best interests of my children for my chosen Guardians to have custody of my children. I expressly authorize that the personal representative of my estate use funds from my estate, and the trustee of the Children's Trust use funds from the trust, to pay any legal expenses associated with carrying out my wishes in his regard.

To provide stability and minimal disruption after JoAnn died, Wilson agreed the boys should continue to live in the family home with JoAnn's parents. In November, Wilson prepared and signed a notarized "Authorization for Medical Care of [E.A.T.W. and E.Y.W.]" to allow the Griecos to make all medical care decisions regarding the boys. In February 2005, Wilson also signed an "Authorization for Schools and Activities," which was acknowledged by the Griecos.² But the authorization specifically states that it should not be construed as a relinquishment of the father's rights as a parent.

The authorization granted herein is not to be construed by the Griecos or their representatives and agents as any forfeiture or derogation of the father's parental rights to, and control of, the children, and it is not to be used by the Griecos in any judicial proceeding regarding [E.A.T.W. and/or E.Y.W.] in which the father is a party to such proceeding.

² Wilson's signature was notarized.

In February 2006, Wilson and the Griecos entered into an "Agreement Regarding the Welfare and Residential Placement of [E.A.T.W. and E.Y.W.]."³ In the agreement, Wilson states that given the present circumstances, the children should continue to live with the grandparents. But because the parties expressly agreed that it is in the best interests of the boys to have regular contact with Wilson, the agreement addresses the means for facilitating communication with the boys and scheduling time with them, including vacations and school breaks.

In October 2006, the Griecos filed a petition to establish de facto parentage or, in the alternative, nonparental custody under chapter 26.10 RCW. As to nonparental custody, the petition alleged the boys were not in the physical custody of either parent and had been in the sole custody of the Griecos since the death of their mother. The petition also cites the February 2006 agreement with Wilson and stating that the parties agreed the children should live with the grandparents. The petition requests an order finding adequate cause to proceed with the nonparental custody action. The petition also requests reasonable visitation for Wilson, child support, and an award of the tax exemptions.

The Griecos filed a motion and declaration asking the court to find adequate cause to proceed with the nonparental custody action. The Griecos' declaration in support of the motion states that their daughter died in October 2004, Wilson moved to California in September 2002, and they have cared for the boys since July 2003. The Griecos also point to the medical and school authorizations and Wilson's 2006

³ The Griecos' signatures were notarized.

agreement that the children should live with them. Wilson filed a declaration in opposition to the motion to find adequate cause, asserting his parental rights to the boys. Wilson states that after JoAnn died, he agreed the boys should continue to live with their grandparents for a while but not permanently.

A hearing on the Griecos' motion to find adequate cause was held before a superior court commissioner in January 2007. The commissioner found that the Griecos established adequate cause for the nonparental custody action "based on the fact that the children are in the physical custody of the grandparents and have been for a few years and it would be detrimental to remove them from the grandparents' care." The commissioner scheduled a trial for September 10.

Wilson filed a motion to revise the commissioner's decision. In opposition, the Griecos argued that the fact that the children were not in the physical custody of the father was sufficient to establish adequate cause for trial.

The children are not in the physical custody of either parent, which alone is sufficient adequate cause for the third party custody action to go forward. In addition, however, the petitioners have made a prima facie case that the father is not a suitable custodian, in part because of the long time the children have been left with the petitioners⁴

The superior court agreed with the Griecos and denied Wilson's motion to revise the commissioner's decision based on the conclusion that the "[c]ourt only needs to find, under [chapter] 26.10 [RCW], that [the] children are not in the custody of parents to find adequate cause." The order also states that because the "[c]ourt cannot determine issues based on written materials[,] trial is necessary." Wilson filed

⁴ Emphasis added.

a motion for discretionary review of the court's order. On June 21, 2007, a commissioner of this court issued a ruling granting Wilson's motion for discretionary review.

On July 3, the Griecos filed a motion and declaration in superior court asking the court to supplement the adequate cause findings in the nonparental custody action. For the first time, the Griecos alleged that Wilson had abdicated his parental role and that placement of the boys with him would result in actual detriment. The Griecos admitted they had not previously alleged actual detriment to the boys. The Griecos asserted that based on Wilson's argument in his motion for discretionary review, "it is necessary for petitioner to allege that placement of the children with him will result in actual detriment Although petitioners disagree with [Wilson's] interpretation of the statute, granting the motion would make the appeal moot." Wilson filed a motion to strike the request to supplement the findings and the Griecos' declaration. The superior court commissioner granted Wilson's motion to strike and imposed sanctions against the Griecos for failure to follow the case schedule. The Griecos then filed a motion to revise the commissioner's decision. On August 9, the superior court denied the motion to revise the commissioner's decision except as to the award of sanctions.

On August 14, we denied the Griecos' motion to modify the ruling granting discretionary review.

Motion to Strike

On August 15, the Griecos filed a supplemental statement of arrangements designating the transcript of the August 9 hearing in superior court denying the

Griecos' motion to supplement the court's findings of adequate cause in the nonparental custody action. Wilson filed a motion to strike the August 9 report of proceedings. A commissioner of this court referred the motion to strike to this panel.

When the superior court does not make written findings, we can look to the court's oral decision to clarify the theory on which the court decides the case.

Goodman v. Darden, Doman & Stafford Assocs., 100 Wn.2d 476, 481, 670 P.2d 648 (1983). And if findings of fact are incomplete, the appellate court may look to the superior court's oral decision to understand the court's reasoning. Lakewood v. Pierce County, 144 Wn.2d 118, 30 P.3d 446 (2001). But if the oral decision conflicts with the written decision, the written decision controls. Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." Ferree, 62 Wn.2d at 567.⁵

Here, because the superior court entered a written order that is not incomplete and does not need clarification, we grant Wilson's motion to strike. The order denying Wilson's motion to revise the commissioner's decision of adequate cause to proceed to trial in the nonparental custody action is unequivocally based on the court's independent finding that the children were not in the father's custody and that the "[c]ourt only needs to find, under [chapter] 26.10 [RCW], that children are not in the

⁵ The Griecos also rely on In re Marriage of Stern, 68 Wn. App. 922, 927-28, 846 P.2d 1387 (1993), to argue that the trial court may enter findings and conclusions even after this court has accepted review. The Griecos' reliance in Stern is misplaced. In Stern, the court held that the failure to enter findings was an inadvertent oversight and not a substantive error. Stern, 68 Wn. App. at 927-28.

custody of parents to find adequate cause.” The court’s statements, six months after its order in the context of denying the motion to make additional findings, have no final or binding effect.⁶

Adequate Cause under RCW 26.10.032

Wilson contends the superior court erred in concluding that the Griecos could establish adequate cause under RCW 26.10.032 based solely on the fact that the children were not in the father’s physical custody.

Chapter 26.10 RCW governs nonparental custody actions. In a custody dispute between a parent and a nonparent, the nonparent must establish that the parent is unfit or that placement with the parent will result in actual detriment to the child. In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981); In re Custody of Shields, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006) (approving of the actual detriment standard in Allen). In 2003, the legislature amended the nonparental custody statute to require a threshold hearing to establish adequate cause to hear the third party nonparental custody petition. RCW 26.10.032 provides:

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the

⁶ In any event, even if we considered the court’s statements during the August 9 hearing, some are consistent with the written order and some are not. The court stated that the children’s absence from their father’s custody was sufficient to establish adequate cause. “[T]he argument focused almost solely on whether their being in the - - in the grandparents’ custody was sufficient . . . to establish adequate cause. And my ruling was that the statute reads in the alternative, that the children have been out of their parents’ custody I said that absence under the statute was enough to meet the threshold” RP (August 9, 2007) at 20-21. However, the court also stated “[b]ut I didn’t revise the Commissioner’s finding of adequate cause. I sustained the Commissioner’s finding of adequate cause.” RP (August 9, 2007) at 21. The statements that are consistent with the written order add nothing. And to the extent the court’s statements are inconsistent, the written order controls. Ferree, 62 Wn.2d at 567.

affidavit, to other parties to the proceedings, who may file opposing affidavits.

(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

The meaning of a statute is a question of law we review de novo. Shields, 157 Wn.2d at 140. The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. Shields, 157 Wn.2d at 140. If the statute's meaning is plain on its face, we give effect to that plain meaning. Dep't of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Our appellate courts have not interpreted RCW 26.10.032. However, the language used in RCW 26.10.032 is nearly identical to the language used in the statute governing adequate cause for a hearing to modify a custody decree or parenting plan, RCW 26.09.270. When similar words are used in different parts of a statute, we presume the legislature intends to use the same meaning. See DeGrief v. Seattle, 50 Wn.2d 1, 11, 297 P.2d 940 (1956). Therefore, we look to the case law interpreting the same language. Green River Comm'ty College Dist. No. 10 v. Higher Educ. Personnel Bd., 95 Wn.2d 108, 117, 622 P.2d 826 (1980) (a similar interpretation should result where the language of the two statutes is similar). RCW 26.09.270 also requires the petitioner to make a threshold showing of adequate cause and to set forth "facts supporting the requested order." RCW 26.09.270 provides:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall

deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

As in the third party custody statute, under RCW 26.09.270, a hearing on a motion to modify the custody decree or parenting plan will only be held if the parent establishes adequate cause. In re Marriage of Mangiola, 46 Wn. App. 574, 577, 732 P.2d 163 (1987), overruled on other grounds by In re Parentage of Jannot, 149 Wn.2d 123,126-27, 65 P.3d 664 (2003). The primary purpose of the threshold adequate cause requirement is to prevent a useless hearing. In re Marriage of Lemke, 120 Wn. App. 536, 540, 85 P.3d 966 (2004). “Adequate cause” has been defined as “something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds for a custody charge.” Mangiola, 46 Wn. App. at 577 (quoting In re Marriage of Roorda, 25 Wn. App. 849, 852, 611 P.2d 794 (1980), Jannot, 149 Wn.2d 126-27).

As in RCW 26.10.032, RCW 26.09.270 requires a petitioner to submit affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260. And under RCW 26.09.260(2)(c) the court must retain the established residential schedule unless “the child’s physical, mental, or emotional health, and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.”

Based on the plain language of RCW 26.10.032 and the case law interpreting the almost identical language in RCW 26.09.270, we conclude that in order to establish adequate cause to proceed with a nonparental custody action, in addition to

showing either that the child is not in the physical custody of a parent or that neither parent is a suitable custodian, the petitioner must set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent.

Here, the superior court unequivocally decided that the “[c]ourt only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause.” We review the superior court’s finding of adequate cause for nonparental custody under an abuse of discretion standard. In re Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003). But where, as here, the order is clearly based on the court’s interpretation of the statutory requirements to find adequate cause under the nonparental custody statute, RCW 26.10.032, our review is de novo. Shields, 157 Wn.2d at 140. The superior court erred in deciding that the “[c]ourt only needs to find, under [chapter] 26.10 [RCW], that children are not in the custody of parents to find adequate cause.” In reaching this conclusion, the superior court ignored the requirement that the petitioner must set forth facts that, if proved, would establish either Wilson was an unfit parent or actual detriment to the boys if they were placed with him. Below, the Griecos only relied on the fact that the boys were not in the physical custody of the father to establish adequate cause.

In the motion and declaration for adequate cause, the Griecos did not allege actual detriment. The Griecos only alleged that the children have lived with the Griecos since 2004 and that Wilson agreed in February 2006 that the children should continue to live with their grandparents. The Griecos argued that the fact the children were not in the physical custody of Wilson “alone is sufficient adequate cause for the

third party custody action to go forward.” The Griecos also argued the father was not a “suitable custodian” because he voluntarily left the children with their grandparents “for an extended period of time.” The declarations do not allege facts that, if proved, would establish actual detriment in placing the children with their father. Because the Griecos did not comply with the requirements of RCW 26.10.032, the court erred as a matter of law in concluding adequate cause was shown based solely on the fact the children were not in the custody of the father.

The Griecos’ reliance on In re Custody of S.H.B., 118 Wn. App. 71, 74 P.3d 674 (2003), to argue that “[i]f the child does not reside with either parent, then the statute requires that the petitioner establish that awarding them custody is ‘in the best interest of the child,’” is misplaced. S.H.B., 118 Wn. App. at 79 (quoting RCW 26.10.100). S.H.B. involved a custody dispute between two nonparents. However, in Shields, the Washington Supreme Court expressly rejected the best interests of the child standard when a custody dispute is between a parent and a nonparent because the standard does not give proper deference to a fit parent. Shields, 157 Wn.2d at 145. The court held that actual detriment to the child is the standard that must apply in a custody dispute between a nonparent and a parent.

Under the heightened standard, a court can interfere with a fit parent’s parenting decision to maintain custody of his or her child only if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child’s growth and development.

Shields, 157 Wn.2d at 144.

The Griecos also rely on the superior court commissioner’s findings below to argue that they established actual detriment. On revision of a commissioner’s

decision, the superior court reviews the findings of fact and conclusions of law de novo. In re Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). If the superior court simply denies the motion to revise the commissioner's findings or conclusions, we have held that the court then adopts the commissioner's findings, conclusions, and rulings as its own. State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007). But when the court makes independent findings and conclusions, the court's revision order then supersedes the commissioner's decision. In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). Here, the court's order supersedes the commissioner's findings, conclusions and order. The court denied the motion to revise the commissioner's decision finding adequate cause. But the court entered a separate and distinctly different order clearly stating the decision to deny the motion to revise was based on the court's interpretation of the statute.

We reverse the superior court's order finding adequate cause to proceed with the nonparental custody action under RCW 26.10 and dismiss that claim.

Schindler, CT

WE CONCUR:

Aziz, J.

Becker, J.

Grieco v. Wilson
Wash.App. Div. 1,2008.

Court of Appeals of Washington, Division 1.
Vito and Yasuko GRIECO, Respondents,

v.
Sachi T. WILSON, Appellants.

No. 59494-0-I.

June 2, 2008.

Background: Maternal grandparents filed petition to establish de facto parentage or, in the alternative, nonparental custody of grandchildren, alleging that grandchildren were not in the physical custody of either parent and had been grandparents' sole custody since the death of their mother, and filed motion to find adequate cause to proceed with nonparental custody action. Father filed declaration in opposition to the motion and asserted his parental rights to children. After a commissioner found that grandparents had established adequate cause, the Superior Court, King County, Suzanne Barnett, J., denied father's motion to reverse that determination, and father appealed.

Holdings: The Court of Appeals, Schindler, C.J., held that:

- (1) as a matter of first impression, allegation that children were not in father's physical custody, standing alone, did not establish adequate cause, and
- (2) court's order superseded court commissioner's findings.

Reversed and dismissed.

West Headnotes

[1] Child Custody 76D ↪907

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk907 k. Record. Most Cited Cases

On discretionary review of superior court's denial of father's motion to revise court commissioner's decision finding adequate cause to proceed to trial in maternal grandparents' nonparental custody action, Court of Appeals would grant father's motion to strike report of superior court's subsequent hearing denying grandparents' motion to supplement the court's findings of adequate cause, where superior court's order denying father's motion to revise court commissioner's finding was not incomplete and did not need clarification; order was unequivocally based on the court's independent finding that the children were not in the father's custody and that such a finding was the only finding necessary to adequate cause, and the court's statements, six months after its order in the context of denying the motion to make additional findings, had no final or binding effect.

[2] Appeal and Error 30 ↪717

30 Appeal and Error
30X Record
30X(N) Matters Not Apparent of Record
30k717 k. Opinion of Lower Court. Most

Cited Cases

When the superior court does not make written findings, the appellate court can look to the court's oral decision to clarify the theory on which the court decides the case, and if findings of fact are incomplete, the appellate court may look to the superior court's oral decision to understand the court's reasoning; but if the oral decision conflicts with the written decision, the written decision controls.

[3] Trial 388 ↪387(1)

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k387 Decision
388k387(1) k. In General. Most Cited Cases

An oral decision is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned; it has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.

[4] Child Custody 76D ⚡500

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk500 k. In General. Most Cited Cases

Maternal grandparents' allegation that children were not in father's physical custody did not establish adequate cause to proceed to trial with grandparents' nonparental custody action, in light of grandparents' failure to allege that father was unfit or that children would suffer actual detriment if placed with father. West's RCWA 26.10.032.

[5] Child Custody 76D ⚡42

76D Child Custody

76DII Grounds and Factors in General

76DII(B) Factors Relating to Parties Seeking Custody

76Dk42 k. Right of Biological Parent as to Third Persons in General. Most Cited Cases
In a custody dispute between a parent and a nonparent, the nonparent must establish that the parent is unfit or that placement with the parent will result in actual detriment to the child. West's RCWA 26.10.032.

[6] Child Custody 76D ⚡500

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk500 k. In General. Most Cited Cases

The primary purpose of the threshold adequate cause requirement to hear a third party nonparental custody petition is to prevent a useless hearing. West's RCWA 26.10.032.

[7] Child Custody 76D ⚡500

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk500 k. In General. Most Cited Cases

In order to establish adequate cause to proceed to trial with a nonparental custody action, in addition to showing either that the child is not in the physical custody of a parent or that neither parent is a suitable custodian, the nonparent petitioner must set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent. West's RCWA 26.10.032.

[8] Child Custody 76D ⚡504

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk504 k. Reference. Most Cited Cases

Trial court's order in maternal grandparents' nonparental custody action superseded court commissioner's findings, such that grandparents could not rely on commissioner's findings to argue that they established actual detriment to children as required to establish adequate cause to proceed to trial with their action; although trial court denied father's motion to revise the commissioner's decision finding adequate cause, the court entered a separate and distinctly different order clearly stating the decision to deny the motion to revise was based on the court's interpretation of the relevant statute. West's RCWA 26.10.032.

[9] Child Custody 76D ⚡504

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk504 k. Reference. Most Cited Cases

On revision of a commissioner's decision in a child custody action, the superior court reviews the findings of fact and conclusions of law de novo.

[10] Child Custody 76D ⚡504

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk504 k. Reference. Most Cited Cases

When the trial court makes independent findings and conclusions on revision of a commissioner's findings in a child custody action, the court's revision order then supersedes the commissioner's decision.

*669 Patricia S. Novotny, Nancy Hawkins, Seattle, for Appellants.

Catherine Wright Smith, Edwards Sieh Smith & Goodfriend PS, Cynthia B. Whitaker, Law Offices of Cynthia B. Whitaker, Seattle, for Respondents.

SCHINDLER, C.J.

¶ 1 Under RCW 26.10.032, in order to establish adequate cause to proceed in a nonparental custody action, the party seeking custody must establish that the child is not in the physical custody of one of the parents or that neither parent is a suitable custodian. In addition, RCW 26.10.032 also requires the party seeking custody to set forth specific facts that if proved would show that either the parent is unfit or placement with the parent would result in actual detriment to the child. In this nonparental custody action, the father contends the trial court erred in determining that the grandparents established adequate cause based solely on the fact that the children are not in his physical custody. Because the trial court erroneously interpreted the requirements of RCW 26.10.032, we reverse and dismiss the grandparents' request to establish nonparental custody under RCW 26.10.032. ^{FN1}

FN1. The grandparents' petition also seeks custody of the boys on an alternative de facto parent theory. Our decision does not affect that claim.

¶ 2 JoAnn Grieco and Sachi Wilson married and had two children, E.A.T.W. and E.Y.W. Their first son, E.A.T.W. was born in 1990. When their second son was born in 1995, JoAnn was diagnosed with breast cancer and underwent surgery and treatment. After the cancer returned in 2000, JoAnn un-

derwent additional surgery and treatment. In August 2002, JoAnn and Wilson separated. Wilson moved out of the family home but continued to have contact with the boys and stayed involved in their lives. In 2003, Wilson began a relationship with a woman he had known for a number of years, Claire Ramsey.

¶ 3 In the summer of 2003, JoAnn's parents, Vito and Yasuko Grieco, moved in with JoAnn in order to take care of her while she went through cancer treatment and to help take care of the boys. According to Wilson, after JoAnn's parents moved in, he was rarely able to spend time with the boys. After JoAnn recovered from the treatment and her parents moved out, JoAnn and Wilson reached an agreement that allowed him to spend more time with the boys.

*670 ¶ 4 In September 2003, Wilson and Ramsey moved to San Diego, California. In the summer of 2004, Wilson filed for dissolution of the marriage. When JoAnn had another recurrence of cancer, Wilson decided to not pursue the dissolution. JoAnn's parents moved back in with JoAnn in order to take care of her and the boys. Thereafter, Wilson tried with limited success to make arrangements with JoAnn and her parents to spend time with the boys. In late October 2006, JoAnn died.

¶ 5 In her will, JoAnn included a specific provision stating it was her desire that her parents raise the boys and authorizing the payment of legal fees.

I understand that if my husband survives me, he would normally be the Guardian of my children. I believe that he has already abandoned my children, and it is my strong wish that he decline to have custody of my children and allow my chosen Guardians to serve. If he does not decline to serve, then it is my strong wish that the court find that he is not fit to have custody of my children, and that it is in the best interests of my children for my chosen Guardians to have custody of my children. I expressly authorize that the personal representative of my estate use funds from

my estate, and the trustee of the Children's Trust use funds from the trust, to pay any legal expenses associated with carrying out my wishes in his regard.

¶ 6 To provide stability and minimal disruption after JoAnn died, Wilson agreed the boys should continue to live in the family home with JoAnn's parents. In November, Wilson prepared and signed a notarized "Authorization for Medical Care of [E.A.T.W. and E.Y.W.]" to allow the Griecos to make all medical care decisions regarding the boys. In February 2005, Wilson also signed an "Authorization for Schools and Activities," which was acknowledged by the Griecos.^{FN2} But the authorization specifically states that it should not be construed as a relinquishment of the father's rights as a parent.

FN2. Wilson's signature was notarized.

The authorization granted herein is not to be construed by the Griecos or their representatives and agents as any forfeiture or derogation of the father's parental rights to, and control of, the children, and it is not to be used by the Griecos in any judicial proceeding regarding [E.A.T.W. and/or E.Y.W.] in which the father is a party to such proceeding.

¶ 7 In February 2006, Wilson and the Griecos entered into an "Agreement Regarding the Welfare and Residential Placement of [E.A.T.W. and E.Y.W.]"^{FN3} In the agreement, Wilson states that given the present circumstances, the children should continue to live with the grandparents. But because the parties expressly agreed that it is in the best interests of the boys to have regular contact with Wilson, the agreement addresses the means for facilitating communication with the boys and scheduling time with them, including vacations and school breaks.

FN3. The Griecos' signatures were notarized.

¶ 8 In October 2006, the Griecos filed a petition to establish de facto parentage or, in the alternative, nonparental custody under chapter 26.10 RCW. As to nonparental custody, the petition alleged the boys were not in the physical custody of either parent and had been in the sole custody of the Griecos since the death of their mother. The petition also cites the February 2006 agreement with Wilson and stating that the parties agreed the children should live with the grandparents. The petition requests an order finding adequate cause to proceed with the nonparental custody action. The petition also requests reasonable visitation for Wilson, child support, and an award of the tax exemptions.

¶ 9 The Griecos filed a motion and declaration asking the court to find adequate cause to proceed with the nonparental custody action. The Griecos' declaration in support of the motion states that their daughter died in October 2004, Wilson moved to California in September 2002, and they have cared for the boys since July 2003. The Griecos also point to the medical and school authorizations and Wilson's 2006 agreement that the children should live with them. Wilson filed a declaration in opposition to the motion to find adequate cause, asserting his parental rights *671 to the boys. Wilson states that after JoAnn died, he agreed the boys should continue to live with their grandparents for a while but not permanently.

¶ 10 A hearing on the Griecos' motion to find adequate cause was held before a superior court commissioner in January 2007. The commissioner found that the Griecos established adequate cause for the nonparental custody action "based on the fact that the children are in the physical custody of the grandparents and have been for a few years and it would be detrimental to remove them from the grandparents' care." The commissioner scheduled a trial for September 10.

¶ 11 Wilson filed a motion to revise the commissioner's decision. In opposition, the Griecos argued that the fact that the children were not in the physical custody of the father was sufficient to establish

adequate cause for trial.

The children are not in the physical custody of either parent, which *alone* is sufficient adequate cause for the third party custody action to go forward. In addition, however, the petitioners have made a prima facie case that the father is not a suitable custodian, in part because of the long time the children have been left with the petitioners....^{FN4}

FN4. Emphasis added.

¶ 12 The superior court agreed with the Griecos and denied Wilson's motion to revise the commissioner's decision based on the conclusion that the "[c]ourt only needs to find, under [chapter] 26.10[RCW], that [the] children are not in the custody of parents to find adequate cause." The order also states that because the "[c]ourt cannot determine issues based on written materials [,] trial is necessary." Wilson filed a motion for discretionary review of the court's order. On June 21, 2007, a commissioner of this court issued a ruling granting Wilson's motion for discretionary review.

¶ 13 On July 3, the Griecos filed a motion and declaration in superior court asking the court to supplement the adequate cause findings in the nonparental custody action. For the first time, the Griecos alleged that Wilson had abdicated his parental role and that placement of the boys with him would result in actual detriment. The Griecos admitted they had not previously alleged actual detriment to the boys. The Griecos asserted that based on Wilson's argument in his motion for discretionary review, "it is necessary for petitioner to allege that placement of the children with him will result in actual detriment.... Although petitioners disagree with [Wilson's] interpretation of the statute, granting the motion would make the appeal moot." Wilson filed a motion to strike the request to supplement the findings and the Griecos' declaration. The superior court commissioner granted Wilson's motion to strike and imposed sanctions against the Griecos for

failure to follow the case schedule. The Griecos then filed a motion to revise the commissioner's decision. On August 9, the superior court denied the motion to revise the commissioner's decision except as to the award of sanctions.

¶ 14 On August 14, we denied the Griecos' motion to modify the ruling granting discretionary review.

Motion to Strike

[1] ¶ 15 On August 15, the Griecos filed a supplemental statement of arrangements designating the transcript of the August 9 hearing in superior court denying the Griecos' motion to supplement the court's findings of adequate cause in the nonparental custody action. Wilson filed a motion to strike the August 9 report of proceedings. A commissioner of this court referred the motion to strike to this panel.

[2][3] ¶ 16 When the superior court does not make written findings, we can look to the court's oral decision to clarify the theory on which the court decides the case. *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wash.2d 476, 481, 670 P.2d 648 (1983). And if findings of fact are incomplete, the appellate court may look to the superior court's oral decision to understand the court's reasoning. *Lakewood v. Pierce County*, 144 Wash.2d 118, 30 P.3d 446 (2001). But if the oral decision conflicts with the written decision, the written decision controls. *672 *Ferree v. Doric Co.*, 62 Wash.2d 561, 567, 383 P.2d 900 (1963). An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree*, 62 Wash.2d at 567, 383 P.2d 900.^{FN5}

FN5. The Griecos also rely on *In re Marriage of Stern*, 68 Wash.App. 922, 927-28, 846 P.2d 1387 (1993), to argue that the trial court may enter findings and conclu-

sions even after this court has accepted review. The Griecos' reliance in *Stern* is misplaced. In *Stern*, the court held that the failure to enter findings was an inadvertent oversight and not a substantive error. *Stern*, 68 Wash.App. at 927-28, 846 P.2d 1387.

¶ 17 Here, because the superior court entered a written order that is not incomplete and does not need clarification, we grant Wilson's motion to strike. The order denying Wilson's motion to revise the commissioner's decision of adequate cause to proceed to trial in the nonparental custody action is unequivocally based on the court's independent finding that the children were not in the father's custody and that the "[c]ourt only needs to find, under [chapter] 26.10[RCW], that children are not in the custody of parents to find adequate cause." The court's statements, six months after its order in the context of denying the motion to make addition findings, have no final or binding effect.^{FN6}

FN6. In any event, even if we considered the court's statements during the August 9 hearing, some are consistent with the written order and some are not. The court stated that the children's absence from their father's custody was sufficient to establish adequate cause. "[T]he argument focused almost solely on whether their being in the-in the grandparents' custody was sufficient ... to establish adequate cause. And my ruling was that the statute reads in the alternative, that the children have been out of their parents' custody.... I said that absence under the statute was enough to meet the threshold...." RP (August 9, 2007) at 20-21. However, the court also stated "[b]ut I didn't revise the Commissioner's finding of adequate cause. I sustained the Commissioner's finding of adequate cause." RP (August 9, 2007) at 21. The statements that are consistent with the written order add nothing. And to the ex-

tent the court's statements are inconsistent, the written order controls. *Ferree*, 62 Wash.2d at 567, 383 P.2d 900.

Adequate Cause under RCW 26.10.032

[4] ¶ 18 Wilson contends the superior court erred in concluding that the Griecos could establish adequate cause under RCW 26.10.032 based solely on the fact that the children were not in the father's physical custody.

[5] ¶ 19 Chapter 26.10 RCW governs nonparental custody actions. In a custody dispute between a parent and a nonparent, the nonparent must establish that the parent is unfit or that placement with the parent will result in actual detriment to the child. *In re Marriage of Allen*, 28 Wash.App. 637, 626 P.2d 16 (1981); *In re Custody of Shields*, 157 Wash.2d 126, 140, 150, 136 P.3d 117 (2006) (approving of the actual detriment standard in *Allen*). In 2003, the legislature amended the nonparental custody statute to require a threshold hearing to establish adequate cause to hear the third party nonparental custody petition. RCW 26.10.032 provides:

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

¶ 20 The meaning of a statute is a question of law we review de novo. *Shields*, 157 Wash.2d at 140, 136 P.3d 117. The primary goal of statutory interpretation is to ascertain and give effect to the legis-

lature's intent and purpose. *Shields*, 157 Wash.2d at 140, 136 P.3d 117. If the statute's meaning is plain on its face, we give effect to that plain meaning. *Dept of Ecology v. Campbell & Gwinn*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

¶ 21 Our appellate courts have not interpreted RCW 26.10.032. However, the language*673 used in RCW 26.10.032 is nearly identical to the language used in the statute governing adequate cause for a hearing to modify a custody decree or parenting plan, RCW 26.09.270. When similar words are used in different parts of a statute, we presume the legislature intends to use the same meaning. See *De-Grief v. Seattle*, 50 Wash.2d 1, 11, 297 P.2d 940 (1956). Therefore, we look to the case law interpreting the same language. *Green River Comm'ty College Dist. No. 10 v. Higher Educ. Personnel Bd.*, 95 Wash.2d 108, 117, 622 P.2d 826 (1980) (a similar interpretation should result where the language of the two statutes is similar). RCW 26.09.270 also requires the petitioner to make a threshold showing of adequate cause and to set forth "facts supporting the requested order." RCW 26.09.270 provides:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

[6] ¶ 22 As in the third party custody statute, under RCW 26.09.270, a hearing on a motion to modify the custody decree or parenting plan will only be held if the parent establishes adequate cause. *In re Marriage of Mangiola*, 46 Wash.App. 574, 577,

732 P.2d 163 (1987), *overruled on other grounds by In re Parentage of Jannot*, 149 Wash.2d 123, 126-27, 65 P.3d 664 (2003). The primary purpose of the threshold adequate cause requirement is to prevent a useless hearing. *In re Marriage of Lemke*, 120 Wash.App. 536, 540, 85 P.3d 966 (2004). "Adequate cause" has been defined as " 'something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds for a custody charge.' " *Mangiola*, 46 Wash.App. at 577, 732 P.2d 163 (quoting *In re Marriage of Roorda*, 25 Wash.App. 849, 852, 611 P.2d 794 (1980), *Jannot*, 149 Wash.2d at 126-27, 65 P.3d 664).

¶ 23 As in RCW 26.10.032, RCW 26.09.270 requires a petitioner to submit affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260. And under RCW 26.09.260(2)(c) the court must retain the established residential schedule unless "the child's physical, mental, or emotional health, and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."

[7] ¶ 24 Based on the plain language of RCW 26.10.032 and the case law interpreting the almost identical language in RCW 26.09.270, we conclude that in order to establish adequate cause to proceed with a nonparental custody action, in addition to showing either that the child is not in the physical custody of a parent or that neither parent is a suitable custodian, the petitioner must set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent.

¶ 25 Here, the superior court unequivocally decided that the "[c]ourt only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause." We review the superior court's finding of adequate cause for nonparental custody under an abuse of discretion standard. *In re Parentage of Jannot*, 149 Wash.2d 123, 127, 65 P.3d 664 (2003). But where, as here, the order is

clearly based on the court's interpretation of the statutory requirements to find adequate cause under the nonparental custody statute, RCW 26.10.032, our review is de novo. *Shields*, 157 Wash.2d at 140, 136 P.3d 117. The superior court erred in deciding that the “[c]ourt only needs to find, under [chapter] 26.10[RCW], that children are not in the custody of parents to find adequate cause.” In reaching this conclusion, the superior court ignored the requirement that the petitioner must set forth facts that, if proved, would establish either Wilson was an unfit parent or actual detriment to the boys *674 if they were placed with him. Below, the Griecos only relied on the fact that the boys were not in the physical custody of the father to establish adequate cause.

¶ 26 In the motion and declaration for adequate cause, the Griecos did not allege actual detriment. The Griecos only alleged that the children have lived with the Griecos since 2004 and that Wilson agreed in February 2006 that the children should continue to live with their grandparents. The Griecos argued that the fact the children were not in the physical custody of Wilson “alone is sufficient adequate cause for the third party custody action to go forward.” The Griecos also argued the father was not a “suitable custodian” because he voluntarily left the children with their grandparents “for an extended period of time.” The declarations do not allege facts that, if proved, would establish actual detriment in placing the children with their father. Because the Griecos did not comply with the requirements of RCW 26.10.032, the court erred as a matter of law in concluding adequate cause was shown based solely on the fact the children were not in the custody of the father.

¶ 27 The Griecos' reliance on *In re Custody of S.H.B.*, 118 Wash.App. 71, 74 P.3d 674 (2003), to argue that “[i]f the child does not reside with either parent, then the statute requires that the petitioner establish that awarding them custody is ‘in the best interest of the child,’ ” is misplaced. *S.H.B.*, 118 Wash.App. at 79, 74 P.3d 674 (quoting RCW 26.10.100). *S.H.B.* involved a custody dispute

between two nonparents. However, in *Shields*, the Washington Supreme Court expressly rejected the best interests of the child standard when a custody dispute is between a parent and a nonparent because the standard does not give proper deference to a fit parent. *Shields*, 157 Wash.2d at 145, 136 P.3d 117. The court held that actual detriment to the child is the standard that must apply in a custody dispute between a nonparent and a parent.

Under the heightened standard, a court can interfere with a fit parent's parenting decision to maintain custody of his or her child only if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development.

Shields, 157 Wash.2d at 144, 136 P.3d 117.

[8][9][10] ¶ 28 The Griecos also rely on the superior court commissioner's findings below to argue that they established actual detriment. On revision of a commissioner's decision, the superior court reviews the findings of fact and conclusions of law de novo. *In re Marriage of Moody*, 137 Wash.2d 979, 993, 976 P.2d 1240 (1999). If the superior court simply denies the motion to revise the commissioner's findings or conclusions, we have held that the court then adopts the commissioner's findings, conclusions, and rulings as its own. *State ex rel. J.V.G. v. Van Guilder*, 137 Wash.App. 417, 423, 154 P.3d 243 (2007). But when the court makes independent findings and conclusions, the court's revision order then supersedes the commissioner's decision. *In re Marriage of Dodd*, 120 Wash.App. 638, 644, 86 P.3d 801 (2004). Here, the court's order supersedes the commissioner's findings, conclusions and order. The court denied the motion to revise the commissioner's decision finding adequate cause. But the court entered a separate and distinctly different order clearly stating the decision to deny the motion to revise was based on the court's interpretation of the statute.

¶ 29 We reverse the superior court's order finding adequate cause to proceed with the nonparental cus-

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tody action under RCW 26.10 and dismiss that
claim.

¶ 30 WE CONCUR: AGID and BECKER, JJ.

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ATTORNEYS AT LAW

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

VITO AND YASUKO GRIECO,)	
)	No. 59494-0-1
Respondents,)	
)	
v.)	
)	ORDER DENYING MOTION FOR
SACHI T. WILSON,)	RECONSIDERATION
)	
Appellants.)	

Respondents, Vito and Yasuko Grieco filed a motion for reconsideration of the opinion filed on June 2, 2008 and the court has determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the respondents' motion for reconsideration is denied.

Dated this 1st day of July, 2008.

For the Court:

Schneider
Presiding Judge

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STATE OF WASHINGTON
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