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No. 59494-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Custody of:
Elliot A.T. Wilson and Evan Y. Wilson

VITO & YASUKO GRIECO,

Respondents,

vs.

SACHI T. WILSON,

Petitioner.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE BARNETT

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The father abdicated his parental role, leaving his children in the care of their grandparents for nearly three years after their mother died. The father now uses his absence from the children's lives to claim that the grandparents cannot prove he is "unfit," and that their third party custody action therefore should be dismissed without a trial on the merits. But the trial court properly recognized that, for purposes of establishing adequate cause to proceed with their third party custody action, the grandparents could show that they had physical custody of the children and that it could be detrimental to remove the children from their home and be placed with their father, with whom they have not lived for the past five years. This court must affirm the trial court's adequate cause order and allow this action to proceed to trial on the merits without further delay.

II. RESTATEMENT OF FACTS

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

The petitioner Sachi Wilson (formerly known as Thornton Arnold Wilson) and JoAnn Grieco married and had two children – Elliott, born in 1990 and now age 17 and a senior in high school,

and Evan, born in 1995 and now age 12 and starting middle school. (CP 4, 35, 72) JoAnn died of cancer in October 2004. (CP 4) The respondents in this review proceeding are Vito and Yasuko Grieco, 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. (CP 22, 45) The Griecos moved in with the family to help care for her and the boys, then ages 13 and 8. (CP 22, 46) Wilson moved to California in September 2003 and began a relationship with Claire Ramsey. (CP 22, 77)

Wilson filed for divorce in 2003, but claims he dismissed his action at JoAnn's request so that she could focus on her cancer treatment. (CP 77) Wilson filed a second petition for dissolution in the summer of 2004. (CP 78) On September 15, 2004, JoAnn

executed a Will asking that in the event of her death the children remain with her parents:

> 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 [parents] 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 [parents] to have custody of my children.

(CP 22)

JoAnn died on October 29, 2004. (CP 4) Shortly after JoAnn's death, Wilson married Ms. Ramsey in California. (CP 89) The Griecos continued to care for the boys, then ages 14 and 9 and attending high school and grade school in Seattle, in the family home where the children have lived since Evan's birth in 1995. (CP 22, 46, 88)

B. 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, he 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 now claims that he intended that the boys' residence with the Griecos to be a "transition" following their mother's death. (CP 79) But neither of these Authorizations are limited in time. (*See* CP 10, 13) And Wilson in fact executed a further "Agreement Regarding The Welfare And Residential Placement" of the boys on February 2, 2006, over 15 months after JoAnn's death. (CP 16-20)

In the parties' 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) 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" in the Agreement. (CP 17) The Griecos, who by this time had

raised and educated Elliott through high school and Evan through his grade school years, also agreed to advise Wilson in advance and to "consider his input prior to making" "major education or medical decisions." (CP 17)

C. The Grandparents' Third Party Custody Action Was Allowed To Proceed To Trial Based On The Potential Harm To The Children If They Were Removed From The Grandparents, Their Sole Caregivers For The Past Three Years.

The parties had signed the February 2006 Agreement "as a mutual commitment to the Children's best interests." (CP 18) But the father thereafter rebuffed the grandparents' attempts to establish a schedule for contact with the children, claiming that he had a "legal right" to take immediate custody of 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)

RCW 26.10.032 requires a threshold hearing to determine adequate cause before a third party custody action can proceed to

trial.[1] In an attempt to maintain family harmony if possible, the Griecos chose to meet adequate cause by demonstrating the indisputable fact that their grandsons had resided with them exclusively for over three years, and that removing the boys from their care at this point would be detrimental to them. (*See* CP 23-24, 46)

In response to the grandparents' showing, Wilson conceded that it was in the children's best interests to remain with the Griecos, and that he was not seeking primary placement of the children with him:

> There is no reason my children cannot live with me. Having said that, I am not demanding that my children live with me immediately. I understand that they have lives here. . . . I can fly to Seattle for a weekend every month or two. I would want the expectation that the children would generally be available and that the Griecos would not schedule other things just to keep them from me. . . . We could arrange to be in Seattle for a month during the summer and rent a house for us all to live in.

(CP 81-82) Despite this concession, Wilson objected to an order establishing adequate cause on the Griecos' petition. Wilson

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[1] No similar common law requirement has been imposed on the *de facto* parentage cause of action established by ***Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 126 S.Ct. 2021 (2006). As this court's commissioner recognized in granting discretionary review, the Griecos' pending *de facto* parentage petition remains unaffected by this review.

admitted that he was objecting not because he wished to have the children reside with him, but so he can retain "legal control" of the boys:

> 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, and that they were in the "physical custody of the grandparents and have been for a few years." (CP 64) The commissioner also found that the grandparents had asserted facts to support their petition that "it would be detrimental to remove [the children] from the grandparents' care." (CP 64)

Wilson moved for revision to King County Superior Court Judge Suzanne Barnett. (CP 54) 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) In a later hearing, the trial court clarified its ruling that the grandparents' showing supported the 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] 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 19-20)

The trial court's order on revision also recited that "Court cannot determine issues based on written materials; trial is necessary." (CP 61) In clarifying this determination, 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. The court made clear that its recital 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)

This court accepted discretionary review of the trial court's adequate cause determination and ordered an expedited briefing schedule. Trial is currently scheduled for November 6, 2007.

III. ARGUMENT

A. A Trial Court's Determination Of Adequate Cause Is Reviewed Under The Abuse Of Discretion Standard.

To date there are no cases interpreting the standard of review for adequate cause determinations under RCW 26.10.032, which was enacted in 2003. However, as the statutes have similar requirements, including the requirement of written affidavits setting forth facts supporting its requested order, this court can look to the standard of review for adequate cause determinations under RCW 26.09.270 for guidance. In ***Parentage of Jannot***, 149 Wn.2d 123,

127-28, 65 P.3d 664 (2003), our Supreme Court held that the appellate court must review adequate cause determinations under RCW 26.09.270 for abuse of discretion.

The ***Jannot*** Court recognized 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." 149 Wn.2d at 127; *see also* ***Marriage of Rideout***, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (applying substantial evidence standard of review when proceeding turns on credibility determinations). The Court further noted that because "parenting plans are individualized decisions that depend upon a wide variety of factors, including 'culture, family history, the emotional stability of the parents and children, finances, and any of the other factors that could bear upon the best interests of the children'" the trial court is "better suited than an appellate court to weigh these varied factors on a case-by-case basis." ***Jannot***, 149 Wn.2d at 127.

Adequate cause determinations under RCW 26.10.032 are likewise subject to review under the abuse of discretion standard. Petitioner recognizes as much in relying on cases discussing the standards for modification under RCW 26.09.270. (App. Br. 9-10)

Regardless of the standard of review, however, the trial court properly found adequate cause here based on the grandparents' showing that it would be detrimental for the children to be removed from the home where for many years they have lived with the father's consent.

B. The Trial Court Properly Found Adequate Cause Based On The Grandparents' Showing That It Would Be Detrimental For The Children To Be Removed From The Home Where They Have Lived For Many Years With Their Father's Consent.

Wilson makes much of the trial court's finding on revision that it "cannot determine issues based on written materials; trial is necessary." (CP 66) But the trial court's adequate cause orders merely recognize a determination on the "ultimate issue" whether placing the children with their father would be detrimental after years in their grandparents' care can only be made after it considered the evidence presented at trial. (RP 20-21: ". . . whether 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.") In doing so, and in finding adequate cause to proceed to trial on the Griecos' third party custody petition, the court properly honored whatever

presumption concerning Wilson's parental "rights" he claims is applicable.

A hearing for adequate cause is merely a threshold determination. The petitioners are not required to prove their case at this stage of the litigation. Rather, petitioners need only make factual allegations, which if proven, would overcome the presumption in this instance that the children should reside with their parent. *See* ***Marriage of Flynn***, 94 Wn. App. 185, 191, 972 P.2d 500 (1999).

In ***Flynn,*** the trial court erred by refusing to find adequate cause for the mother's petition for modification of a parenting plan when she "alleged facts, if proved at an evidentiary hearing, satisfy the prima facie case requirements" under the standards then governing relocation. 94 Wn. App. at 192. ***Flynn*** was a parenting plan modification action under RCW 26.09.270. Adequate cause requirements for third party custody actions are similar to those for parenting plan modification actions, as both require the petitioner to file an affidavit "setting forth facts supporting the requested order." *Compare* RCW 26.09.270 *with* RCW 26.10.032. In this case, the grandparents asserted facts sufficient to show that it would be detrimental if the children were ordered to return to the care of their

father, with whom they have not lived for nearly five years, as required by RCW 26.10.032.

The grandparents asserted that the children had not lived with their father since August 2002, when he moved out of the family home (CP 21), that they have lived with and cared for the children since May 2003, when their mother was disabled by a metastasized brain tumor (CP 45), and that the children have been in their sole care and custody since the mother died in October 2004. (CP 22) These facts are undisputed. The grandparents further asserted that the father had, as early as November 2004 and as recently as February 2006, consented to the children's integration into their household (CP 22), and that during this time the father chose to exercise very little residential time with the children. (CP 46)

The trial court properly found these facts were sufficient to support adequate cause to go to trial because moving the children could be detrimental. In making a final determination whether the children should be removed from their grandparents' home and placed in the custody of their father, the trial court recognized that it would need to consider more than written affidavits, as the parties dispute the circumstances under which the father has failed to

exercise his parental "rights" over the past five years. (*See* CP 66; RP 20-21) But there was nothing either extraordinary or legally incorrect about this recognition that factual determinations should be made after trial.

If anything, the trial court's order was to the father's benefit, as the courts of this state have shown wide (and questionable) latitude in allowing trial courts to make factual determinations on conflicting affidavits in family law cases. *See* ***Rideout***, 150 Wn.2d at 351-52. While the trial court made no specific finding of detriment in its adequate cause order on revision, it sustained the commissioner's finding of detriment by denying the father's motion for revision. (CP 65-66; RP 20-21) Contrary to petitioner's argument (App. Br. 4), the commissioner's findings therefore must be considered on review. *See* ***State ex rel. J.V.G. v. Van Guilder***, 137 Wn. App. 417, 423, ¶ 9, 154 P.3d 243 (2007) (when the trial court denies a motion for revision, as the trial court did here, "it adopts the commissioner's findings, conclusions, and rulings as its own"). Petitioner misplaces his reliance on ***Marriage of Dodd***, 120 Wn. App. 638, 644, 86 P.3d 801 (2004) (App. Br. 4), for the proposition that the commissioner's ruling is irrelevant; in ***Dodd***, unlike here, the trial court revised the commissioner's ruling and the

only order on review was that of the trial court. 120 Wn. App. at 643.

The trial court properly considered the potential detriment to the children that would result from removing them from the care of their grandparents, with whom they have lived for the past five years. "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 award of custody to father would be detrimental to child). Under these circumstances, where the petitioners made a showing that they had had physical custody of the children for a significant period of time with the parents' consent, the trial court properly found that the grandparents made a prima facie showing that warranted trial on their third party custody petition.

C. The Trial Court Properly Found Adequate Cause Because The Children Had Not Been In The Physical Custody Of Either Parent For A Significant Period Of Time.

Wilson's claim that the trial court erred by finding adequate cause "merely [because the grandparents] have physical custody" (App. Br. 8) misrepresents the trial court's ruling. The trial court did not just find that the children were in the grandparents' custody and not in the custody of either parent, but also that a prima facie case had been presented that removing the children after years in their care could be "detrimental" to the children. (*See* CP 64; RP 19-21) In any event, the grandparents established adequate cause based on a plain reading of the relevant statute because they alleged sufficient facts to prove 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." RCW 26.10.032(1) (emphasis added).

RCW 26.10.032 was enacted in 2003 to establish a threshold adequate cause procedure before third party custody cases could proceed to trial. (*See* House Bill Report 1720, House Bill Report 1878) The statute followed this court's decision in ***Custody of Nunn***, 103 Wn. App. 871, 14 P.3d 175 (2000), in which

Judge Kennedy described the dangers of proceeding with a third party custody action without first making an early threshold determination whether the petitioners have "standing" to pursue custody:

> [T]he failure of the parties and the trial court to focus on the question of [the aunt]'s standing to bring this custody proceeding resulted in months of irrelevant inquiry by the guardian ad litem into the relative merits of the mother and aunt as prospective custodians, a five-day trial, an erroneous custody order, and this appeal – not to mention unwarranted disruption of the parent-child relationship of [the mother] and her son, and the resulting heartache to each of the them.

Nunn, 103 Wn. App. at 873-74.

Wilson mischaracterizes the facts of ***Nunn*** by claiming that it is similar to this case because the child was in the custody of his aunt when she filed her petition for third party custody (and, not incidentally under the facts of that case, for control of the child's anticipated estate). (*See* App. Br. 6) That is not true. In ***Nunn***, the aunt filed her petition for third party custody of a child who was at the time still in the physical custody of both parents. The child lived primarily with his father, who died two days after the petition was filed, but also lived with his mother for two or three overnights each week. ***Nunn***, 103 Wn. App. at 874-75.

Unlike the grandparents in this case, because the parents had "physical custody of the child," the aunt in ***Nunn*** brought her third party custody petition alleging that neither parent was a suitable custodian:

> [A] nonparent lacks standing to seek custody of a child, as against a fit parent *who has physical custody of the child.* The allegation of parental unfitness required by RCW 26.10.030 thus presents a threshold issue that should be addressed as early in each nonparental child custody proceeding as may be practicable in all the circumstances of the given case.

Nunn, 103 Wn. App. at 873 (emphasis added). The aunt alleged that the mother in ***Nunn*** was unfit because she was an alcoholic and a prostitute. 103 Wn. App. at 875. Given these allegations, the ***Nunn*** court held that the threshold inquiry should be whether the non-parent petitioner can prove standing to bring the action by producing "substantial evidence to support the allegation of parental unfitness by which he or she gained entry to the courthouse in order to file the petition." 103 Wn. App. at 882.

There was in fact no evidence in ***Nunn*** that the mother continued to engage in the type of conduct alleged by the aunt that might have proven the mother's unfitness, and thus the aunt could not meet the threshold determination. 103 Wn. App. at 885. The consequence of the trial court's failure as a preliminary matter to

examine the aunt's claims of unfitness was exacerbated by its reliance on a parenting evaluator's "best interests" analysis under the criteria of RCW 26.09.187 to conclude that the aunt was a "better" custodian for the child. ***Nunn***, 103 Wn. App. at 883-84.

The trial court here committed none of the errors addressed in ***Nunn***. Under the plain language of RCW 26.10.032, the grandparents were not required to prove the father's unfitness, or that he was not a suitable custodian, because they had shown that the children were not in his physical custody:

> 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). ***Nunn*** does make clear that, contrary to petitioner's argument (App. Br. 8-12), a non-parent's "standing" to seek custody is the relevant inquiry in establishing adequate cause in a third party custody action. Gaining "entry to the courthouse," ***Nunn***, 103 Wn. App. at 883, is of no consequence unless a third party custodian can proceed to trial on the merits. A non-parent's "standing" to proceed to trial is properly established under the

statutory criteria of RCW 26.10.032, which authorizes the third party custody action to proceed to trial if "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." (emphasis added)

The fact that the children are not in the custody of either parent, through no action of the State, is clearly relevant in determining whether to allow a non-parent to pursue a third party custody action to trial. Allowing a third party custody action to proceed based on such a showing does not "set the bar far too low." (App. Br. 4) In fact, this court has already distinguished the standard that must be met when a third party seeks custody of a child who is in the custody of a parent versus custody of child who does not reside with either parent. When the child is not in the custody of either parent, the third party need not show that the parents are unfit, but only that awarding them custody is in the best interests of the child:

> If the child is in the custody of a parent, to gain custody the petitioner must establish that the parent is unfit, or that continuing to reside with the parent would "detrimentally effect [sic] the child's growth and development." If 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."

Custody of S.H.B., 118 Wn. App. 71, 79, 74 P.3d 674 (2003), *affirmed by* ***Custody of Brown***, 153 Wn.2d 646, 105 P.3d 991 (2005).

When, as here, there is evidence that a parent has voluntarily relinquished custody to a third party for a significant amount of time, the continued welfare of the child becomes a fit subject for consideration by the courts. *See* ***Allen***, 28 Wn. App. at 648; ***Stell***, 56 Wn. App. at 369; *see also* ***Brown***, 153 Wn.2d at 654 (trial court does not infringe on the parents' fundamental rights by allowing a third party to pursue custody when children are not in a parent's custody). ***Nunn*** itself clearly recognizes this principle, carefully limiting its reasoning to circumstances where a parent has not voluntarily relinquished custody. *See* 103 Wn. App. at 882: "Both parens patriae power and police power provide the state with the authority to act to protect children lacking the guidance and protection of fit parents of their own." (citations omitted) A parent who voluntarily relinquishes custody has withdrawn his "guidance and protection," and the State if called upon then has the authority and obligation to insure that the welfare of his children are

protected by entertaining a third party custody action, in order to give legal effect to the "family entity" created by the parent's acquiescence in non-parental custody.

Detriment can clearly arise from removing a child from his home to give custody to an otherwise fit parent. The importance of custodial continuity was recognized by the legislature by its enactment of RCW 26.10.190(1), which requires the same high burden of proof to modify an existing third party custody arrangement as in parenting plans between parents. RCW 26.10.190(1) (third party custody orders are subject to the same high standards as set forth in RCW 26.09.260); *see also* ***Allen***, 28 Wn. App. at 648 (acknowledging that an award of custody to stepmother allowed the child to maintain the family unit formed on his father's marriage to the stepmother).

Our legislature and courts have repeatedly recognize the importance of custodial continuity and the detriment caused by its disruption. *See* ***Marriage of Shryock,*** 76 Wn. App. 848, 850, 888 P.2d 750 (1995) ("Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification"); *see also* ***Marriage of Thompson,*** 32 Wn. App. 418, 421, 647 P.2d 1049 (1982) ("the

stability of child's environment is of utmost concern"). The fact that a child's residential arrangement is not one established by court order does not mean it deserves any less protection. For purposes of modification of parenting plans, for instance, adequate cause is established when "the child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan." RCW 26.09.260(2)(b).

This basis for modification reflects the significance placed on where the child "views" his "established home," regardless of court orders (or presumptions of parental "rights") establishing his home elsewhere. *See* ***Timmons v. Timmons***, 94 Wn.2d 594, 601, 617 P.2d 1032 (1980) ("the children's views as to where 'home' is, and whether the environment established at each parent's residence is permanent or temporary are significant in determining whether 'consent' and 'integration' are shown); ***Thompson v. Thompson***, 56 Wn.2d 244, 352 P.2d 179 (1960) (reversing an order placing child with father when the child had established himself at his mother's home despite an original custody order providing the child live with his grandmother).

The trial court properly considered the fact that the children had not been in the physical custody of either parent for a

significant period of time in finding adequate cause had been established to proceed with the grandparents' third party custody petition. This court should affirm the trial court's order establishing adequate cause.

D. Dismissing The Third Party Custody Action Would Leave The Children In A State Of Legal Limbo.

Showing far more regard for his supposed "rights" than for his children's interests, Wilson demands dismissal of this action even while claiming that he does not intend to relocate the children "against their wishes or interests." (CP 81) If this court were to reverse the trial court's order finding adequate cause and dismiss the grandparents' third party custody action, the children will be left in limbo. The children will presumably remain in the care of their grandparents, but there will be no way for the family to protect and formalize the current custodial arrangement.

The father claims he objects to formalizing the agreed custody arrangement so that he can retain "legal control." (CP 81) However, a third party custody order will not deprive Wilson of whatever "control" over the children his own actions, and the children's interests, justify. The third party custody statutes contemplate that parents will retain legal rights. *See* RCW

26.10.150 (parents shall have full and equal access to education and medical records of child absent a court order to the contrary); RCW 26.10.160 (parent not granted custody of child is entitled to reasonable visitation rights). The father's parental rights will not be terminated, and a third party custody order can accommodate his interests while formalizing the custodial arrangement for the children that the father has already agreed is in the children's best interests. (CP 17) For instance, an order establishing the father's visitation rights could allay his claimed (but unfounded) concerns that he was somehow prevented or discouraged from visiting the children regularly. (*See* CP 80)

Dismissing this third party custody action outright, on the other hand, would leave the parties (and more importantly, the children) in an untenable situation, utterly dependent on the father's assertion of parental "rights" despite his demonstrated failure to fulfill attendant parental responsibilities. This court should affirm the trial court's order allowing the grandparents to proceed to trial on their third party custody action so that a parenting plan that is in the best interests of the children and preserves the rights of the parties as the children's custodians and parent can be established.

IV. CONCLUSION

The trial court did not abuse its discretion in finding adequate cause to proceed to trial under RCW 26.10.032. The children have not resided with their only living parent for the past five years. Instead, with the father's written consent and agreement, the children have resided solely with their grandparents since their mother's death three years ago. The trial court properly found that adequate cause was established to proceed to trial on the grandparents' third party custody action. This court should affirm the determination of adequate cause and allow this third party custody action to proceed to trial on the merits.

Dated this 7th day of September, 2007.

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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 September 7, 2007, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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Tara D. Friesen

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