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DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 284450

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JAN 25 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Spokane County Superior Court Case No. 08-3-00010-7
The Honorable Linda Thompkins
Superior Court Judge

In Re the Custody of SL
AARON LITTELL, PETITIONER

V

EDNA MICHELE LITTELL, RESPONDENT

PETITION FOR REVIEW TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

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Statement of Grounds for Review

I. Nature of the Case and Decision:

This case is an appeal from the Superior Court of Spokane County of a custody order under RCW 26.10, the non-parental custody statute, and Division III of the Court of Appeals which upheld that ruling.

Mr. Littell, the Petitioner, is the natural father of the subject child, SL. [RP 14 line 23-25] The child's mother is Sara Ann Daniels, and she was not served although she was a party to the action. [RP 1 line 11-25] Mr. Littell did not waive Ms. Daniel's service. [RP 2 line 1-4]

In 2002 Mr. Littell was having difficulty with his daughter in California because she was acting out, lying, hurting herself, threatening other children, and stealing. [RP 19 line 2 to p.22 line 1] A California schoolteacher for the child filed a complaint with their state's CPS and an investigation began regarding these concerns. [RP 19 line 9 to p. 20 line 25]. Mr. Littell was so concerned about these problems that he made a list of SL's problems, which seemed endless. [Id.] Mr. Littell did not want SL to end up in the "CPS system" so he decided to talk to his mother in Spokane and see if she could help him with his daughter. [RP 22 line 2 to p.23 line 23] The Petitioner/Respondent herein agreed to help him with his daughter's problems by allowing her to come live with her in Washington. [RP 142 line 20 & p. 147 line 2-7] The father testified that he told his mother that he was only temporarily sending SL up to her in Spokane. [RP 23 line 2 to p. 26 line 24] Mr. Littell even drafted a

“temporary” agreement with his mother outlining this change in her care and the parties agreed and SL came up to her grandmother in December 2002 to live. [Id.] Additionally, he indicated that his mother also agreed with his plan to remove SL away from the California CPS, as well as why that was important. [RP 52 line 1-15]

With the knowledge of the move of SL to Spokane, California CPS dropped their investigation. [RP 54 line 7 to p.55 line 21] Between the time the father sent SL up to Spokane and the summer of 2006, he was only able to see his daughter a few times. [RP 56 line 22 to p.66 line 22] There are disputes about why this lack of contact occurred, which included testimony from the natural father that the grandmother refused or stood in the way of allowing the father’s contact, along with the high cost of travel. [Id.] SL went to school and counseling in Washington and eventually stopped having problems, although it was not right away. [RP 89 line 4-21]

Approximately 1½ years after SL came up to Spokane the father and grandmother started becoming embroiled in arguments about how often he could see or have SL during the summer. [RP 57 line 13 to p.60 line 18]. In the summer of 2006 the father and grandmother had discussions about SL returning to him but according to him, she would not respond. [RP 41 line 9 to p.42 line 8]. In 2007 the father and the grandmother had some serious arguments again about his desire to spend more time with SL and now possibly terminating the temporary custody agreement and eventually with the grandmother agreeing SL would be returned. [RP 60 line 19 to p. 61 line 14] In 2007 the father tried to have SL again but was put off by his mother saying that SL was going on a Wyoming vacation instead; eventually, the father found out later that the trip to Wyoming never really occurred. [RP 63 line 14 to p.66

line 2] With the Wyoming fiasco in mind, Mr. Littell now felt he could not trust his mother with SL and especially in following their temporary custody agreement. [RP 66 line 3-20] He also began to be nervous about whether his mother would let SL return to his care as they agreed. [Id.] By the end of the summer 2007 these difficulties in communication became worse over a series of phone calls until he told the grandmother he wanted SL back in his care. [RP 69 line 16 to p.70 line 7]. By December 2007 nothing was resolved with regard to SL and the father flew up to Spokane, went to the grandmother's home and in writing terminated any agreement that they had to allow SL to remain with the grandmother. [RP 69 line 16 to p.70 line 7]. The record is not clear from trial, but the grandmother alleged that father then took SL back home with him to California at that time. From that point on SL was with him in his care, until he was ordered to return SL to Spokane and the grandmother's care. [CP 3-8].

After the child was back in the father's care in California, in 2007 the grandmother filed a RCW 26.10 action and requested emergency orders, adequate cause, and temporary orders. [CP 1-8] Her Petition, which did not mention detriment as a basis, nor that the father was unfit, was filed January 3, 2008. [Id.] She did plead that SL had been basically living with her in Spokane due to problems in California and that the grandmother was fearful he would not provide proper schooling for her. [Id.] There was no affidavit of service in the file showing when Mr. Littell was served with this Petition, therefore there was no way to tell when either the 60 days for default or the adequate cause motion was to run. See CP generally.

At the time of filing the Petition, the grandmother also presented a CR 65 motion to the Spokane County Exparte Commissioner; this motion requested that the Adequate Cause hearing be shortened to 20 days. Without having any service on the father, the grandmother apparently convinced the Exparte Pro Tem Commissioner to shorten the 60 day out of state time limit for the adequate cause hearing to 20 days from the date of filing (not service), setting it on January 25th, 2008 in the exparte show cause order. The Pro Tem Commissioner also signed emergency orders requiring the natural father to fly up to Spokane to show cause why custody of SL should not go to the grandmother. [Id.]

The Adequate Cause hearing was held on February 1, 2008. [CP 12-13]. Temporary Orders were entered ordering that the child remain in Spokane with the grandmother and gave the father substantial parenting contact in the summer of 2008. [CP 14-15] More specifically the Adequate Cause order states that adequate cause was found, and that "the child has not been in the Respondent's care since 12-02, and/or there is adequate cause to determine if the child's growth and development would be detrimentally affected by placement with the Respondent" even though the Petition did not suggest that the child was in a detrimental situation in California. [CP 12-13 & 3-8]. The court also orally ordered that a GAL be appointed for the child, however, that was never done.

After the temporary orders were entered the father complied and brought the child to the paternal grandmother in Spokane; he then took his summer parenting time in California where he testified that SL did very well in California with her stepmother and stepsiblings, and it was without incident. [RP 70 line 19 to p.71 line 7]. The

grandmother did not rebut this evidence. [RP generally]. Just before trial the father brought SL up to Spokane so that she could see her grandmother before a decision was made regarding her permanent custody and the grandmother's counsel wanted her to visit with her counselor Dr. Brennan. [RP 103 line 1 to p.104 line 11]. Dr. Brennan did not testify at trial, in fact no expert testified at trial.

At trial, the grandmother did not show that there were any current problems with the child's environment in California, instead her testimony focused on how SL came up in 2002 and the father's contact since then. [RP 142 line 16 to p. 224 line 20]. The only thing that the Petitioner did was show an old 2002 "problem" list, drafted by the father, of the child's previous difficulties as a measure and proof of why she should be placed with her in Spokane. [Id. & RP 19 line 9 to p. 20 line 25]. This list did not reflect any current problems in 2007 or 2008. [Id.] The Petitioner's counsel also tried to have the court find that the grandmother was the child's defacto parent, but that was denied. [RP 274 line 5 to p.275 line 11] [CP 52-57]. However, the trial judge did find that it was in child's "best interests" to be placed with her grandmother, and that the Respondent did not satisfy his burden of proof to show that there were no longer any problems down in California. [CP 25-42] The court also did not find that the father was unfit. [Id.]. The trial judge also indicated in her oral ruling that it took "notice of the testimony through the experts and the exhibits that [SL] was having a difficult time and anger and all sorts of problems were a part of her world", in spite of the fact that no experts testified at trial. [CP 37 line 11-17]. Neither did a GAL provide a report as was contemplated in the adequate cause hearing by the court commissioner.

A point of emphasis in this Petition for Review is that the grandmother showed no evidence that proved that anything that was in the child's history had any current applicability. Because those facts were already established in history, the father was required to basically disprove the notion that his daughter should stay with his mother in Spokane. The entire burden of proof was placed on his shoulders, to basically prove that his daughter should now go with him, even though she had done well during the temporary order phase of the case and there was no evidence that the same problems existed as before. The child now lives here in Spokane, by court order/decre. [CP 47-66].

II. Reasons why review should be granted:

- A. There are conflicting Appellate Court decision on the application of RCW 26.10 law.
- B. The trial court placed the initial burden of proof on the Respondent, to disprove that there will be a detriment to the child if she was placed with him in California in complete contradiction to the mandates of the case of *In re Custody of Shields, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006).*
- C. It was improper for the trial court to use as the standard of custody the child's "best interests", again, in complete contradiction to previous RCW 26.10 actions.
- D. The trial court found standing for the grandmother, even though Mr. Littell was fit and had the child in his care when the action was filed.

- E. A determination of Adequate Cause based on a Petition which does not state the basis that the court used to determine this standard is inconsistent with past Supreme Court rulings.
- F. There were substantial due process and procedural flaws in this matter which should have been cured before Adequate Cause was found.
- G. The trial court used standards and cases from RCW 26.09 case law (by analogy) in its decision to find adequate cause.

III. Grounds for Review:

- A. There are conflicting decisions in two different Appeals court divisions on some of the issues faced in this case.

Division III of our Court of Appeals and Division I have conflicting rulings on the interpretation of the new adequate cause statute RCW 26.10.032. Division III has ruled in the case of *In re custody of BJB & BNB v. Barrett 2008-WA-0812.123*, that the lower courts cannot and should not use RCW 26.09.270 rulings by analogy, in their application of this new statute, since these are rulings between two natural parents and RCW 26.10 cases are completely different, being between a natural parent and non-parent. Division I however, has said exactly the opposite, and even used RCW 26.09.270 cases by analogy in their interpretation of the new RCW 26.10 adequate cause statute. *See Grieco v. Wilson; 2008-WA-A0602.001*

One example of how that is important in this case is when we look at the Petitioner's allegations in support of adequate cause. She alleges a laundry list of history about the child, but never alleges "actual detriment", however, she did allege that the child (like Division I) lived with the grandmother in Spokane. In fact the Adequate Cause

order itself says that it was because the child has not lived with father, and/or there is adequate cause to see if there is detriment, leaving the only real fact at the time of Adequate Cause to be that the child has lived with the grandmother. In further example of this conflict of decisions, Division III stated, "The fact that the parties agreed the children were not in the custody of either parent gave rise to an undisputed basis to find adequate cause under the statute." See *Barrett supra*. However, Division I stated clearly that, "[b]ased 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 non-parental 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." See *Grieco, supra (emphasis added)*.

As can be seen, Division I says that it is insufficient that a child is in the custody of the non-parent, and Division III says that that is all that is needed to find adequate cause under a RCW 26.10 petition. *Id. and Barrett, supra*. Additionally, Division III states that cases on adequate cause under RCW 26.09 are inapplicable, but Division I state that RCW 26.09.270 cases should be referenced to see how to apply this new statute. This is clearly a conflict in the law in this state between divisions of the courts of appeals, and makes it impossible to reconcile the facts and the finding of adequate cause in this case, as well as brief the concepts without referring to the Division's inclinations.

To further complicate this matter, Division III appears to take a "substance over form" approach to the Adequate Cause declaration, by looking through the fact that the

judge appeared to use the best interest standard. However, they also said, "Adequate cause in these cases thus requires something more than prima facie allegations" that are required in a RCW 26.09 action. *Id.* Whereas Division I actually used RCW 26.09.270 cases to justify their conclusions, but did not go beyond the pleadings. They actually denied adequate cause in *Grieco*, and found that because the Petitioner did not actually plead detriment, his entire case should be dismissed, which is completely opposite of what Division III, and Justice Stephens ruled.

Mr. Little cannot either properly brief the issue of adequate cause or argue his position without offending either Division III or Division I on that issue. This is also a threshold and important issue given the facts in this case, as they are virtually identical to the Division I case. This case appears to fall under the guidelines of RAP 4.2(a)(3); review should be accepted by this court.

- B. The Appellate Court's decision conflicts with the ruling in *In re Custody of Shields*, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006), in that they placed the burden of proof on him, an otherwise fit parent, to show that the problems with his daughter no longer existed, even though these facts and problems were several years old.

The Supreme Court in *Shields*, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006) found that it was error for the trial court to require that a natural parent prove that their child would not be detrimentally affected by placement with them, basically misplacing the burden of proof in such cases. They specifically indicated that a RCW 26.10 trial court must not place the burden on a fit natural parent to show that they will not act in the best interests of their child. They specifically said in *Shields*, at page 147-148,

Second, and more troubling, instead of appropriately applying the presumption that Harwood, a fit parent, will act in the best interests of her child,

the trial court applied an opposite presumption against Harwood. The trial court said, "[t]he reasons asserted for separating him [C.W.S.] from his siblings [to live with his mother] do not appear to be compelling in light of the totality of the circumstances." CP at 248. Thus, the trial court required Harwood to provide evidence of "compelling reasons" to gain custody of C.W.S., her son.

To justify placing the burden on Harwood, the trial court relied on inapplicable case law and cases that have been overruled. For example, the trial court cited both *In re Marriage of Little*, 26 Wn. App. 814, 614 P.2d 242 (1980), *rev'd*, 96 Wn.2d 183, 634 P.2d 498 (1981); and *Smith v. Frates*, 107 Wash. 13, 180 P. 880 (1919), for the proposition that a court can separate siblings in a custody dispute if it only finds "compelling reasons" for doing so. However, both of those cases involved custody disputes between two parents, not a custody proceeding involving a parent and a nonparent. Moreover, neither supports the proposition even in cases involving two parents.

In this case the Appellate Court approved Judge Tompkins' ruling to place the Appellant's child with her grandmother because he did not prove that he had resolved those problems that existed at the time that he transferred custody to the grandmother. The trial court basically abrogated the *Shields* ruling by stating that because of what happened in the father's home 6 years ago, and even though he was fit, that that was sufficient to support this change in primary custody without any proof provided by the grandmother that these facts still existed as problems. Put another way, the trial court basically said that Mr. Littell did not show that the facts that existed at the time that he placed his daughter in his mother's care, had changed. By making this the primary basis for her decision the trial court basically said that Mr. Littell did not meet his burden of proof to show that there were no longer any problems in California.

In addition to all this, the trial judge indicated that Mr. Littell was "fit" but that the history of care from when he did have his daughter, previous to being with her grandmother, showed that he could not provide a current proper home, or at the least supported a change of custody to the grandmother. This ruling came in the face of the

admission by all parties that Mr. Littell sent his daughter up to Washington, with his mother's approval, to get her out of a bad situation. Further, there was no evidence provided by the grandmother that there were still problems in California from 6 years ago. What the facts appeared to show was that the child was likely over any problems that she had had in California prior to the petition being filed, since, as in the *Shields* case, she did very well with the father during the interlocutory period. To carry the Court of Appeals and Trial Court's ruling to its final conclusion and application in future cases would be to say that every parent that has a child that is out of control and sends them to either a private reform school or to a relative for help, is doing so to the detriment of that child and then they have the burden to show that the child should be returned to their care, even though the helping relative has shown nothing that indicates that those problems still existed. Basically, that parents should never turn to their family for help with their children for fear of losing custody of the child.

As a final comment, it is also obvious that Mr. Littell and his mother made these arrangements in the best interests of his daughter, with the grandmother agreeing all the way that this was a proper step. To lay this entirely on Mr. Littell's door step as showing that he now cannot take care of her is to completely forget that the grandmother was complicit in this arrangement and makes Mr. Littell responsible for everything without proof of such a conclusion. This then could have only led to the presumption that Mr. Littell, a fit parent, had to show that he now could care for his daughter, almost exactly like the trial court did in *Shields*. Mr. Littell feels that this shows why his Petition should be accepted for review by this court, since the Appellate Court seemed to completely misapply the *Shield's* holding regarding burden of proof in these cases.

To reiterate, the grandmother simply showed why the granddaughter came up to Washington by using the "laundry list" of her problems down in California from years gone by, without dealing with her progress and whether she still had problems. Basically Mr. Littell had to show that these facts, that existed before the Petition was filed, no longer existed. This is exactly what the trial court did in *Shields* and is not the approved way to apply the burden of proof requirements in RCW 26.10 action. If this is not rectified by this court, the *Shields* ruling on burden of proof will have little or no meaning in these cases.

This is a case also involves a fundamental and urgent issue of broad public importance. It appears that the trial courts is misreading the *Shields* mandates in such cases, and construing the proof requirements to lean heaviest on those parties the Supreme Court never intended them to fall. As such, not only is the mandate to not use the lower "best interest" standard being misapplied, the burden of proof requirements were again ignored. Division III of the Court of Appeals is still presuming that a natural parent has the duty to prove that there are no longer any problems in their homes. This misapplication of the *Shield's* case needs to be specifically addressed as a very important public policy issue.

- C. The reduction of time by exparte motion to hear the adequate cause issue is of significant public policy importance, since it basically changes the entire format of how to present and file cases involving a change of custody, as such it has broad public importance on the issue of proper notice and due process rights.

It is clear that the Petitioner did not file a motion to shorten time for hearing the adequate cause matter in this case from 60 to 20 days. A review of the case record clearly shows that no such shortened time motion was ever filed. CR65 also states that the

attorney must certify the efforts he has made to contact the other party before trying to obtain ex parte orders. The Petitioner's counsel did not do this.

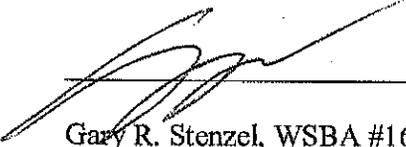
Actually, there is no evidence of why the ex parte court simply hand wrote that the time for a adequate cause hearing was shortened; it appears to be an after thought, not sought by the Petitioner, but recommended by the pre tem commissioner. In either case, the time allowance required under CR 4 & 4.1 should not have been reduced. The Supreme Court has made it clear that service of the summons is the first step in any procedure after filing, and that the 20 day rule, or rule regarding the date for default is to be followed as a bright light rule. It is not 19 days, it is 20 days; in this case it should have been 60 days. *See e.g. Troxell v. Rainier Public School Dist. No. 307, 154 Wn.2d 345; 111 P.3d 1173 (2005).*

RCW 4.28.180 also requires 60 days service before a default can be entered against a non-resident respondent. There is no statute or court rule that allows the court to reduce the amount of time a non-resident has to respond to such actions, and if there is need for such a rule, it is the place of the Supreme Court to make that decision. CR 6 allows for any "written motion" to be heard by a different time if ordered by the court, however, that same rule requires that such motions be served at least 24 hours before the time of the hearing. Again, the Supreme Court is the final arbiter of due process and court rule issues. Since this is a very important public policy and constitutional due process issue, it is important that they tell us if someone can reduce the time for hearing an adequate cause motion, under the circumstances of this case. This is especially true given the fact that no RCW 4.28.185 Affidavit of out of State Service was filed, putting in question the entire Service of Process and Adequate Cause orders.

D. The use of case law and standards from dissolution cases has not been approved by the Supreme Court, yet Division III of the court of Appeals seems to sanction their use in this case, causing a substantial conflict between what the courts have said is the standard of law in RCW 26.10 cases.

The Appeals Court in this matter upheld this ruling which in fact applied RCW 26.09 case law on both the determination of Adequate Cause (integration with consent – RCW 26.09.260). By doing this they abrogated the law in RCW 26.10 cases from the Supreme Court which clearly indicated that the standards from RCW 26.09 et seq. should not be used in a non-parent custody analysis. *See Shields, supra; and In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998)*. Although the trial court used many words in its oral ruling, it cannot escape the fact that it used the wrong standard from RCW 26.09 to make its ruling. However, since we have two competing Appellate Court rulings on the appropriateness of using such rulings in RCW 26.10 cases, this issue needs to be resolved by this court.

Respectfully submitted this 24th day of January 2010.



Gary R. Stenzel, WSBA #16974

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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III**

In Re:

**EDNA MICHELLE LITTELL,
Respondent,
and
AARON LITTELL
Appellant.**

No: 284450

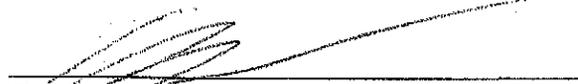
DECLARATION OF SERVICE

I, Gary R. Stenzel, being first duly sworn upon oath deposes and says:

That he is now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of eighteen years; that on the 25th day of January, 2010, affiant hand delivered a copy of the Notice of the Discretionary Review to: Allen Gauper, 422 W Riverside, Ste 824, Spokane, Washington;

Said address being the last known address of the above-named individual, and on said date personally delivered to the above addressed.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



Gary R. Stenzel

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Custody of:

No. 28445-0-III

SAMARA CHEYENNE DANIELS-
LITTELL,

Child.

EDNA MICHELE LITTELL,

Respondent,

and
v.

AARON ANTHONY LITTELL,

Appellant,

SARA ANN DANIELS,[†]

Respondent.

Division Three

UNPUBLISHED OPINION

Sweeney, J. —The natural father of a minor child appeals a superior court judgment awarding custody of the child to a nonparent (the child's paternal grandmother).

[†] Ms. Daniels is not a party to this appeal.

No. 28445-0-III

In re Custody of Daniels-Littell

The father first challenges the adequacy of the showing made by the nonparent to support her petition for a full hearing on custody and the court's decision to shorten the time for notice of that show cause hearing. But the petition ultimately proceeded to full hearing with evidence, argument, and a resolution by the trial court. So even if we passed on the propriety of the show cause procedure, there is no effective relief we could now provide. The court's decision to award custody to the nonparent is either correct or it is not correct, regardless of any flaws in the initial show cause procedure. The father also challenges the adequacy of the trial court's findings and conclusions to support the decision to award custody to the nonparent. He maintains that the court applied the wrong standard. We conclude that the court applied the correct standard (actual detriment to the child) and the findings here support the conclusions and ultimate decision to award the nonparent custody. We therefore affirm the judgment of the trial court.

FACTS

Sara Ann Daniels¹ gave birth to Samara in 1996. Samara lived with her mother until she was approximately two years old. In approximately 1998, paternity testing confirmed that Aaron Littell is Samara's father. Samara began to live full time with Aaron almost immediately after the paternity determination. In 2000, Aaron married a

¹ We use first names for clarity because some of the parties share a last name.

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In re Custody of Daniels-Littell

woman other than Samara's mother. Aaron gained custody of Samara in 2001. And in summer 2002, Aaron, his wife, and Samara moved to California. Samara's teacher reported concerns about Samara's behavior to California's child protective services agency shortly after the move to California. In December 2002, Aaron and his mother, Michele,² who lives in Spokane, agreed that Michele would take custody of Samara until the end of the 2002-03 school year.

At the time Michele and her partner took over care of Samara, Aaron provided Michele with a list of Samara's behavioral problems. The list set out nearly 50 behaviors that had intensified since Samara's move to California. They included self-mutilation, frequent mood swings, extreme lack of conscience, pathological lying, depressed moods, stealing, compulsive behavior, and sleep disturbances.

Michele placed Samara in counseling and enrolled her in public school in Spokane. Her behavior improved. Samara's mother visited Samara in Spokane in late 2002 but has had no contact since. Samara returned to Aaron and his wife in California in July 2003. Later that summer, Aaron informed Michele that it was not working out for Samara at his home in California. Michele and her partner drove down to pick up Samara

² Although the Respondent's Brief refers to Edna Michele Littell as "Edna," the parties refer to Ms. Littell as "Michele" throughout the trial transcript. Report of Proceedings (RP) at 1-301. And Ms. Littell introduces herself as "E. Michele Littell" at the beginning of her testimony. RP at 141.

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In re Custody of Daniels-Littell

and returned to Spokane in time for her to start second grade in September 2003. Aaron next visited Samara in Spokane in December 2006. Aaron maintained regular telephone contact with Samara throughout the time she lived with Michele.

The relationship between Aaron and Michele began to deteriorate by 2006. Aaron says that Michele resisted his efforts to have Samara visit or return permanently to California. In December 2007, Aaron travelled to Spokane, picked up Samara, and took her back to California.

Michele petitioned for nonparent custody on January 3, 2008. Michele did not file an affidavit in support of her petition. Her petition represented that she wanted custody of Samara because she was concerned about the child's wellbeing. She also alleged that Aaron removed Samara from Michele's care primarily to avoid paying the increased child support award that the State was seeking in fall 2007. Michele asked the court to shorten the time for the adequate cause hearing from 60 to 20 days. The court did so. But the court later continued the adequate cause hearing, at Aaron's request, until February 1.

A court commissioner found adequate cause to proceed to trial and ordered Aaron to return Samara immediately to Spokane. The court commissioner also ordered the appointment of a guardian ad litem, but no guardian ad litem was ever appointed. The court commissioner further provided that Aaron was allowed to have visitation with Samara during spring break and summer 2008. The parties cooperated and Samara returned to California to stay with Aaron

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and his wife and Samara's step-siblings during summer 2008 prior to trial.

Aaron, Michele, Michele's long-time partner, and Aaron's father testified during the August 2008 trial. Aaron testified that Samara thrived during the time she lived in California just prior to trial in summer 2008. Samara also attended counseling when she was in California over summer break.

The court concluded that placing Samara with Aaron would detrimentally affect her and that it is in Samara's best interests to reside with Michele. Aaron appealed directly to the Washington Supreme Court. The Supreme Court determined that the case presented no novel legal issues and transferred it to this court.

DISCUSSION

Aaron assigns error to the court's decisions on the procedure used to find adequate cause for a full hearing on custody. He argues that the court improperly shortened the time for the hearing from 60 days to 20. And he argues that Michele failed to make the necessary statutory showing that the child is not in the physical custody of either parent or that neither parent is a suitable custodian. RCW 26.10.030(1). But even were we to assume that the preliminary procedure, necessary to warrant a full custody hearing, was flawed, the question is what we should do about it now.

This dispute proceeded to a full hearing. Both sides presented evidence. The court entered appropriate findings of fact and conclusions of law and a judgment that awarded custody of Samara to her

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grandmother, Michele. If that decision was legally supportable—the findings are supported by the evidence, and the findings support the court’s legal conclusions—then it makes no sense to reverse and remand for the statutory show cause hearing (RCW 26.10.032) to determine whether adequate cause for a hearing exists. They have already had a full hearing, and that hearing made it clear that cause exists. If, on the other hand, we conclude that the findings are not supported by the evidence, or that the court’s findings do not support the conclusions that ultimately result in the award of custody to the grandmother, then again it makes no sense to remand for a show cause hearing. We simply dismiss the petition and remand for entry of an order to return custody to the father. Our analysis of this preliminary procedural matter would be different if we were asked to review these preliminary decisions before the full custody hearing. But that is not the case here. Accordingly, we turn our attention to the hearing itself and the court’s judgment.

Aaron contends that the court applied the wrong standard—the best interests of the child standard. What standard the court applied and whether that standard was legally correct are both questions of law that we will review de novo. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.3d 1182 (2005). Likewise, whether the court’s findings of fact support the court’s conclusions is a question of law that we will review de novo. *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007). Aaron does not challenge the court’s findings of fact, so

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they are verities on appeal. *In re Marriage of Knight*, 75 Wn. App. 721, 732, 880 P.2d 71 (1994).

First, our review of this record, including the court's findings, suggests that the court did not apply the "best interests of the child" standard rejected by the Supreme Court in *In re Custody of Shields*.³ In custody disputes between parents, a court determines the child's best interest by deciding which parent offers the child the better home environment. *In re Custody of Anderson*, 77 Wn. App. 261, 264, 890 P.2d 525 (1995). By contrast, in disputes between a parent and a nonparent, Washington law requires a heightened standard to determine whether to award custody to the nonparent. *Shields*, 157 Wn.2d at 142. The heightened standard follows from a parent's constitutional right to the custody of his or her children, as Aaron correctly maintains. *Anderson*, 77 Wn. App. at 264; *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981). Therefore, a nonparent seeking custody must establish either that the parent is unfit or that "circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Allen*, 28 Wn. App. at 647. "There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the 'best interests of the child' test. Precisely what might outweigh parental rights must be determined on a case-by-case basis." *Id.* at

³ *In re Custody of Shields*, 157 Wn.2d 126, 149-50, 136 P.3d 117 (2006).

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649. The fact that the form on which the trial court entered its findings uses the “best interests” language is not determinative. *In re Custody of A.C.*, 137 Wn. App. 245, 262, 153 P.3d 203 (2007), *rev'd on other grounds*, 165 Wn.2d 568, 200 P.3d 689 (2009).

The trial court here found:

When [Samara] was in an environment that provided the stability of regular school, activities, and a stable home, she was able to function at a high level and with a degree of academic and activity success. The petitioner has met her burden and has established that the respondent is not a suitable custodian. *There would be actual detriment to the child's growth and development, if placed with respondent.* The respondent's parenting history, from disputing paternity, moving forward with a pattern of turmoil, lack of real parenting history, coupled with the child's traumatic California environment with serious counseling and academic and acting out needs, and Child Protective Services' involvement, provides sufficient evidence of detriment.

Clerk's Papers (CP) at 55 (emphasis added).

Aaron argues that Michele failed to show that there are *still* problems with Samara in California and that placement with the father would be a detriment now. Br. of Appellant at 10. But there is no statutory or case law requirement that the detriment to the child be recent. The question is simply whether the court's findings that there will be actual detriment to the child are supported. *Allen*, 28 Wn. App. at 647. Aaron's factual arguments that Samara's problems while in his custody were in the past and, specifically, that substantial weight should be given to the testimony supporting that assertion are matters for the trial judge sitting as the fact finder. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 451, 177 P.3d 1152 (2008).

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We will not reweigh those factual determinations. *In re Disciplinary Proceedings Against Vanderveen*, 166 Wn.2d 594, 604, 211 P.3d 1008 (2009).

The evidence at trial showed that Samara originally came to live with Michele in late 2002 because, at the age of six, she exhibited nearly 50 serious behavioral problems while living with Aaron in California. Those problems included self-mutilation, frequent mood swings, extreme lack of conscience, pathological lying, depressed moods, stealing, compulsive behavior, and sleep disturbances. Those behaviors began to improve while she received one-on-one attention from Michele and gained regular access to counseling and other treatment. Samara returned to Aaron and his wife in summer 2003, and her behavioral problems resurfaced. Aaron asked Michele to take Samara at the end of the summer because it was not working out for Samara at his home. Back in Spokane, Samara thrived academically and socially in public school and engaged in extracurricular activities.

The trial court's findings carefully trace Samara's behavioral and mental health challenges, their relation to the detrimental circumstances Samara experienced in California, and her improvement while in Spokane. Aaron does not challenge those findings. The trial court also found that Samara's behavior regressed when she returned to California in 2003. And when Aaron brought Samara back to California in December 2007, "there was an overarching ambiguity as to whether the child should go to public school or should be home schooled." CP at

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55. The trial court reasoned that that ambiguity and the looming presence of Child Protective Services indicated that the detriment had not yet been resolved. The court also determined that Aaron is not a suitable custodian for Samara. These findings support the trial court's conclusion that placement with Aaron would result in actual detriment to the child. And that is all the showing the statute requires. *Allen*, 28 Wn. App. at 647.

We conclude that the court applied the correct standard. And any challenges to the show cause procedure were adequately resolved by the full hearing on the merits of the petition. We, therefore, affirm the judgment of the trial court awarding custody to Samara's grandmother, Michele.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Kulik, A.C.J.

Korsmo, J.