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IN THE SUPREME COURT OF THE STATE OF WASHINGTON BY ROMA [unclear] CENTER

No. 82237-9

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COA # 28445-0



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

APPELLANT'S REPLY BRIEF

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STATUTES AND COURT RULES

RCW 26.10.032. 1

I. FACTS

The Respondent in this appeal has suggested the following in their responsive brief:

1. The Appellant waived the adequate cause notice by arguing the case in the beginning;
2. The Appellant also waived the 60 days notice requirement for a nonresidents service of process;
3. The Appellant also waived the long arm statute requirements that a affidavit of out of state service had to be filed for the court to obtain jurisdiction;
4. The Respondent also implies that the Appellant waived the jurisdictional requirements of RCW 26.10.032 that the court must find that the child is either living with the nonparent at the time of the filing or the natural parent was unfit.
5. The Respondent was the proper person to be the custodian of the child because she was the "defacto parent" to Samara in this matter.
6. Finally, the Respondent provide an overturned case to support her position in this case on the finding of detriment, and specifically did not deal with the burden of proof of that detriment.

The Appellant contests these arguments where applicable.

II. ARGUMENT

A. Due process and jurisdictional issues can be raised at any time in the case, even on appeal.

The Respondent in this matter suggests that the Appellant waived his right to complain about the due process of his service by arguing the case and that now is not the time to deal with that issue. However, the general rule is that subject matter jurisdiction and authority to decide a matter may be questioned at any time in the proceeding. *See In Re Dependency of KNJ No. 61849-1-I, Consolidated with No. 62340-1-I, No. 62341-9-I (2009)*.

In this case, Mr. Littell received less than a third of the notice time period required under the statute. The notice he received was harmful to his case since it required him to respond in a condensed time period, and this was not only difficult from California, the time issue was critical in a custody case. For example, in this case the court ordered the child away from him and back to Spokane even before the 60 days was up in which he could have argued against adequate cause under *RCW 26.10.032*.

Ms. Edna Littell then states that he waived his concerns about due process by arguing the case in the beginning, citing *In the Matter of the Welfare of H.S. 94 Wn. App. 511, 973 P.2d 474 (1999)*, however, the *H.S.* case was a dependency case in which the parents had attended matters in the case over and over, and repeatedly litigated the issues in the case. Moreover the *H.S.* case has been primarily cited for the proposition that parents have a fundamental constitutional right to be around and raise their children, rather than the proposition primarily cited by the Respondent. *See e.g. In re the Welfare of: M.R.H. and J.D.F., No. 25703-7-III (consolidated with No. 25704-5-III No. 25705-3-*

III No. 25706-1-III (2009). To illustrate further the *H.S.* case cited the case of *In re A.W. 53 Wn. App. 22, 765 P.2d 307 (1988)* showing that their analysis of whether there was a due process violation depends on whether the complaining party had hearing after hearing in the case, not simply one hearing and then trial. The *H.S.* case is completely distinguishable from this case in that regard.

In contrast, all third party custody cases must follow the statute regarding adequate cause. *In Re Parentage of M.F.141 Wn. App. 558, 170 P.3d 601 (WA 2007)*. There is no indication in the statute that it can be waived. Nor do the statutes suggest it is proper to give a nonresident less than the 60 days notice of the pending Petition for custody. As they said in the case of *Lois Ashley v. Superior Court for Pierce County, 83 Wn.2d 630, 521 P.2d 711 (1974)*, that even though the court may change the way the service is made, there is no case that indicate that the basic time limits in the statute can change. They said, that although service may be made by mail, “[it] is important that the defendant should have the full 60 days from the date of receipt of the summons, prescribed by CR 4(e)(2) and RCW 4.28.180, within which to respond to the complaint if he wishes to do so.” The way it can be served can be waived but not the amount of time you give someone for response to an out of state summons. *Id.*; (See also *Ware v. Phillips, 77 Wn.2d 879, 884-85, 468 P.2d 444 (1970) (holding a lack of notice voids a judgment on due process grounds)*).

- B. The court did not find that Ms. Edna Littell was a defacto parent in either the oral ruling or the final paper work; it is therefore inappropriate for the Respondent in this matter, who also argued that the uncontested findings are a verity, to now say that this case was properly decided based on that concept when in fact that was not a finding of the trial court.

The Respondent has stated in her brief, "Edna Littell is Samara's De Facto parent, and as such, custody was properly awarded to her". The court specifically in writing and orally did not find that Edna Littell was a defacto parent to Samara; therefore, this statement is a completely unsupported position and argument by the Respondent in this matter and should not be considered. CP 25-42 and CP 52-57.

C. The Respondent has cited a case, which has been reversed by this court, as the law to follow on the issue of the basis to determine custody in third party cases.

The Respondent has cited the case of *Custody of A.C. at 137 Wn.App. 245, 153 P.3d 203 (2007)*, in support of her position that the court should uphold the trial court's ruling in this case of a finding of "detriment". That case has been overruled by the Supreme Court in the case of *Custody of A.C. _____ Wash. _____, 200 P.3d 689, (Wash.2009)*. The Supreme Court has indicated clearly in other recent RCW 26.10 cases that reliance on overturned cases can lead to strained, if not completely wrong results when important parental issues of constitutional proportions are at stake. *See Custody of Shields 157 Wn.2d 126, 136 P.3d 117 (2006)*. However, it would be inappropriate to not address the issue of detriment and this case. From Mr. Littell's point of view the court should look past the language of this one finding, and look at the overall determination in this case, where it will find that the trial court actually shifted the burden of proof so profoundly on to Mr. Littell as to force him to disprove that those detrimental things that had occurred some 5 to 6 years earlier were no longer still happening. RP142-229 The court did this in spite of the fact that the Petitioner did not provide any proof whatsoever that these things were currently happening. RP 142-229. This, and for other reasons cited

by the Petitioner should support a reversal of the trial court in this case.

Dated: 7-28-09



Gary R. Stenzel, WSBA #16974

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty to perjury pursuant to the laws of the State of Washington, that on the 28th day of July 2009, the foregoing document was filed with the Clerk of the Court and was delivered to the following persons in the manner indicated:

Allen Gauper	<input checked="" type="checkbox"/> Via Regular Mail
422 W Riverside, #824	<input type="checkbox"/> Via Fed Ex Overnight
Spokane, WA 99201	<input type="checkbox"/> Via Certified Mail
	<input type="checkbox"/> Via Facsimile
	<input type="checkbox"/> Hand Delivered

Dated this 28th day of July 2009.


