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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

No. 82237-9

COA # 28445-0

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

In Re the Custody of SL  
AARON LITTELL, PETITIONER

v.

EDNA MICHELE LITTELL, RESPONDENT

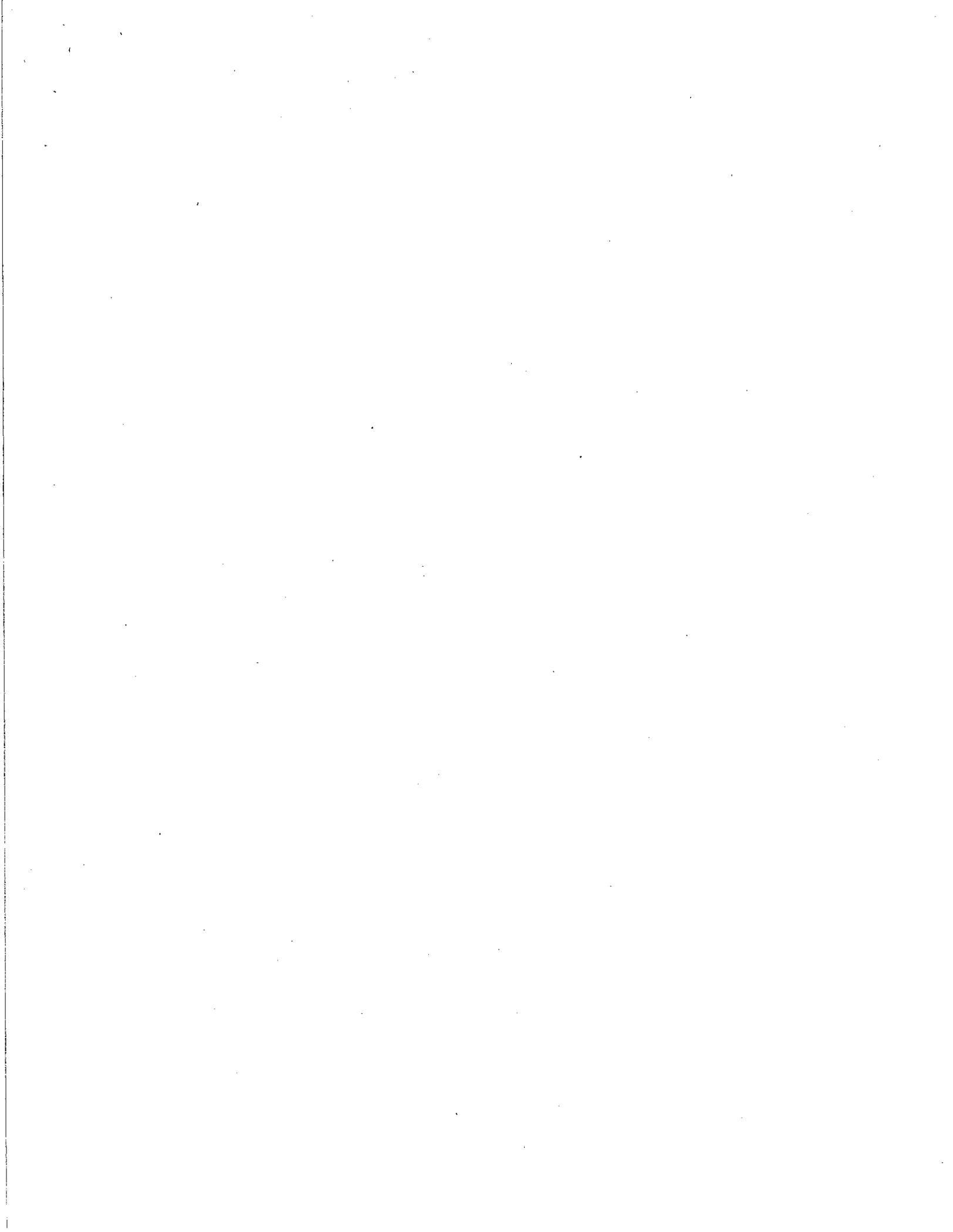
RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

This matter is a third-party custody action brought by Edna M. Littell, the paternal grandmother of Samara Littell. The respondent is Samara's father, Aaron Littell.

Aaron Littell, hereinafter referred to as Aaron, provided no care for Samara between her birth in April of 1996 and 1998, as his paternity was not known, nor had it been established. (RP 14) Between 1998 and 2001, he indicated she "basically" lived with him. (RP 15) Aaron relocated from Spokane, Washington, to the state of California, with Samara, in 2002 in search of a job. (RP 16) In December of 2002, because there had been a Child Protective Services referral made regarding Samara's living environment, he returned Samara to Spokane to live with Edna. (RP 21) While Samara had, prior thereto, never lived with her paternal grandmother, Aaron brought Samara to Spokane, they spent the night at Edna's home, and the next day he returned to California, leaving his six-year-old daughter with Edna. (RP 153) At the time of this transfer, Aaron provided to Edna a "list of behaviors" (Exhibit P-1) which indicated that Samara's following behaviors have increased and have gotten worse, such as self-mutilating, pathological lying, stealing, hordes and gorges food, triangulation with adults, false allegations of abuse, rages and explosive temper tantrums, oppositional behavior, racing thoughts, depressed

moods, lethargy, compulsive behavior, manipulative, unusual or bizarre thoughts and ideas, extreme decline in personal hygiene, soils self out of anger, spiteful and vindictive, etc. Aaron indicated that he did not want Samara to end up in the Child Protective Services and wanted to send her to Spokane, so she could get needed medical attention and one-on-one care. (RP 24-25) He had not sought the apparent necessary medical attention or one-on-one care in California. (RP 19-23) Between December of 2002 and December 2007, he had actual, physical contact with Samara for a total of about two and one quarter months, seeing her, in California, for approximately two months in the summer of 2003, and for approximately one week during Christmas 2006 in Spokane. (RP 29-31) Aaron admitted that he maintained regular phone contact with Samara. (RP 47)

During that 60 month period, he did not contact Samara's school teachers, her physician, dentist, extracurricular instructors, or any of her friends' parents. (RP 32-33) He indicated that he sent minimal amounts of money a few times. (RP 33-34)

On December 8, 2007, he, without forewarning, came to Spokane, summarily removed Samara from her school and her grandmother's care and returned with her to California. He apparently did not enroll her in

any school, rather seems to have home schooled her until January 21, 2008. (RP 38-39)

Edna Littell is Aaron's mother and Samara's grandmother. (RP 143) Edna indicated that Aaron sent Samara to Spokane, as he didn't want to lose his other children because of Samara, due to the Child Protective Services investigation. (RP 146) At the time she assumed the care, custody, and control of Samara, she had fully raised her children and was happily working as an electrician. (RP 147) She indicated it was odd that Samara would be sent up to Spokane to get "necessary treatment," as she had no special ability to seek and obtain medical/psychological intervention for a young child. (RP 150) She took over all of Samara's care, made all decisions on her behalf. (RP 152) She immediately started psychological treatment for Samara (RP 153) and noted that Samara, when she arrived in Spokane, was in "bad shape," (RP 154) and that she needed to simply stay with her until Samara literally came out from hiding. (RP 153, 156) She immediately enrolled Samara in school (RP 158) and maintained her availability until Samara had transitioned into school. (RP 182-183) It was her thought that Samara would be returned to her father's care in the summer of 2003, as her custody of Samara was not intended on being forever. (RP 161) However, in the summer of 2003, after spending two months with her, Aaron indicated that things were not working out,

Samara was lying, vicious, and mean. (RP 163) Thus, Edna drove to California to retrieve her granddaughter. (RP 164) She indicated that, between the summer of 2003 and December 2006, Aaron made no attempt to see Samara during vacations (summer, spring, Thanksgiving), and made no request for physical contact. (RP 166) Rather, he indicated he “wasn’t ready yet.” (RP 167) He did travel to Spokane during Christmas 2006 to see his father, who was dying/sick, and also saw Samara during that time. (RP 168) Edna indicated that she thought that the reason Aaron retrieved Samara in December of 2007 was due to the State’s request to increase his child support transfer payment from \$25 per month. (RP 175) He indicated, at that time, that he did not want to lose his family because of her (Samara). (RP 176) In terms of Samara’s needs, Edna indicated she needed to be wanted, nurtured, guided, understood, and accepted. (RP 188)

#### STANDARD ON REVIEW

Since the trial court has the “unique opportunity to observe the parties,” its custody decision will be disturbed only upon a showing of “manifest abuse of discretion.” *In Re Custody of Stell*, 56 Wn. App. 356, 366, 783 P.2d 615 (1989).

## ADEQUATE CAUSE HEARING

The court conducted an adequate cause hearing on February 1, 2008. (CP 12-13) It found as follows:

Adequate cause for hearing the petition has been established. The child has not been in 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 respondent.

In *Grieco v. Wilson*, 144 Wn. App. 865, 184 P.3d 668 (2008), the court stated:

The primary purpose of the threshold adequate cause requirement is to prevent a useless hearing. *In Re Marriage of Lenke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004).

Edna's motion for adequate cause essentially alleged that, between December 2002 and December 2007, Samara was in her physical care and custody, and that Aaron had little or no contact beyond telephonic. She alleged that she began counseling for Samara and counseling issues centered around the living environment prior to December 2002 stating:

There was harsh/inappropriate discipline, her stepmom had some psychological/psychiatric issues surrounding self-mutilation, and life in that household seemed to be quite bizarre.

She was concerned that removal from a traditional school environment into a home school environment would eliminate public scrutiny, to Samara's detriment. She alleged that the only reason respondent retrieved Samara was to avoid paying increased child support.

The Court of Appeals, in *Custody of BJB*, 146 Wn. App. 1, 189 P.3d 800 (2008), stated:

Under RCW 26.10.032(2) once adequate has been established, a show cause hearing is held to determine if the motion should be granted. It is then that the non parent must show the parent is unfit, or that placement with an otherwise fit parent would detrimentally affect the child's growth and development. See *Shields*, 157 Wn.2d at 142-43. Once adequate cause is established, then the court must use this heightened standard to determine if awarding custody to a non parent is proper.

The trial court, in an unchallenged Finding (2.6) stated:

Between December 2002 and December 2007, the child had not been in the physical custody of either parent.

and referred to Finding of Fact (R), which states as follows:

On December 8, 2007, the father appeared in Spokane, was concerned, and was previously contacted in California by the state as it relates to child support. He had been making regular telephonic contact with the child, but on December 8, he appeared in Spokane and forcibly took the child back to California.

A court's finding of adequate cause is reviewed for abuse of discretion. *Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2002) The court did not abuse its discretion, as it did not require the parties to participate in a useless hearing. The trial court affirmed the finding that adequate cause existed when it awarded custody to the third party petitioner, the paternal grandmother.

**THE TRIAL COURT APPLIED PROPER LAW TO THE FACTS**

The court, in unchallenged Findings of Fact (CP 52-57), squarely placed the burden of proof on petitioner, Edna. The court's unchallenged Findings (which are now verities on appeal – *Davis v. Dept. of Labor and Industries*, 94 Wn.2d 119, 615 P.2d 1279 (1980)) indicated:

Finding of Fact 2.7(H): (that the child's initial life was filled with)

[b]ouncing back and forth, court proceedings, and her living environment, as far as support and structure, was somewhat traumatic and chaotic.”

Finding of Fact (L):

During that somewhat turbulent period in California, the public school the child had begun to attend filed a report with California Child Protective Services concerning what appeared to be acting out in the child's behavior. No Child Protective Services charges were filed.

Finding of Fact (M):

There were very detrimental circumstances going on, and her needs were to immediately leave the state.

**Finding of Fact (N):**

The child left the state to avoid a Child Protective Services investigation.

**Finding of Fact (O):**

Between December of 2002 and December of 2007 the child was involved in school, received exceptional grades, was involved in regular counseling, participated in music, and had obtained health and dental care.

**Finding of Fact (P):**

In the summer of 2003 there was a mutual effort by both parties to place the child back in the home climate in California, but problems emerged again detrimental to Samara, requiring her to get out of that environment to come back to Spokane.

**Finding of Fact (V):**

Samara was neither with her mother, Sarah, nor her father, Aaron, at the relevant periods of time. Neither parent was a suitable custodian. It would not be suitable, not only at the time of filing this petition, but at the time of trial, as it would not be suitable environment, nor would the respondent be a suitable custodian in California. There is nothing but trauma and Child Protective Services involvement, with no understanding whatsoever of any of the conclusions that Child Protective Services came to. The child was twice placed in that environment and twice was required to move back to Spokane. The court takes notice that that

the child was having a difficult time, and anger, and all sorts of problems were a part of her world.

**Finding of Fact (W):**

When she 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.

**Findings of Fact (X):**

When the child was returned to California in 2003, it did not take any time whatsoever for that detriment to again appear.

**Findings of Fact (Y):**

After the child was returned to California in December of 2007, there was an overarching ambiguity as to whether the child should go to public school or should be home schooled. Child Protective Services was hovering with no resolution and with the extended period of time these California parents took to have in place the foundation and the stability the child needed. This court is not able to find that detriment has been resolved.

**Findings of Fact (Z):**

If the child were to remain in that computer home school program, there would be no reporter there, as there was when she was in public school, to provide any information to the outside world, if that detriment was present or had been resolved.

**Findings of Fact (AA):**

The court cannot find that the detriment has been resolved. Growth and development is what the child needs, and she has a continuing need for structure, stability, and treatment. In the course of a long period of time where she did have stability in Spokane, she did have structure and a significant history that her wellbeing was being promoted by the care she received in Spokane. The father does not have a burden; rather, the petitioner does. The very short but traumatic points in father's care provide the court sufficient facts to retain the primary residential schedule here with the petitioner.

**RESPONDENT HAS WAIVED HIS RIGHT TO CONTEST ANY ISSUES REGARDING SERVICE OF PROCESS**

Aaron argues that his time to appear at the adequate cause hearing was shortened, given out of state service, from 60 days to 20 days without a motion and without notice as to the cause of the reduction. He argues that this shortened hearing cannot be justified and may have infringed on his right to due process, citing *Troxell v. Rainier Public School District*, 154 Wn.2d 345, 111 P.3d 1173 (2005). In that case, the respondent made a prompt motion for summary judgment on the basis that the action had been commenced before the statutory prescribed time. In this case, Aaron secured counsel, counsel asked for and was granted a one-week continuance (CP 10, 11), he prepared responding affidavits, no objection

was made at the time as to the date of the hearing, and therefore, any inadequacy was waived. Inadequate notice, as a matter of personal jurisdiction, is waived where a party appears and litigates the issue. *In Re Welfare of H.S.*, 94 Wn. App. 511, 973 P.2d 474 (1999). Further, CR 12(H)(1) states:

1. A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g) or (B) if it is either made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Moreover, even when inadequate notice implicates due process:

It is harmless beyond a reasonable doubt when the complaining party subsequently participates. *Id at 525-26.*

At no time, until this appeal, has Aaron complained of lack of notice or inadequate time to prepare. Aaron further contends that no affidavit of service was on file at the time of the adequate cause hearing.

CR 4(g)(7) states:

In case of service otherwise done by publication, the return, acceptance, admission or affidavit must state the time, place, and manner of service. Failure to make proof of service does not affect the validity of service.

**THE TRIAL COURT APPLIED AN ACTUAL DETRIMENT  
STANDARD**

The trial court properly applied an actual detriment standard. Aaron contends that the trial court erroneously used a “best interest” standard in deciding custody. The mandatory form, mandated by the court, has a heading, at 2.7, entitled “best interest of the child.” The court, at unchallenged Finding of Fact (W), states:

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.

In *Custody of A.C.*, 137 Wn. App. 245, 153 P.3d 203 (2007) (overruled for lack of subject matter jurisdiction), the Court of Appeals noted that despite the “best interest” language, which is part of the standard form, the trial court’s findings and oral ruling showed that an actual detriment standard was applied. (At 262).

The court did not order the appointment of a Guardian ad Litem. The court’s Order Re: Temporary Custody and Order Re: Adequate Cause, signed by both parties and the court on February 1, 2008, (CP 12-13, 14, 15) did not order the appointment of a Guardian ad Litem. Aaron proceeded to trial without a Guardian ad Litem. Had Aaron, indeed,

wanted or requested or believed that a Guardian ad Litem was mandatory, he could have, and should have, raised that issue and refused to go to trial without a Guardian ad Litem in place.

**EDNA LITTELL IS SAMARA'S DE FACTO PARENT, AND, AS SUCH, CUSTODY WAS PROPERLY AWARDED TO HER**

The petitioner was a de facto parent. The court could have applied a best interest standard relative to placement, if it found that Edna was Samara's de facto parent. In *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), the court dealt with a custody decision relative to a child born to a same sex couple by virtue of artificial insemination. The parties listed themselves as both mothers, lived together as a family unit for approximately six years, and shared parenting functions. When the child was approximately six years old, the parties ended their relationship, and custody litigation ensued. The court stated:

As such, the common law grants Carvin (the non-biological mother) standing to prove she is a de facto parent and if so determined, to petition for the corresponding rights and obligations of parentage.

To establish standing as a de facto parent we adopt the following criteria, delineated by the Wisconsin Supreme Court and set forth in the Court of Appeals opinion below:

- (1) The natural or legal parent consented to and fostered the parent-like relationship;

- (2) The petitioner and the child lived together in the same household;
- (3) The petitioner assumed obligation for parenthood without expectation of financial compensation; and
- (4) The petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

See *In Re Parentage of L.B.*, 121 Wn. App. at 487. In addition, recognition of a de facto parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." *C.E.W.*, 845 A.2d at 1152.

We thus hold that henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise. *25 C.E.W.*... 845 A.2d at 1151-52. As such, recognition of person as a child's de facto parent necessarily "authorizes a court to consider an award of parental rights and responsibilities... based upon its determination of the best interest of the child. *Id* at 1152. See RCW 26.09.002.

Aaron consented to the parent-like relationship between grandmother and granddaughter. They lived together continuously in the same household for five years. Edna assumed each and every obligation of parenthood, without expectation of compensation. Five years is a more than adequate time to establish a bonded, dependent relationship, parental in nature.

**CONCLUSION**

The court properly applied facts to the law and awarded to petitioner the care, custody, and control of Samara. The trial court's ruling should be affirmed.

Respectfully submitted this 11 day of June, 2009.

SALINA, SANGER & GAUPER

By:   
ALLEN M. GAUPER, WSBA #6884  
Attorney for Respondent

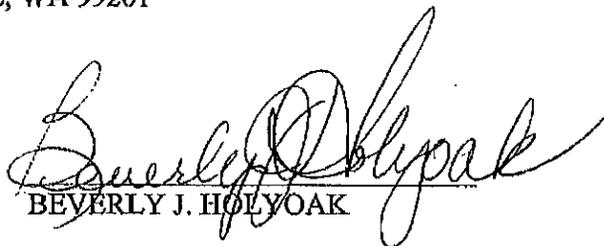
**CERTIFICATE OF SERVICE**

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

That on the 11 day of June, 2009, she served a copy of the Motion and Declaration for Extension of Time for Filing Respondent's Brief to the person hereinafter named at the place of address below which is the last known address via regular U.S. Mail.

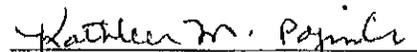
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BEVERLY J. HOLYOAK

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of June, 2009.



  
NOTARY PUBLIC in and for the  
state of Washington, residing at  
Spokane County  
Commission Expires: March 25, 2011