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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

DIVISION III COURT OF APPEALS  
STATE OF WASHINGTON

NO. 313735

SPOKANE COUNTY SUPERIOR COURT  
CASE NO. 09-3-02721-6

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In Re the Custody of SR

CATHERINE LYLE AND KEVIN JAMES, RESPONDENTS

V.

ALICIA MCDONALD, now CROSTON, APPELLANT  
JACK ROSMAN, RESPONDENT  
JAMES AND DEENA MCDONALD, RESPONDENTS

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BRIEF OF RESPONDENTS,  
CATHERINE LYLE AND KEVIN JAMES

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## I. RESPONSE TO STATEMENT OF FACTS

A non-parental custody petition filed on 06/23/2008 by grandparents James and Deena McDonald under Spokane Superior case no. 08-3-01412-4 was action initiated to address the needs and circumstances surrounding the care of their grandchild, Savahna, which resulted in a custody decree on 11/06/2008. CP 225-238 and CP 240-245. In the following year, McDonalds declined to continue as custodians, and they specifically supported the 10/23/2009 petition filing of Respondents Lyle and James to become legal custodians. CP 1-14. Both petitions stated the facts related to adequate cause to which there was a joinder by the natural parents. A temporary hearing was conducted on 01/29/2010, and all parties appeared, and an order was entered to transfer placement and right relating back to the McDonald decree. RP 1-18 and CP 53-54. After the process of appointing a guardian ad litem in the following April (CP 55-61), and the appearance of counsel for the parties, at further temporary hearing on 09/30/2010, a request made for a retraction of the initial petition joinder to the Lyle and James petition was granted, along with other relief, and the consolidation of the case with the 2008 proceeding. CP 73-74.

The ongoing proceedings based on both third party custody cases reflect how the court addressed the placement and parental contact concerning the child in the context of the provisions of the non-parental custody statute. RCW 26.10.100 and .160. CP 62-63, 75-95, 91-92, 140-142, and 143-144. Over time, the record reveals that the Appellant mother failed to demonstrate her commitment to rehabilitation and to comply with the stipulated conditions precedent to her regaining primary care of the child. CP 108-109. The factual outline provided by Appellant is an attempt to portray legal defects that would dismiss this custody action resulting in a final decree, and Opening Brief requests relief to reinstate the McDonald 2008 custody decree. In conjunction with the motion to modify the ruling on the motion to strike, it is important to recite that the last word from the McDonalds is their not supporting the mother's motion during the time after the rehabilitative provisions of the 01/24/2011 parenting plan to grant shared custody between them and Alicia and their view of the "work" she had yet to do. CP 307-308.

The Appellant Brief is a convoluted effort to seek dismissal based upon proceedings conducted over years of custody litigation. The evidence is considerable and more than adequate to support prior findings concerning the needs of the child and the standard to

which the proceedings were subject. CP 98-106, 107-117 and 181-183.

The Appellant Statement of Facts opens with reference to the assertion that on the entry of the 2008 McDonald decree the Appellant mother became the non-custodian and that her fitness was no longer relevant. This is not comprehensible to the Respondent in any response thereto. Further, the Statement of Facts not only mischaracterizes the relationship and placement of the child through 2009 (see supporting declaration of Deena McDonald, CP 246-247) when the aunt and uncle, Lyle and James, began providing care of Savahna, but goes on to misstate the legal representation of Petitioners Lyle and James. Apart from the erroneous reference of counsel in the hearing transcript (RP 5, lines 1-6), it is abundantly clear at the temporary hearing conducted on 1/29/2010 that the father, Jack Rosman, was not represented by attorney Rochelle Anderson. RP 1-19 and CP 46-48. If there is a point to the misidentification, it appears it is to denigrate the role of counsel, unless the reply of counsel is to acknowledge his error while stating in the brief that there had been a "strange representational twist." The thrust of the Appellant fact presentation is that the McDonalds were not "unfit" in the process of

their replacement aside from their support of Lyle and James, and the peculiar contention that the Lyle and James action was that which required the allegation that McDonalds were also not fit along with the mother and father. This is the crux of Appellant's request for custody to be returned to the McDonalds.

Respondents herein in the Supplemental Designation of Clerk's Papers respecting the 2008 McDonald Non-Parental Petition under Spokane Superior Court No. 08-3-01412-4 provides a sworn fact declaration of adequate cause which is recognized by the natural parents in the petition joinder and waiving entry of a decree. CP 225-238. The record demonstrates the basis for the McDonalds initially in pursuing the custody of their granddaughter, and in obtaining the custody decree it is shown that the mother acknowledged the facts stated in the Petition that the child was not in the physical care of either parent, and the mother was not suitable in her role as a custodial parent as prescribed by RCW 26.10.032(1). Further, the petition stated facts supporting the requested order as provided by statute. No opposition to the action was made and pursuant to the waiver language of the joinder, the custody decree was entered.

In a like manner, the 2009 Lyle and James petition went forward to which there was also a joinder at filing. The hearing on 01/29/10 before Superior Court Commissioner Moe manifested the extent to which all parties acknowledged the threshold of adequate cause and on the basis of the prior 2008 decree. Even the declaration of Appellant mother reveals her state of not challenging the facts of the Lyle and James petition concerning adequate cause. CP 1-14 and 33-36. Although the Appellant mother opposition to this custody placement change was noted, it had no impact on the showing of adequate cause.

Factually, the issues on appeal relate to the essential procedural events that resulted in the placement of the child with Respondents Lyle and James.

- On January 29, 2010, the Commissioner in consideration of the facts of the petition and essentially agreed to granted temporary placement after hearing at which time the parties addressed the court. RP 1-19. The court further transferred custody from McDonalds pursuant to the 2008 case and modified or even effectively vacated the prior non-parental

decree by the consent of the custodial grandparents. CP 53-54.

- Whether by the non-opposition of the parties and/or the court's assumption, the form of an adequate cause order was not entered (the words "good cause" were used instead, CP 53) due to the prior 2008 non-parental custody decree and joinder by all parties in both proceedings. A finding of adequate cause is implicit in the record of proceedings.
- Guardian ad Litem Colton addressed appropriately in the investigation report to the court the non-parental custody standard. CP 248-303. As a result of the report, the stipulated to Final Parenting Plan of 01/24/2011 was entered. No contested hearing was conducted, and the Plan contained specific conditions for the mother to regain custody.
- Contrary to any assertion or inference, the Superior Court Judge did not reference any prior lack of adequate cause at the time of entering temporary orders during the review hearings conducted in 2011. At an initial review, there was an approval of a therapist for the mother and how that would affect the mother's contact with the child. RP 18-26 (Hearing

date of 06/09/2011). There was discussion of whether adequate cause was needed to change the schedule as provided by the 01/24/2011 plan. At a review and denial of a motion to change the schedule, there was no discussion of adequate cause. RP 33-35 (Hearing date of 11/03/2011). After a final review hearing, in the Order filed 10/1/2012 the court recited that the prior plan did not require an adequate cause finding in the review process. CP 181-183. At the time of a presentment, based on the findings of non-compliance the court made the determination that any future modification would require the showing of adequate cause, removed the rehabilitative provisions, and determined that the child was deserving of finalization. RP 2-13 (Hearing date of 09/06/2012). CP 184-193. The decree of custody was entered incorporating the changes to the parenting plan. CP 198-202.

- Appellant seeks reinstatement of the McDonald 2008 decree and seeks the relief to place the child back with the grandparents. An issue of whether the grandparents now request and are in accord with this relief requested is

addressed in a prior motion to strike as companion to this Response.

2. RESPONSE TO "LIST OF ERRORS" SUBMITTED BY APPELLANT

Appellant assigns errors to the trial court action by listing the manner in which the trial court failed to follow or observe statutory procedures. Respondents address the list as follows.

Firstly, the contention is made that it was not proper to allow the Lyle-James third-party petition to go forward after the McDonald joinder retraction. The assigned error is that because the McDonalds were not unfit to parent their custody decree should have been reinstated. The McDonalds wanted their daughter to regain custody and not themselves.

Secondly, the contention is made that the Lyle-James petition claimed the wrong "best interests" standard. This is contrary to the substance of their petition and the record.

Thirdly, the contention is that the Lyle-James third party petition should have been dismissed after striking of the joinder. The reference to a dismissal was not a motion made by Appellant.

The court instead consolidated the 2008 McDonald action and allowed the parties to amend pleadings as a proper exercise of discretion.

Fourthly, the contention is that a temporary order should not have been entered prior to an adequate cause finding. The stipulation and joinder to both the 2008 and 2009 petitions is tantamount to such a finding or otherwise that the appearance of a lack of a finding of adequate cause is subject to the equitable doctrine of estoppel.

Fifth, the contention is that the wrong legal standard was used for the proceedings. The actions and determinations founded in the non-parental custody statutes demonstrate to the contrary.

Sixth, the contention is made that the final orders were not properly entered because of the lack of adequate cause. The final parenting plan and decree entered on 01-24-11 when all parties were represented by counsel and with a Guardian Ad Litem, observed the standard for entry of non-parental custody orders. The parenting plan entered 11/01/12 did not require an additional adequate cause finding. Lastly, the contention is that the Lyle-

James petition in failing to indicate that the McDonalds were unfit should have resulted in dismissal should be rejected.

### 3. RESPONSE TO LAW AND ARGUMENT

- A. A requirement of RCW 26.10.032 & .200 is satisfied by the court recognizing that the petitions filed asserting adequate cause were the subject of a joinder.

The non-parental custody statute was not violated and the petition of Lyle and James should not have been dismissed. Both non-parental custody actions provided sworn statements in the manner provided by RCW 26.10.032 and .200 declaring the circumstances under which custody was sought. As stated in the decision of *Custody Of E.A.T.W.*, 168 Wn.2d 335, 344, 227 P.3d 1284 (2010)

The statute first requires a petitioner seeking a nonparental custody order to submit an affidavit declaring that the child is not in the physical custody of one of his or her parents or, in the alternative, that neither parent is a suitable custodian. RCW 26.10.032(1). The statute then requires the nonparent to set forth facts supporting the requested order. *Id.* As indicated by the statute, the "requested order" is a permanent custody order. *Id.* Therefore, in addition to alleging that a child is not in the physical

custody of the parent or that the parent is not a suitable custodian, the nonparent must also set forth facts supporting the custody order. The superior court may ultimately issue a custody order granting the nonparent custody only if the court finds that the parent is unfit or placement with the parent would result in actual detriment to the child's growth and development. *Shields*, 157 Wn.2d at 142-43.

This articulation of the unambiguous language of RCW 26.10.032 indicates no requirement for an actual order, but rather a finding of adequate cause which is unmistakably borne out of the petition and declarations and even the admissions of the mother.

It is apparent from this interpretation of the statute that the factual showing supporting the "requested order" relates to the permanent order, and no issue is presented of an objection to the matter when the matter proceeded to a final hearing on the contentions of the petition.

The striking aspect of the Appellant's position is that she indicates no objection to the custody decree of the McDonalds, but seeks to overturn the custody award to Lyle and James, when both were presented on the same factual basis. The petitions were submitted by use of mandatory approved forms. RCW 26.10.015. Such forms provide for a joinder which was signed by both parents in both proceedings **and** by McDonald to the Lyle and James

petition. CP 13-14. Such a “joinder in pleading” is the acceptance of opposing party’s proposed issue and mode of trial. Black’s Law Dictionary, p. 854 (8<sup>th</sup> Edition 2004).

The proceedings in which this matter went forward were based upon a series of hearings and orders upon the recognition that the mother was unprepared to assume custodial responsibilities. CP 33-36. The adequate cause basis was that the court accepted the proposition from the mother as to her own shortcomings and effectively adequate cause was determined. CP 37 and 53-54. No thought was ever given, much less a motion or oral assertion made to deny an adequate cause determination.

This is not an issue of subject matter jurisdiction, but rather the extent to which the court possessed statutory authority to grant third-party custody relief. The sufficiency of the declarations in the petition and elsewhere established the threshold requirement of the statute. After the initial temporary orders, the matter went to a trial setting with all parties participating. CP 118-119.

There is no record of any motion by Appellant for a dismissal of the Lyle and James non-parental custody petition proceeding, particularly on the basis of any perception of a lack of adequate cause from the many hearings. What distinguishes the case on

appeal from cases such as *In re Custody of SED-L*, 170 Wn. 2d 513 (2010), is any lack of factual showing that the parents were not fit and that a petition not supported by required declaration and averments.

- B. The Lyle-James petition filed as a replacement for the McDonald 2008 proceeding is that which superseded and no separate adequate cause finding was necessary.

The indisputable reality is that the circumstances leading to the filing and issuance of temporary orders in the 2009 action of Respondents were contemplated by all parties. In the appropriate manner under the non-parental custody statute the matter was investigated by the GAL and full opportunity to present evidence.

The finding of the trial court that the Appellant mother had not complied with the stipulated conditions under which the child may be returned to her primary care, and hence that the custodial environment would be detrimental to the child is as set forth in the order on review entered 10/01/2012. CP 181-183. Should there be a need to address the basis on which the final custody placement was made, it would be appropriate to remand. *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006); *Custody of E.A.T.W.*, 168

Wn.2d, 335, 227 P.3d 1284 (2010). It should be acknowledged that “the trial judge is in the best position to assign the proper weight” to factors. *In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003).

A legal proposition that is presented in this Response is whether or not the 1/24/2011 Final Parenting Plan entered, which was subject to a review process, and the orders entered in the Non-Parental Custody Order entered 11/1/2012 (CP 184-193), superseded and effectively nullified the prior 2008 order. There could not be two pending custody orders which state inconsistently which party is to have primary care of the child. The 11/6/08 custody order was superseded when at the time of the entry of the 1/24/11 custody order pursuant the stipulation of all parties. Circumstances had materially changed such that the prior order cannot be allowed to be reinstated. The concept of modification wherein the court changes the prior custody arrangement enumerating new rights is such that previous rights do not exist. See *Klettke v. Klettke*, 48 Wash. 2d 502 (1956); *Rivard v. Rivard*, 75 Wash. 2d 415 (1969). In defining “modification” a thing cannot exist as it did prior to modification because the thing has parts that are different than before. See [www.merriam-](http://www.merriam-)

webster.com/dictionary/modify. Thus, it is not possible to reinstate the McDonald decree as the only relief requested by the Opening Brief.

C. Appellant's contention of the doctrine of "invited error" is in an effort to have the court disregard joinders to both petitions.

The reference to the doctrine of "invited error" is misapplied. It is plain that this doctrine would not pertain as it only applies when a party attempts to set up an error at trial and then complaining of it on appeal. See *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P3d 273 (2002). There is no semblance of a record that such an attempt was made.

The defect asserted is that the issue of applying the non-parental custody standard is related to subject matter jurisdiction. The authority cited by Appellant under *Marriage of Shryock*, 76 Wn. App. 848, 888 P.2d 750 (1995), addresses the statutory authority under the modification statute and addresses in no way that the issue is one of subject matter jurisdiction, but rather whether there was a statutory basis to grant relief.

- D. The assertion that McDonalds should be considered as though they were natural parents and subject to the finding of unfit should be rejected.

The concept that once the McDonalds were decreed to have custody that they were like unto natural parents is an absurdity. The suggestion is that for their replacement to have occurred the court must have found them unfit is that which the court must reject as a legal proposition. The record reflects that this contention was never made at any time and not until the appeal has the Appellant raised the issue that McDonalds now possess some status the same as natural parents, and that there was a burden to prove that they were unsuitable or unfit. This theoretical proposition is not supported by any existing case law. It is inconceivable that the court would extend to the grandparents the rights afforded only natural parents under constitutional considerations. See *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998).

- E. The record is bereft of any indication that the McDonalds sought custody after the Lyle-James interim "final" parenting plan was entered.

In the same vein of the assertion that the McDonald decree somehow should be reinstated, the argument of Appellant is that

once the 2008 decree awarded custody, the natural mother's fitness was no longer at issue. Thus, the argument is made that because the Lyle and James case had no "concerns" about the grandparents, that case should have been dismissed. The motion of the McDonalds' once they had counsel was to consolidate the proceedings. At every opportunity the McDonalds could have pursued custody in a trial proceeding. Instead, the parties agreed to a parenting plan entered 01-24-2011.

The reference is made to dismissal language contained in the order of 09-30-2010. CP 74. It is noted that the father Jack Rosman moved to dismiss the McDonald action asserting that it was defunct and should be dismissed. CP 304-306. The order providing that "motions to dismiss petition and 2008 decree are denied" reflects that the court left both proceedings intact for a potential final hearing. Again, this simply demonstrates the implicit finding of adequate cause contained in the pre-existing 2008 action and Lyle and James 2009 proceeding.

- F. There was good cause to consolidate the custody petitions based upon common issues of law and fact which resulted in final orders.

The argument is continually made as to how the court should have dismissed the Lyle and James action at the same time when the court made the discretionary determination that the matters should be heard pursuant to the ongoing GAL investigation and the trial setting alluded to in the transcript of the 09/30/2010 hearing. CP 75-95.

The approval by the Appellant mother (with counsel) along with the grandparents as third party petitioners in the 01/24/2011 parenting plan/custody order speaks for itself. It is that which provided for the manner in which the mother could remedy the basis on which the placement was made. CP 108, Sec. 2.2 (recital of the "adverse effect" of mother's involvement or conduct). What further evidence is needed to establish that in the outcome it was found that the placement outside the mother's care was necessary is difficult to ponder.

- G. The court has properly granted custody orders which protect the best interests of the child having provided the parents with the opportunity to address their lack of parental fitness.

In regard to the Findings of Fact and Conclusions of Law (CP 98-106) entered, the reservation of those determinations and in

the final orders is evident because the mother was afforded the opportunity and had nearly two years to rehabilitate her condition pursuant to the terms of the parenting plan provisions of 01-24-2011.

This case is comparable to *In re Marriage of Possinger*, 105 Wn. App. 326 (2001), a circumstance dealing with natural parents in a dissolution, deferring review of a final parenting decision under the best interests standard, but should not be considered in the context of the matter on appeal. Here, as to the review under the non-parental custody statute, the attempt is to analyze that case relating to whether or not there should have been a further adequate cause finding necessary for the entry of the second parenting plan. The review process was fashioned by the parties with the GAL involvement and did not violate the statute.

The ultimate final parenting plan was based upon the inadequacy of efforts made by the mother to meet the conditions so as to rehabilitate herself. The court exercised proper discretion and made provision for future modification based upon the provisions of the custody statute and her making the showing of adequate cause.

H. Equitable estoppel should be applied to grant Respondents' relief and deny the relief requested by Appellant.

The best interests of the child dictate application of equitable estoppel. Although cases reported pertain to the defense for the recovery of child support in spite of an established obligation, the doctrine of equitable estoppel has been applied in other settings. See *Hartman v. Smith*, 100 Wn.2d 766, 674 P.2d 176 (1984); e.g., *Cummings v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980). The court should recognize and exercise its equitable powers to afford equitable relief. This court is presented with the opportunity to apply such a remedy where the mother has joined in a petition which addressed the basis of adequate cause and never raised the defense of the lack of an adequate cause finding, but on appeal argues such a legal defect. See Washington State Bar, Family Law Deskbook (2000 and Supplement 2012), Chapter 12 § 1233; *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). The court has equity jurisdiction to determine custody disputes, and the mother, by her acts and representation has caused Respondents to act in proceeding with custody, and Appellant mother should not be permitted to be heard to say that she did not recognize the basis on which Respondents took non-parental custody action.

#### IV. CONCLUSION

The assemblage of petitions and joinders and proceedings were designed to address the needs of the child both by the McDonalds and by Lyle and James. The contention that the "new" nonparental custody action was flawed is a perhaps a novel or imaginative approach, but is contrary to the record in that apart from the joinder concept, the McDonalds supported of the Lyle and James action. The relief sought to reinstate the 2008 decree is to ignore the superseding or modification effect of the 2012 decree. Appellant has nothing to say to prevent the court from recognizing the mother's failure to appropriately rehabilitate herself, i.e., demonstrate her progress, leading to the 2012 parenting plan and decree. The statutory authority allowed the court to proceed on the basis of agreement to adequate cause, enter temporary orders and grant the requested permanent order, and the Superior Court should be upheld.

Respectfully submitted,



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Attorney for Respondents

CERTIFICATE OF SERVICE

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

That on the 20<sup>th</sup> day of December, 2013, she sent by courier service a copy of this Brief of Respondents, Catherine Lyle And Kevin James, to the person hereinafter named at the place of address stated below which is the last known address.

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SUBSCRIBED AND SWORN TO this 20<sup>th</sup> of December, 2013.



*Dawn A. Baxter*

\_\_\_\_\_  
DAWN A. BAXTER  
Notary Public in and for the state  
of Washington, residing at Spokane  
My commission expires: 09-07-2015