

No. 229301-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

IN RE THE MATTER OF:

ANGELO FLORES-CORK

HOLLY MARIE CORK,

Appellant,

v.

DAVID NAGEL & ANITA BANGERT,

Respondents.

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BRIEF OF APPELLANT

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### **ASSIGNMENTS OF ERROR**

1. The Trial Judge erred by hearing this matter when Washington court did not have subject matter jurisdiction to do so.
2. The Trial Judge erred in finding that it would be in the best interests of the child to be taken from his mother and placed with the nonparental petitioners
3. The Trial Judge erred by admitting hearsay statements of the child in direct conflict with Evidence Rule 803(a)(4)
4. The Trial Judge erred by placing great weight on the Report of the Guardian ad Litem in that the report was not thorough or independent investigation.
5. The Trial Judge erred in placing great weight on the conclusions of Carol Thomas in that Ms. Thomas applied the wrong standard in making her conclusions for placement and her knowledge of critical evidence was limited.

### **STATEMENT OF THE CASE**

Holly Cork (mom) is the biological mother of Angelo Flores Cork. Angelo's father, Ricky Flores is deceased. David Nagel and Anita Bangert (foster parents) are not related to the Ms. Cork or the child at issue; they are the child's prior foster parents from Montana. In 1998, Helena DSHS in Montana began a Dependency action regarding Angelo

Flores Cork. On February 18, 1999, The foster parents, residents of Montana, became licensed foster care parents to run concurrently as an adoptive home. Their only intent in entering this program was to adopt a child. They made it very clear to DSHS they did not want to be just foster parents. *RP 640,654*. Angelo was in the care and custody of mom from birth until he was placed in foster care with the foster parents on June 21, 1999. *RP 75*. Only a few short weeks after Angelo was placed with the foster parents, they decided they wanted to adopt him, even though they knew the placement was only temporary and the child was to be returned to mom. *RP642*. During the time Angelo was residing with the foster parents they began arrangements to adopt Angelo. *RP 646* In September 2000 parental rights of mom were terminated by State of Montana, Eleventh Judicial District Court. *RP644* December 20, 2001, Montana Supreme Court reversed the termination and as a result, mom's parental rights to Angelo Flores-Cork were fully restored. *RP479*. The foster parents were not only devastated but angry as they were days away from adopting Angelo Cork and did not want to return the child to his mother. *RP 648, 651,652,653, 655, 657*. Mom immediately began exercising her rights and decision making as a parent by requesting there be a reunification period. *RP48, 658* During this reunification period the foster parents resisted at every opportunity; they even hired an attorney during

the process. *RP649*. Mom and Child and Family Services of DHHS in Montana stipulated to a Temporary Investigative Authority (TIA) to determine whether DSS should petition the Court for legal custody of mom's son. *RP481*. March 27, 2002 there was an Assessment of foster parents in relation to Adoption Update and Youth Foster Home Relicensing which indicated that foster parents were not to be approved for foster placement, only adoptive placement due to their inability to be supportive to Angelo in a transition to birth mother's home..." *EX R108 Section IV*.

On April 16, 2002, it was determined that placing Angelo in the care and custody of mom would not be detrimental to his well-being. *EX 112*. On May 15, 2002 Angelo Cork was returned to the care and custody of mom. *EX112*. On May 16, 2002 mom and her son, Angelo moved to Spokane, Washington. Angelo Cork had no physical, mental or emotional problems after the transition and was adjusting well to the transition. *RP 781* Foster parents were told by Montana professionals that any interference with or failure to support Angelo in the case of permanency with his mother would be detrimental to him. *RP 658, EX R107*. From June 2002 through September 2002, foster parents ignored the direction of Montana professionals and pushed for mom to allow them visitation with Angelo. *RP780, 781*. Out of fear of the foster parents, mom allowed briefs

visits during the summer 2002. *RP 780*. In September 2002 mom promptly stopped foster parents from contacting and/or visiting her son when it became clear that the visits were detrimental to Angelo's well-being. *RP 780*. Foster parents continued to insist on visits but mom ceased all contact with foster parents. *RP 780*

October 4, 2002 Spokane County Child Protective Services received an "anonymous" call from a female that mom is physically abusing Angelo Cork and that the "mom moved from Montana with extensive CPS hx." Report stated that caller indicated, "Holly wasn't ever interested in parenting but was interested in winning in court." *EX 115*.

October 11, 2002 foster parents, on their own initiative sent a letter to Spokane County DSHS expressing their desire to continue providing Angelo foster/adoptive care." *EX 114*. CPS investigation was "unfounded" and the recommended disposition was" **End Service. Little to no risk, services not needed.**"*EX115*.

October 29, 2002, less than 6 months after mom and Angelo Cork moved to Washington, foster parents filed a Summons/ Petition for NonParental Custody of Angelo Cork alleging "neither parent is a suitable custodian." *CPI-8*. Foster parents have no contact with Angelo from September 2002 until the end of December 2002, during which Angelo did not exhibit any signs of mental, emotional or physical detriment in the

care and custody of mom. *RP134-141, 176,194,202,209,216, 780*. At foster parents' request, the court grants temporary visitation between Angelo Cork and foster parents. *CP 29-33*. Angelo's school teacher confirmed that as late as November 27, 2002 there were no behavior problems of any sort while Angelo was in the care and custody of mom. *RP202* There was no mental, emotional or physical abuse in mom's home.*RP216*. Beginning shortly after the second half of the 2002-2003 school year began, foster parents were reintroduced into his life, Angelo's behavior started to deteriorate at school. *RP 163-164, 176,194,204-205,210*. Foster parents did not have visits in February 2003. *RP210*. The visits resumed in March 2003 and the longer the visitations continued with the foster parents the more aggressive and disruptive Angelo became. *RP207-208,210,212*. This aggression continued even after the foster parents were granted custody in August 2003. *RP241*.

A Guardian Ad Litem (GAL), was appointed in March 2003.*RP127*. The GAL did not make a recommendation to change placement from mom to the foster parents until August 29, 2003, after she received the report of the counselor Carol Thomas, *RP 211, 437* The GAL however did not complete a thorough and independent investigation, as required by the order appointing her, of all the facts and evidence pertinent to this case. Furthermore, she did not contact or speak with individuals

relevant to a complete understanding of the critical and complex circumstances and history of the parties and the child:

1. GAL failed to speak with David Sturm, *RP 223*, *RP705-706* Liz Hayden, *RP 225*, Vicki Weida, *RP 225* or Colleen Lipke who were all integral members of the team of professionals involved in the reunification process of Angelo Cork and his mother.
2. GAL failed to speak with Dr. Robert Page who did Appellant's psychological evaluation in parenting assessment during the transition period and part of the reunification team. *RP 225*. Dr. Page determined it would not be detrimental to Angelo to be placed in the care and custody of mom.
3. GAL failed to review the countless documents vital to completing a full and independent investigation. *RP 225-228 (List of Documents)*
4. The GAL did not indicate in her report that the foster parents solicited Spokane CPS so they could provide foster/adoptive care for Angelo. *RP223* The GAL was unaware of all the professionals warning them not to interfere with mom's bonding process with Angelo.
5. GAL failed to even check if Respondents were currently licensed foster care parents. *RP 226* GAL had no knowledge that the State of Montana never renewed Respondents foster care license. *RP 226*
6. GAL never conducted a home investigation of the foster parents' home; she only reviewed pictures supplied by the foster parents.

The GAL concluded that:

1. Mom has made positive strides. *RP 132*
2. Mom's home was clean appropriate. *RP 132 -133*. Living arrangements were more than appropriate. *RP135*

3. There was no evidence of drugs, drug paraphernalia smoking cigarettes, alcohol or anyone using alcohol in mom's home. *RP 133*
4. During a visit at mom's home, Angelo Cork was very animated, happy, excited and eager to show the models he made with mom's boyfriend, Joshua Rich. *RP 135* Angelo stated he like his room and enjoyed playing with his toys. *RP 135*
5. Mom had an appropriate job and was employed full-time for over a year and a half. She was the financial supporter of her entire family. *RP 135-136* Mom has her CNA license and GED. *RP 136*
6. Mom takes care of Angelo's medical needs and followed up appropriately with care for him. *RP 136* Records indicated Angelo appeared healthy and his judgment and mood were appropriate for his age, as well as his mood and affect. *RP 137-139*
7. There was nothing to indicate any physical abuse of Angelo or indication of any bruises or Angelo being spanked hard that would leave a bruise. *RP 139* No evidence of any CPS involvement with mom's other child. *RP 139*
8. Mom had provided stability for Angelo. *RP 139* She communicated with Angelo's teachers throughout the school year, attended all parent/teacher conferences and mom would even drop by the school just to sit and spend time with her son. *RP 141, 157-158*
9. As of April 12, 2002, all school records and conversations with Angelo's teacher indicated Angelo was doing well and there were no concerns about any behavioral problems. *RP157-158*

GAL then in her report of August 28, 2003 stated that mom's home is detrimental to Angelo and recommended placement of Angelo be

changed to the foster parents' home in Montana. *RP 142*. The GAL then admitted that she based her recommendation to change placement on the report of Carol Thomas that the foster parents are the psychological parents of Angelo Cork. *RP 142* Ms. Thomas admitted that she knew there was a reunification that took place in Montana, but she had no knowledge that there was a team of professional counselors, therapists and social workers being involved. *RP439* Ms. Thomas admitted she never spoke with any of the individuals involved with the reunification process, nor with any of Angelo's therapists or caseworkers in Montana. *RP 439*. Furthermore, Ms. Thomas began her assessment without any knowledge of any advances or progress or anything that was being done up until that point regarding bonding with Angelo and his mom. *RP 440*. Her information came from the foster parents and mom. *RP 440*. Ms. Thomas then submitted a report to GAL in August 2002 recommending Angelo be placed with the foster parents in Montana. *EX R119* Ms. Thomas concluded that the foster parents were Angelo's psychological parents *RP 418* to whom he was attached and bonded to and that another interruption in care would place him at risk for increasing behavioral and emotional concerns. *RP 435*. In discussing attachment and bonding, Ms. Thomas clearly stated that if the primary attachment occurred during the first year of life that would be the foundation for continuing relationships. *RP 442*.

Once [Angelo] forms a primary attachment that sets the stage for [him] to bond to other people throughout [his] life. *RP451*. Furthermore, Ms. Thomas admits that since the primary attachment is formed during the first year of life the foster parents were not Angelo's primary attachment because he did not go to live with them until June of 1999. The attachment would have been formed between August 1997 and August 1998. *RP 442*. Angelo was in the primary care of his mom from August 1997 until August 1998 and therefore formed his primary attachment with her. *RP443* This allowed him to form the bond and attachment with the foster parents that Ms. Thomas is indicating. More importantly, Ms. Thomas was not aware that the foster parents were warned numerous times that any interference [with Angelo's bonding to his mom] would be considered damaging to Angelo's well-being. *RP440*

Ms. Thomas had no contact with Angelo Cork and his mom during the months of September 2002 until the end of December 2002. *RP 443* It was during this time that the foster parents were unable to interfere in Angelo Cork's life and therefore she had not had the opportunity to observe the interactions between Angelo and his mom while there was no involvement from the foster parents. *RP 443* In total, Ms. Thomas had only three 50 minute sessions to observing Angelo and his mom together. *RP 448*.

Just prior to Ms. Thomas and the GAL filing their reports, Mom's attorney withdrew for the case. Four days after withdrawal was effective, mom was served with a Notice for Hearing to transfer placement of Angelo Cork to foster parents. Motion was scheduled to be heard on August 29, 2003. *CP 56-59* Coincidentally the GAL Report and report of counselor were submitted that same day. At the hearing, the Court ordered Angelo to be removed from his mom's care and given to the foster parents in Montana citing the Interstate Compact Act as authority to do so. Mom was not represented by counsel. *CP 138-142, CP 351-359*

Unbeknownst to mom, foster parents hired Robert Dickey, a counselor in Montana for reintegration counseling between them and Angelo. October 8, 2003 Center For Justice entered Notice of Appearance and filed Motion to Continue Trial Date and reopen Discovery. During a telephone conference with Judge (other than actual trial judge) trial date was continued to January 2, 2004. Discovery issue was not addresses by the judge and thus not reopened. Center For Justice filed another motion to have discovery reopened. That motion was denied by the trial judge.

Mom filed a Motion to Dismiss Petition for Lack of Subject Matter Jurisdiction. *CP 199-330* Motion was Denied. Mom filed Motion for Reconsideration. *CP 379-389* Motion was denied. Trial was held on February 11, 2004 and permanently transferred placement of Angelo to

the foster parents. Limitations were placed on mom's visitation and she was denied any decision making regarding her son.

### **SUMMARY OF THE ARGUMENT**

This case presents three very important issues. First, Washington Courts did not have jurisdiction to make any custody determination regarding Angelo Cork. Angelo Cork and his mother were residing in Washington less than six months at the time the Petition for NonParental custody was filed. Furthermore, the Montana Courts had continuing jurisdiction over matters relating to Angelo Cork in that the Montana courts were making determinations regarding custody of Angelo Cork from 1998 until 2001 all the way up to the Montana Supreme Court. Less than six months prior to the Petition being filed in Washington, there was still ongoing court action regarding custody of Angelo in the Montana courts. The second critical issue is Mom is a fit parent and has a constitutional right to the care and custody of her son, Angelo Cork. The Supreme Court in In re the Parentage of L.B., 121 Wash.App.460, 89 P.3d271, (2004), made it very clear that even though Washington recognizes the common law claim of psychological parentage in an action for co-parentage or visitation by a nonparent, it is allowed only when the parent like relationship was formed with the consent and encouragement

of the biological parent. Here, the mom never consented to nor encouraged the parent like relationship between her son and the foster parents. Thus, this court cannot use the “psychological bond that was formed during that relationship remove Angelo from her care and place him with the nonparent foster parents. Third, this court cannot substitute its judgment for that of a mom who is a fit parenting making decision regarding counseling, moving residences or otherwise.

#### ARGUMENT

1. **THIS COURT DID NOT HAVE JURISDICTION UNDER THE UCCJEA TO MAKE A CHILD CUSTODY DETERMINATION OF ANGELO CORK**

This Court did not have jurisdiction to make custody determinations of Angelo Cork. Angelo and his mother resided in Washington less than six months prior to the foster parents filing the Petition for NonParental Custody, and custody determinations regarding Angelo were being decided in Montana during those prior six months.

a. **This Court did not have Subject Matter Jurisdiction to make a child custody determination of Angelo Cork.**

Angelo Flores Cork and his mother did not reside in Washington for the mandated “at least six months” prior to commencement of the NonParental Custody action. Washington clearly was not the home state of Angelo at the commencement of these proceedings. Section 2.3 Basis

of Jurisdiction, of the Findings of Fact indicates Washington is the home state of the child and that no other state is the home state and significant and substantial connection and contacts exist in Washington. The Child Custody Jurisdiction Enforcement Act (UCCJEA), specifically RCW 26.27.201, requires that a court of the state of Washington is competent to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

Washington clearly was not the home state of Angelo Flores Cork at the commencement of these proceeding because he had not resided there for at least six months. Washington must be the "home" state of the child on the date of the commencement of the proceeding in order for the state to have jurisdiction of the matter. Under RCW 26.27.021, "home

state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. Section (5) of this statute defines “commencement” as the filing of the first pleading in the proceeding. Under UCCJEA, jurisdiction is to be determined as of the time action is commenced. In re Marriage of Ieronimakis, 66 Wash.App. 83, 831 P.2d 172, *review denied 120 Wash.2d 1006, 838 P.2d 1142.* (1992). Commencement in this case would be October 29, 2002; the date the Petition was filed.

Angelo Cork and his mom began residing in Spokane, Washington on or after May 15, 2002. The foster parents indicated an even further date when mom and her son began residing in Washington when they stated in the Petition, “*Angelo has lived in Spokane, WA since 6/02*”. *CPI-8*. At the time the proceedings were commenced, neither the mother nor the child was living in Washington State for “*at least six consecutive months preceding the commencement of the proceedings,*” as specifically required to invoke the power of the Washington Court. The time between when mom and her son began residing in Washington on May 15, 2002 and the filing of the first pleading in this matter on October 29, 2002 is only five months and two weeks. This is not “at least six months.” At the

time of commencement of this action, Washington was not the “home state” of the minor child.

The foster parents cannot invoke the jurisdiction of the Washington Courts solely by asserting ‘*that [Angelo and Holly Cork or Angelo] and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the child’s care, protection, training and personal relationships and the child no home state else where.*’

The language that foster parents asserted above is only subsection (i) of RCW 26.27.201(1)(b). The statute is clear in that jurisdiction requires all the factors indicated in subsections (b) **and** (b)(i) **and** (b)(ii) to be present in order to invoke the jurisdiction of Washington Courts. These factors are:

- (b) A court of another state does not have jurisdiction, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.267 or 26.27.271, **and:**
- (i) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; **and**
- (ii) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships;

The foster parents failed to meet the requirements necessary to invoke the power of the Washington Court. Montana was the home state of mom and Angelo Cork at the commencement of these proceedings; not Washington. At the time of commencement, Montana had jurisdiction to hear this case. There is no evidence to support that Montana has declined to exercise jurisdiction which is required under the UCCJEA. Even though there is evidence to show mom and Angelo may have a connection to Washington, the majority of evidence relating to Angelo's care, protection, training and personal relationships is in Montana. Montana maintains an extensive history of substantial evidence relating to care and custody of Angelo Cork as well as mom's fitness to parent her child.

The Court found that mom consented to subject matter jurisdiction by failing to raise it in her Answer to the Petition. However it is well-established that litigants may not waive subject matter jurisdiction, and furthermore, a party may raise that issue at any time. *Id. See also, In re Custody of R.* 88 Wn.App 746,762(1987). Summarily, lack of subject matter jurisdiction renders the court powerless to pass on the merits of the case. *Skagit Surveyors & Eng'rs, LLC v. Friends*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Here, since the facts indicate that Washington Court clearly lacks subject matter jurisdiction, the case must be dismissed and all orders made on the merits of the case are null and void.

- b. **Washington Court did not have jurisdiction to hear this matter because the State of Montana, Eleventh Judicial District Court has continuing jurisdiction over determination of custody of Angelo Flores Cork.**

Custody determinations of Angelo Cork were litigated up to the Montana State Supreme Court and back. *EX R109* Less than six months prior to the foster parents filing a NonParental Custody Petition in Washington, the Department of Social and Health Services were still involved in determination of Angelo's custody. *EX R111,112*. Montana Court has continuing, exclusive jurisdiction under Washington's Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). Under the UCCJEA, a state that has made a custody determination retains continuing, exclusive jurisdiction over a child custody determination as follows:

(1) Except as otherwise provided in RCW 26.27.231, a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(2) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under RCW 26.27.201.

Pursuant to RCW 26.27.021, “child custody determination” means a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. Under this same statute, a “child custody proceeding” means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. RCW 26.27.021(4). Here, the District Court of the Eleventh Judicial District initially terminated the parental rights of Holly Cork on September 29, 2000, and then later reversed that termination on December 20, 2001. An order terminating parental rights and an order later reversing that termination are custody determinations under the UCCJEA. RCW 26.27.021. The Montana Court made an initial custody determination about Angelo Cork consistent with RCW 26.27.201 as Montana was the home state of the child in September 2000 and in December 2001. The child and mom did not leave the State of Montana until June 2002, less than six months prior to the Washington action commencing.

As argued above, at the time the NonParental Custody Petition was filed, Washington did not have jurisdiction to make an initial custody determination, Montana already made the initial custody determination and retains exclusive continuing jurisdiction. Furthermore, within the previous six months prior to “commencement” of this third party custody action, there was still a “child custody proceeding” going on in Montana involving Angelo Flores Cork. Mom voluntarily signed a Temporary Investigative Authority (TIA) and Parental Agreement for Substitute Care for her son Angelo, through the Montana Department of Public Health and Human Services on April 16, 2003. Two days later, on April, 18, 2002 the previous TIA was dismissed with the Court. In accordance with the UCCJEA, these proceedings were “child custody proceedings” because they dealt with physical custody and visitation with respect to Angelo Flores Cork. RCW 26.27.021(4). The April 16, 2002 agreement terminated on May 15, 2002. Not only does this agreement validate Montana’s continuing jurisdiction, but it additionally eliminates any doubt as to whether or not the foster parents could establish the requirements necessary to invoke the power of the Washington Court to make an initial custody determination under RCW 26.27.021. Since, RCW 26.27.021 grants Washington courts the authority to make an initial custody determination regarding a child only if, “*a court of another state does not*

*have jurisdiction” or “a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum,”* the power of the Washington court was improperly invoked. Here Montana has continuing jurisdiction over custody determination of Angelo Flores Cork and there is no evidence to indicate that the Montana Court has ever declined to exercise its jurisdiction.

Additionally, the foster parents’ reliance on “significant connections” as a basis for jurisdiction is misplaced. They cannot rely on this factor alone. The foster parents must also demonstrate that in addition to a finding that one or all of the parties maintain significant connections with the state, RCW 26.27.211(1)(a) requires and that there is substantial evidence in this state as to the child’s circumstances as well. Whether there is a "significant connection" is a factual determination made on a case-by-case basis. Hudson v. Hudson, 35 Wash.App. 822, 830, 670 P.2d 287 (1983). In general, the most significant evidence as to a child’s care, protection, training and personal relationships comes from the child’s parents, from those who might be entrusted with the child’s care, and from those who can testify about the competence of these persons as custodians. Greenlaw v. Smith, 67 Wn.App. 755, 840 P.2d 223 (1992). Just five months prior to this action commencing, all of the child’s connections were in Montana. The child, his mother and the foster parents all resided

in Montana. The child currently and at time of trial attended school and counseling in Montana. *EX R124* The mother is registered with the Blackfeet Tribe in Montana. The child's maternal grandfather, uncle and other family members are registered with the Blackfeet tribe and reside on the reservation in Montana. Moreover, in addition to the extensive litigation involving custody of this child occurring in the Montana Courts, there is substantial evidence in Montana as to mom's custodial competence, the foster parents' custodial competence and significant involvement of Montana Department of Social Health Services (DSHS) in this matter. The care, protection, training and personal relationships of the child and the parties are historically and currently in Montana. Practically all witnesses, documents, and /or evidence relating to the foster parents, the child and mom were located in Montana and were needed to be subpoenaed for trial. Thus the child, his current custodians and arguably his mother herself had more than significant connections to Montana which necessitated the matter remaining under the continuing jurisdiction of the Montana courts.

Montana also maintains continuing jurisdiction under the federal Parental Kidnapping Prevention Act (PKPA). The PKPA was enacted to prevent jurisdictional conflicts in competition over child custody awards (Thompson v. Thompson, 484 U.S. 174 (1988)), protects the right of a

decree state to exercise continuing jurisdiction over child custody decrees, and manifests a strong congressional intent to channel custody litigation into the court having continuing jurisdiction. Mark L. v. Jennifer S., 506 N.Y.S.2d 1020, 133 Misc.2d 454 (1986). Where there is a conflict between a state's Uniform Child Custody Jurisdiction Act and the PKPA, the PKPA preempts state law under the supremacy clause. In re Marriage of Murphy, 90 Wn.App. 488, 495, 952 P.2d 624 (1998).

Under the PKPA, the jurisdiction of a State which made a custody determination consistently with the provisions of the PKPA continues as long as the State has jurisdiction under its own laws and the State remains the residence of the child or a contestant. 28 U.S.C.A. 1738(A)(d). A child custody determination is made consistent with the PKPA if the determination was consistent with State law and the State was the home State of the child under the PKPA at the commencement of the proceedings. 28 U.S.C.A. 1738A(c)(1), (2). The definition of home state under the PKPA mirrors Washington's UCCJEA and the old UCCJA. 28 U.S.C.A 1738A (b)(4); RCW 26.27.021(7). As explained above, the initial custody order was made consistent with Montana law and Montana was Angelo's home state at the time, both under the PKPA and the UCCJA. Montana State is the current residence of Angelo and the foster parents. Therefore, because Montana has jurisdiction under its own laws, it is the

residence of the child and the foster parents, and was the residence of mom less than six months prior to commencement of the action, Montana has continuing jurisdiction under the PKPA.

The UCCJEA was crafted to ensure that the court having continuing, exclusive jurisdiction over parties in separate states has the power to gather the information necessary to an informed custody determination without prejudicing the rights of those parties. Thus, under the UCCJEA, and the PKPA, Montana Court retains continuing, exclusive jurisdiction to hear this matter and the means to do so in a fair and just manner.

- c. **Even if it is determined Washington Courts had Subject Matter Jurisdiction at the commencement of these proceedings, Washington was an inconvenient forum under all relevant circumstances and this case should have been transferred back to Montana.**

The mother raised the issue of *forum nonconveniens* and complained to the trial court that Montana was the most convenient forum, not Washington, to hear custody matters of her son. *CP 199-330* The Court disregarded her complaint. Even though the Court decided Washington had jurisdiction when it clearly did not, under RCW 26.27.261, “a court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum

under the circumstances and that a court of another state is a more appropriate forum.” The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

In determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. In doing so, this court “shall consider all relevant factors,” including those listed in RCW 26.27.261. Among those factors to be considered in determining whether the doctrine of *forum non conveniens* requires a court to refuse jurisdiction over an interstate child custody dispute are the continuing jurisdiction of the other state’s court over the parties and subject matter and its power to modify the award at any time, the parents’ participation in the other state’s proceedings, and the nature and scope of the proceedings in the other state. Dunkley v. Dunkley, 89 Wn.2d 777, 575 P.2d 1071 (1978).

In applying the above statutory criteria, Montana remains the most convenient forum for litigating this matter. As argued above, Montana had subject matter jurisdiction at the time the Petition was filed and has continuing jurisdiction to decide the issue of custody of Angelo Cork. The foster parents, mom and the minor child have more significant contacts with Montana than they do with Washington.

The issue of custody of Angelo Flores Cork has been ongoing in the State of Montana since 1998. Less than six months prior to commencement of this action, legal documents were still in place regarding the custody and care of the child. DSHS in Montana has an extensive history relating to not only Angelo Cork, but mom and her family. The entire dependency action of Angelo was tried in Montana. All history relating to mom's ability to parent her child was in Montana. The staff at DSHS and an entire team of professionals had extensive interaction with the foster parents. All issues relating to foster care of the child have been in Montana. The Declarations presented by the foster parents in support of their care for the minor child were from individuals who all reside in Montana. The foster parents and the child currently and at the time of trial resided in Montana. The Guardian Ad Litem specifically confided that she did not review numerous pertinent documents nor speak to vital witnesses. *RP 225-228* She was also unable to conduct a home evaluation of the foster parents because of the long distance. *CP 62-117* Thus, the majority of evidence and witnesses with pertinent information relating to the protection, training and personal relationships of the parties and the child were in Montana. Therefore, the evidence presented in pretrial pleadings and at trial does not support the Findings.

**2. UNDER TROXEL WHEN A BIOLOGICAL PARENT IS FIT, THIS COURT IS PROHIBITED FROM INTERFERENCE WITH THE 14TH AMENDMENT DUE PROCESS CLAUSE PROTECTION OF THE FUNDAMENTAL RIGHT OF A BIOLOGICAL PARENT TO MAKE DECISIONS CONCERNING THE CARE, CUSTODY, AND CONTROL OF THEIR CHILD.**

This Court erred in finding that it would be in the best interests of the child to be taken from his mother and placed with the nonparental foster parents. The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this [U.S. Supreme] Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), the U.S. Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), the U.S. Supreme Court again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." They explained in Pierce, 268 U.S. 510 at 535 that the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

They returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.

In subsequent cases also, the U.S. Supreme Court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g.*, Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978) ("We have

recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right... to direct the education and upbringing of one's children" (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted by this court that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Here mom was and currently still is a fit parent for Angelo; she is entitled to the care, custody and control of her son. In Troxel v. Granville, 120 S. Ct. 205 (2000), the U.S. Supreme Court looked at an RCW 26.10 visitation case and gleaned that the standard for custody must be at minimum the same as for visitation. The Supreme Court in Troxel,

stated clearly that: "First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. Id. See, *e.g.*, Reno v. Flores, 507 U.S. 292,304.

Here, the court made a specific finding that the "The Guardian Ad Litem testified that [Appellant] is not an unfit parent, and I am not making a finding that Holly Cork is an unfit parent." *RP 818* she appears at this point to have a very stable living arrangement. She has done very well considering her roots. *RP 813* She obtained her GED and she is, from what I can tell, the bread winner of the family. *RP 814* She has a CNA here and also in the state of Montana. *RP 814* She has done a good job in getting her life in order." And "In September of 2002, Angelo entered kindergarten and things apparently seemed to be going well from the report of the Guardian Ad Litem who interviewed Ms. Lalley, who was the kindergarten teacher and from Ms. Lalley's testimony, things were going well." *RP 814* Thus, the mother is a fit parent for Angelo.

Accordingly, there is no reason for the State to inject itself into the private realm of the mom's family to further question her ability to make the best decisions concerning the rearing of her son, Angelo. Especially when it is clear that the concerns regarding Angelo's behavioral issues were raised in April 2003, which was shortly after the foster parents were immersed back into his life, thus validating that it is the intrusion by the foster parents that places the child's growth and development in detriment. Interestingly, GAL did home visit with mom in April 2003 and said everything was fine with child in mom's custody; no behavioral concerns. *RP 134,135*

- a. **The court erred in using the psychological parent criteria in this case because the foster parents became psychological parents through unconstitutional conduct and without the consent of the biological mother.**

The standard that applies in a custody dispute initiated by a third-party non-relative is found in Washington statute RCW 26.10.100, which states, "The court shall determine custody in accordance with the best interests of the child." In custody disputes between parent and nonparent, nonparent must allege that neither parent is a suitable custodian. RCW 26.10.030. In determining whether or not a parent is a suitable custodian, the nonparent 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. In re

Custody of Stell, 56 Wash.App 356, 783 P.2d 625 (1989). Here, the court did not find that mom was unfit, but rather, found that Angelo's' growth and development would be detrimentally affected by placement with his mom. *RP 818* The court in finding that placement with mom would be detrimental to Angelo's growth and development rested primarily on Ms. Thomas' conclusion that the Respondents are the "psychological parents" of Angelo. *RP818*.

Washington courts have used this theory of "psychological bond" on minimal occasions and only in extraordinary circumstances. Each case in which this theory was used there were unique circumstances and the nonparent developed the bond with the child through a consensual marriage or meretricious relationship with one of the natural parents. The historical case of In re the Marriage of Allen, 28 Wn. App. 637, 626 P. 2d 16 (1981), was the first to seriously address the issue of depriving an otherwise fit parent of custody. The Allen case involved a stepmother's fight for custody of her stepson from her estranged husband in their active divorce case. 28 Wn. App. 637, 626 P.2d 16 (1981). The Allen court was very cognizant of a parent's fundamental right to parent their child when it concluded that courts determining custody between a parent and nonparent must apply a more stringent balancing test to protect both the parents' constitutional rights to privacy and the family entity. Id. at 645-46. The

court concluded that a finding of unfitness was not required in a nonparent custody proceeding because the neglect and termination provisions served a different purpose and resulted in the drastic consequence of depriving the parent of all rights to the child. Id.

This case differs significantly from the Allen case in that the Allen case was a suit between Mr. and Mrs. Allen and did not involve the natural mother of the child. The child was also in the stepmother's care when she filed the action. The step mother had been the child's main source of assistance in overcoming his hearing handicap; the child was severely disabled and she was part of his therapeutic milieu. She immersed herself into the deaf community and provided a therapeutic environment at home to deal with the child's special needs. The natural father on the other hand did nothing of significance to help the child or foster his growth and development. Actually, it was the father's consent that created the relationship between his child and the nonparent. That relationship developed into a situation where child would not and could not function without the nonparent. If child were to be placed with the father his essential needs would not be met and his growth and development would be obstructed in every way.

Here, there is not marriage or meretricious relationship between the parties. The foster parents and Angelo's mom have no relationship to

each other. The foster parents who by Carol Thomas' testimony are bonded and attached to Angelo offer no special environment like Mrs. Allen did in that case. In the Allen case, the child absolutely needed the home Mrs. Allen provided in order to function on a daily basis. There were no alternatives because the father was unwilling and incapable of providing for his child's special needs. Here, the evidence supports that as late as April 2003, Angelo was doing well in his home with his mom and developing physically, mentally and educationally. *RP 134, 135*. There was no evidence Angelo needed to be with the foster parents for any health reasons or other significant reasons. It is clear from the evidence presented that Angelo's growth and development altered significantly only when there was interference by the foster parents. First when they tried to force visits and contact shortly after the reunification process. Then again beginning the second half of the 2002/2003 school year, when the foster parents through visitation order reentered his life and disrupted his bonding with Appellant. As indicated in the Allen case the facts were unique and each case should be looked at on a case-by case basis. Therefore, to use the Allen case as support for transferring placement in this case would be in direct conflict with the decision of the United States Supreme Court in Troxel.

After Allen and Stell, numerous cases have addressed this delicate issue of third party custody, not only as it relates to the child's growth and development being detrimentally affected by placement with an otherwise fit parent, but more specifically the issue of a child having a "psychological bond" with a nonparent as reason for transferring placement. In In re Custody of Shields, 120 Wn. App. 108 (2004), the court affirmed an award of custody to the stepmother after the natural father died. The Court held that even though the natural mother was found to be fit, it was detrimental to the child to remove him from the *de facto parental relationship* formed between him and the stepmother. In that case, the child lived with the stepmother and natural father by consent of the natural mother for almost eleven years and had other siblings living in the stepmother's home with him. Moreover, at the time of trial the child was fifteen years old and able to express his wishes to the judge. Evidence showed that the natural mother consented to and encouraged the relationship with the nonparent by moving to Oregon when child was only five years old and continuing to exercise only 15% of her regular visitation time with the child. Id.

This case differs significantly from Shields in that Angelo's placement with the foster parents was through the foster care system, not by any consent or willful choice of mom. Mom had no control over

whether or not any bond or attachment was formed with the foster parents. The State of Montana made all the choices regarding Angelo's placement and relationship with the foster parents as well as how much contact mom could have. *RP647*. It was actually the state, through the foster care program that consented to and encouraged the bonding and attachment of Angelo and the foster parents as well as mom's contact with child. *RP661*. Additionally, Angelo was with the foster parents for less than three years as compare to eleven year in Shields. Unlike Shields, Angelo's only sibling is not residing with the foster parents, but is with his mother here in Washington. Evidence supports Angelo's attachment not only to mom and her boyfriend, but to his brother, Chester. *RP 135*

The central and most recent case which comprehensibly addresses the issue of psychological bond is In re the Parentage of L.B. 121 Wash.App.460, 89 P.3d 271, (2004). This case is Sue Carvin and Page Britain, a same sex couple involved in along term relationship for 12 years. Together they made a decision to parent a child together. Britain gave birth to the child the couple was to parent. From birth until the child was approximately six years old, both women parented the child equally. The couple separated and agreed to share parenting of their child. Britain began to limit Carvin's contact with the child. Carvin filed a Petition under the UPA for determination of parentage. She also plead under the

common law theory of *defacto* parentage and alternatively for third party visitation.

Among several issues raised, Britain claimed that she was a fit parent and the court's recognition of a common-law claim for *defacto* parentage would violate her constitutional guarantees against unwarranted governmental intrusion into her parenting decisions. The Court concluded that Britain's argument ignored the fact that many of the cases reflected statutory limitation in the law based on dependency, custody or adoption actions where the biological parent was alleged to be deficient. Moreover, the Allen court held that the State may interfere with the natural parents constitutional rights only if (1) the parent is unfit or (2) the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. However, Carvin did not seek a determination of co-parentage because Britain was unfit. Rather, she alleges she is the *defacto* parent with whom the child is psychologically bonded and that it would be detrimental to L.B.'s growth and development to deprive her of the *defacto* parenting relationship **that was fostered with Britain's consent and active participation**. In response to Britain's argument that recognition of the de facto parentage creates a "pseudo adoption" without constitutional constraints, the court found her argument "missed the point." The *defacto* parentage rule adopted by other states emphasizes the

original consent by the legal parent to the relationship. Following suit, the Court in L.B. held that under a petition for co-parenting, the “de facto parent-child relationship must have been formed **with the consent and encouragement of the biological parent.**” Id.

The L.B. court clarifies the circumstances under which such a theory as used in Allen and Shields to expand the statutory requirement of “detrimental to the child’s growth and development to obtain custody to include “psychological bond” with child is applicable. Accordingly, four critical factors must be met. The petitioner in a nonparental custody action must present sufficient evidence that: 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 obligations of parenthood without expectation of financial compensation, and 4.) the petitioner has been in the parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Of these factors, the most notable, which has been present in L.B. and nearly all the cases prior to L.B. that have transferred placement from an otherwise fit parent to a nonparent is the biological parent’s consent to and fostering of the relationship between the child and nonparent. In Allen, the biological father was married to the nonparent and consented to

the relationship. In Shields, the biological mother originally placed the child with the father by agreement, then after the father remarried, the biological did not move for an adjustment of the parenting plan, but rather she moved to Oregon. The mother consented to the relationship of the child and stepmother by moving further away from her son and not exercising her visitation rights under the parenting plan for the next six years. In L.B. the natural mother and nonparent were in a long term committed relationship in which the parent like relationship was consented to and fostered by the natural mother. The required “consent to and fostering of the relationship” simply is not present here. All evidence contradicts any “consent to or fostering of” on mom’s part to such a relationship. Mom always wanted to have Angelo in her sole custody, care, and control even during the appeal process. *RP 646, 647.*

It is clear from the facts and evidence that Angelo had bonded and attached to his mom during his first two years of life when he was in her care and custody. The initial time Angelo was removed from his mother’s care and their bonding and attachment was interfered with was without her consent; the State of Montana began a dependency proceeding and placed Angelo in foster care. The second time the child was removed from her care permanently and her bonding and attachment was interfered with was when the State of Montana unconstitutionally terminated her parental

rights; again this was without her consent. The third time her bonding and attachment was interfered with was when the foster parents after being warned not to interfere, came to Washington and filed a Petition for NonParental Custody and sought court ordered visitation in late December 2002; this was without mom's consent. The fourth time her bonding and attachment was interfered with was when Washington court granted temporary placement with the foster parents in August 2003; this was without her consent. The last time her bonding and attachment had been interfered with was this court's final determination that the Petition for NonParental custody would be granted and child was permanently removed from mom; this was without her consent. It has been during every single incident that mom had not "consented to [nor] fostered the parent like relationship" with the foster parents that the "psychological bond" occurred and is now being used by this court as the basis to deny mom her constitutional right to the care and custody of her child.

**c. The "psychological parent" may be re-defined through reintegration of the mother and child.**

It has been affirmed that Angelo formed his initial bond and attachment with his mother during his first two years of his life. *RP 542* It was through this initial bonding that foster parents were able to form the current "psychological bond" at issue in this case. The "psychological

parent” may be re-defined through reintegration of mom and child. *RP 544*

As testified to in trial by Dr. Jorgensen the child can be reintegrated with his biological mother and she can resume that role of actual and psychological parent. *RP 544*. This testimony was not rebutted. He concluded that the mother and child likely formed a parent-child bond when the child was very young. This healthy bond is the foundation for all other bonds the child would make later. The determination that the child initially formed a healthy bond with mom and was therefore able to bond with the foster parents supports Dr. Jorgensen’s analysis, and is not rebutted even by Carol Thomas. In fact, Ms. Thomas’ testimony affirms this fact. Finally, Dr. Jorgensen testified that the ability to form these bonds meant that the child could again form a bond with his mother and other important individuals and this was also not rebutted. *RP 542* Thus, the mother and child can form a bond if given an opportunity, and most likely were from May 2002 until December 2002, until the foster parents and this court interfered. The Court however gave no weight to this testimony.

Since the foster parents and the court have always interfered in this process, Angelo and his mom have been denied this opportunity. Again, this alleged deficiency of mom may be cured by remedial measures and placement of the child with a third-party is improper.

d. **Alleged speculative future harm without any objective measurement is insufficient to deprive a fit parent of her fundamental right to the care and custody of her child.**

This court relies unduly on Ms. Thomas' concerns about Angelo's future. This court stated in its oral ruling that, "She [Ms. Thomas] also expressed concerns, not just concerns, but great concerns that continued placement with mom would have a detrimental affect on his socio-emotional growth and development, and she feared that it was likely that this would result ..." *RP816*. Ms. Thomas may have concerns and may believe that future conduct is likely. However, this is mere speculation and cannot be considered by this Court. Many counselors believe that someone with a childhood like that of mom's, specifically her mother's addiction to narcotics, that it is likely that mom would have substance abuse problems. However, this is not true in the case of mom and the likelihood of future conduct is dependent on a myriad of factors. Ms. Thomas concluded that remaining with his mom, who is a fit parent, will be detrimental to him. *RP 818*. Yet Ms. Thomas fails to account in any way for the fact that Angelo's mom is a fit parent. Ms. Thomas and mom merely differ in their opinion about what is best for Angelo Cork. This court erroneously chooses to believe Ms. Thomas over mom and this is prohibited by the Troxel decision.

It was improper to give such weight to Ms. Thomas's contrasting opinion when the determination of Angelo's undisputedly fit parent had already determined what was best for her child. Angelo's mom once before decided counseling was appropriate for Angelo; she merely made the decision that this time it wasn't. *RP 770-772,785*. Ms. Thomas spent less than 10 hours with Angelo. *RP 447-448* That does not give rise to the state being allowed to come in and remove her child for that reason. It is not only improper, but unconstitutional for this court to substitute its decision-making for that of a fit parent.

- b. **A fit parent possesses the fundamental constitutionally protected right to make decisions regarding her child whether it is a decision regarding counseling, changing residences or otherwise.**

The Court improperly placed weight on Appellant's decision regarding counseling in its determination that placement with Appellant would be detrimental to Angelo's growth and development. Custody of Osborne, 119 Wn.App. 133 (2003) cited Smith and Troxel in addressing the issues of a fit parent making decisions regarding her child. In that case the trial court stated " in Smith, the trial court can only have reached the conclusion it did by construing Troxel to mean that until a parent is found to be unfit, her decisions regarding third party visitation are final and unassailable-no matter how much harm her decision might do to the

**child.”** The court further quoted Justice O’Conner who wrote, “The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville’s determination of her daughter’s best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption.” Here, the trial court not only ignored credible testimony supporting mom’s decisions, but indeed gave no weight what so ever to mom’s parental right in her decision not to seek counseling for her son, Angelo. This decision, and all other parental decisions, must be given great deference when made by a fit parent. Parents, counselors, judges and other professionals will have differing opinions as to when, or if, a child should get counseling. Some may believe that any minor event requires the parent to seek counseling on behalf of their child. Some believe that only major traumatic events require counseling and others do not believe in counseling at all.

Here, there were some concerns expressed over a two year period. However, at no time did anyone state that if mom did not seek counseling for her son Angelo, that harm to her son would result. The CPS worker did not mandate counseling, *RP 745* the school teacher never sent a letter home expressing concern, *RP 182-183* nor was there any evidence that Angelo would be unable to re enroll in the same school. No one took any

formal action to put mom on notice that Angelo was at significant risk due to lack of counseling. In fact, mom had already demonstrated she has no problem making decisions regarding her son. Once the Montana Supreme Court restored her parental rights, she could have just taken her son back. However, she recognized Angelo needed counseling and reintegration. She chose to have extensive counseling, therapy and reunification done. *RP 770-772, 785* Ms. Weida, the caseworker from Montana not only affirmed mom's prior choice for counseling but further offered the explanation for mom's decision about counseling after reunification. Testimony presented indicated that there was no order requiring counseling for Angelo nor was there a specific directive to seek counseling. *RP502* Mostly because it would in large part depend on not only how Angelo interacted with his mom after reunification, but whether there was a financial way for mom to continue counseling, or simply it might just be their exercise of parental decision making not to seek counseling. *RP502*.

In fact, there were conflicting concerns. Ms. Lally expressed that Angelo was doing just fine and there were no apparent behavioral problems from the beginning of the 2002/2003 school year all the way into the beginning of the second semester. Angelo did not begin to exhibit behavioral problems rising to the level of necessary counseling until the

foster parents were re-involved in his life. At the point where Angelo had developed significant behavioral problems, the Guardian ad Litem was already involved and counseling had begun for Angelo. CPS investigated a false claim made against mom and counseling was suggested, but also determined to end service for mom because there was little or no risk. *RP 742-745*. At that same time the court found and Angelo's school teacher, in April 2003 confirming that, "**things were going well.**" *RP 814* For this court to disregard a fit parent's right to decide when or if to seek counseling is contrary to the Supreme Court's decision in Troxel and an unconstitutional infringement of a parent's fundamental right to the care and custody of her child. This court cannot substitute its judgment for a fit parent's judgment regarding the care of her child.

To consider the further findings of the court that mom did not provide a stable home for Angelo as evidenced by the various moves she made is not supported by the evidence. Testimony from Vicki Weida, clearly rebutted this finding in that "almost all children[who] returned to the birth parents move several times...its very usual for birth parents and their returned children to move." *RP 500* the GAL's home visit in April 2003 was very positive and child was happy and excited in his home. *RP 134-135* Angelo was thriving in school while in mom's home and under her sole custody and care. No evidence was presented that supported any

findings that these moves were detrimental to Angelo's growth and development.

The court made a specific point to recognize mom's testimony and general attitude concerning issues relating to Angelo in consideration of her placement decision, in that mom's "attitude toward the situation with regard to Angelo is, at best, casual." *RP 817* This court clearly ignored the fact that culturally, Native Americans, such as Ms. Cork present in a very stoic manner regardless of the intensity of their emotion. *RP 769*.

**4. MS. THOMAS' REPORT WAS NOT A COMPLETE REPORT, WAS BASED ON THE WRONG STANDARD, LACKED A FULL UNDERSTANDING OF THE HISTORY OF THE CHILD AND PARTIES AND WAS BASED PRIMARILY ON INADMISSIBLE HEARSAY.**

The court rested its findings primarily on conclusions made by Carol Thomas from her interaction with Angelo. The Court cited specific statements Angelo made to Ms. Thomas in rendering its opinion that placement with mom would be detrimental to Angelo. These conclusions of Ms. Thomas were in turn based on non-admissible child hearsay statements. **Under Evidence Rule 803(a)(4)**, the following are not excluded by the hearsay rule, even though the declaring is available as a witness:

**(4)- Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain,**

or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

By Ms. Thomas' own admission in her letter to the GAL dated 8-15-03, Ms. Thomas states that she is seeing Angelo "for the purpose of assessing his relationship and interaction with them" [them is mom and foster parents]. In her *Conclusions & Recommendations* (p 7-9) she made no diagnosis. *RP 432* Furthermore, in her recommendations she made no recommendation of any treatment. Ms. Thomas merely recited to the court her observations that have nothing to do with any actual or potential diagnosis. Neither did she make any recommendations of medical treatment because she did not conduct any diagnosis. Here, Ms Thomas was not treating Angelo, thus any hearsay statements made by Angelo during his interaction with Ms. Thomas were inadmissible hearsay and cannot be considered by this Court. For the above reasons these hearsay statements of Angelo Cork were not admissible under ER 803(a)(4) and should have been excluded as unreliable hearsay.

Moreover, Ms. Thomas admitted her report was not a complete report and lacked a full understanding of the history of the child and the parties. *RP 440* Ms. Thomas admitted she did not review any previous reports of the child or the parties, nor did she consult with any of the child's or the parties' previous counselors. *RP 440* She admitted she did

not observe Angelo during the period of time (May 2002-June 2003) when Appellant had custody of her son and the Respondents, specifically September 2002 thru January 2003, weren't even involved in Angelo's life. *RP 443* This observation was critical to any assessment of whether or not placement of Angelo with his mother, Appellant would be detrimental to his physical, mental or emotional well-being. This is critical because the court found that in September 2002, when Angelo entered kindergarten, things apparently seemed to be going well from the report of the Guardian ad Litem who interviewed Ms. Lally, the kindergarten teacher, and from Ms. Lally's testimony things were going well. Things all in all seemed to be going well. It was during this time that Appellant had sole custody of Angelo and the foster parents were not involved in the child's life at all. Foster parents did not have visitation in February but when their visits resumed in March and April, Angelo behavioral problems escalated even further. Evidence revealed that this behavior continued after the foster parents were granted custody in August 2003. *RP317-318*.

The proper nonparental custody standard for determining placement was not used. Testimony from Carol Thomas indicated the standard she used for determining placement of the child was the same standard she uses for determinations of placement between two parents in

a dissolution action. *RP432 In Custody of Nunn*, the court decided RCW 26.09 provisions do not apply in 26.10 cases. In *Nunn*, the GAL applied RCW 26.09.187(3) criteria in determining custody for a nonparental action. In a custody dispute between parents, the standard is the best interest of the child and the Court considers which offers the better home environment. However, in a custody dispute between parents and nonparents, the analysis must consider the balance of the rights between the parent and nonparent, or the parent's constitutionally protected right to the care and custody of their child.

Here, the court emphasized its particular consideration of the report of Carol Thomas and Ms. Thomas' observations and conclusions regarding placement. However, Ms. Thomas' conclusions are not valid as they are based on the improper standard for a third party custody action.

#### **CONCLUSION**

First and foremost, Washington court did not have jurisdiction under the UCCJEA to hear any matters relating to custody determination of Angelo Flores Cork. At commencement of this action, Angelo and his mother were not residing in Washington for at least six months. There was still custody determination of Angelo occurring in Montana less than six months prior to filing the Washington action. Moreover, almost all critical evidence and pertinent witnesses relating to the child and parties

was located in Montana as well as the parties and children have their most significant connection in Montana.

For this court to take Angelo away from his mother who is not unfit, In Re Parentage of L.B. mandates a showing that Angelo's natural mother consented to and encouraged the parent like relationship of the foster parents. Mom did not consent to the foster parents developing such a relationship with her son Angelo. In fact, she always fought to have her child returned to her. The relationship between the foster parents and Angelo developed because the State of Montana placed the child in foster care with them; not by mom's choice. Montana prolonged this placement and further development of a bond between foster parents and Angelo when mom's parental rights were unconstitutionally terminated. Then there was a lengthy appeal process that resulted in mom's rights being restored. Angelo remained with the foster parents for the length of time he did by no fault of mom.

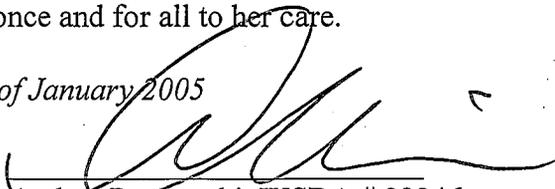
Furthermore, foster parents knew Angelo needed to bond with his mother, but they just could not let go; they wanted him for their own. Angelo was going fine until the foster parents intruded in his life.

Evidence undisputedly points out that behavioral problems did not occur or rise to the level of concern until foster parents' re-involvement.

Ms. Thomas clearly admitted that given Angelo's history, it is an interruption in care that places him at risk for the emotional and behavioral concerns. *RP 435* It was the actions of this court and foster parents that caused this repeated disruption and interference in the relationship of Angelo and his mom which eventually lead to the emotional and behavioral detriment to this child. None of these interruptions were the choice or the cause of mom.

Allowing the foster parents to use the relationship they developed as foster parents to Angelo Cork to be the basis for obtaining third party custody will set a destructive precedent which would essentially allow every foster parent to seek custody of their foster children in lieu of the children ever being returned to their biological parents. Thus, opening the door to possibly any and every care provider who has formed a strong bond with a child to seek and obtain custody of that child away from the natural parent. Appellant respectfully asks this court to set aside the ruling by the trial court and return Angelo once and for all to her care.

*Respectfully submitted this 21st day of January 2005*

  
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