

79938-5

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF ANGELO FLORES-CORK

DAVID NAGEL & ANITA BANGERT
Respondents

V.

HOLLY MARIE CORK
Appellant

NO. 229301-III

RESPONDENT'S APPELLATE BRIEF

DAVID J. CROUSE
Attorney for Respondents
W. 422 Riverside, Suite 518
Spokane, WA. 99201
(509) 624-5338
WSBA #22978

TABLE OF CONTENTS

Table of Authorities Page 3
Issues presented Page 5
Statement of Case Page 5
Argument Page 16
Conclusion Page 30

TABLE OF AUTHORITIES
 STATUTES AND COURT RULES

RCW 26.1036
 RCW 26.27 (UCCJA) ..13,16,17,18,19,20,22,24,27,30,34
 CR 8(d)14,26
 ER 803(a) (4)51,53

STATE CASES

In re Custody of R.R.B, 108 Wn. App. 602 (2001)..36
In re Custody of Shields, 120 Wn.App 108
 (2004).....35,36,37,38, 49
In re Custody of Stell, 56 Wn. App. 356
 (1989).....36,49
In re Marriage of Allen, 28 Wn. App. 637
 (1981).....35,49
In re Marriage of Greenlaw, 123 Wn.2d 593 (1993).21
In re Marriage of Kovacs, 121 Wn.2d 795
 (1993).....35,50
In re Marriage of McDole, 122 Wn.2d 604 (1993)..34
In re Payne, 79 Wn. App. 43 (1995).....23
 Marriage of Zadorozny, 70 Wn. App. 464 (1993)...31
Neilson v. Vashon Island School District, 87 Wn.2d
 955 (1976)..... ..15
Schuster v. Schuster, 90 Wn.2d 626 (1978)....34,50

ISSUES PRESENTED

- I. Did the Washington courts have subject matter jurisdiction in this matter where the appellant filed a answer admitting to Angelo's residence in this state for more than six months at the time of the filing of the petition, where no other state than Washington could be the home state, and where all relevant evidence to this action was located in Washington?

- II. Did Holly Cork waive any issue of subject matter jurisdiction, significant connection, or inconvenient forum by personally appearing in this matter, participating in the proceedings, claiming affirmative relief, failing to appeal this court's visitation and custody determinations, and failing to timely appeal this court's finding of subject matter jurisdiction?

- III. Was there substantial evidence that Holly Cork was not a suitable custodian for Angelo, that placement of Angelo with Holly Cork would detrimentally affect Angelo's growth and development, and that custody of Angelo should be awarded to the Nagels?

- IV. Was the trial court's reliance, in part, on the testimony of the child's counselor Carol

Thomas and the guardian ad litem Mary Ronnestad an appropriate exercise of discretion?

V. Did the trial court err in admitting statements made by Angelo to his counselor Carol Thomas?

STATEMENT OF THE CASE

On July 17, 1997, CFS Montana received a referral regarding Holly Cork, who was 14, pregnant, and shoplifting baby clothes. At that time, Holly Cork's mother was incarcerated for drug related charges and Holly Cork was living with her grandmother Mavis Thornton and aunt Sherry Williams. As a result of the CFS complaint, Holly was placed in a foster home. EX 2, page 3. Angelo Cork (hereafter Angelo) was born August 28, 1997.

Holly Cork did not remain in her foster home and instead returned to the home of Mavis Thornton. In October 1997 CFS began receiving referrals from relatives regarding educational neglect, physical neglect, and emotional abuse of Angelo by Holly Cork. EX 2, page 3-4.

As a result of the concerns, CFS again placed

both Holly Cork and Angelo in foster care. On January 1, 1998, Holly Cork and Angelo were unlawfully removed to Spokane, to the home of Holly Cork's uncle Steve Cork. About February 1, 1998, it became known that Holly Cork and Angelo were now living on their own in Spokane. Holly Cork, age fifteen, and Angelo, age six months, lived on their own for about 5 months in Spokane. EX 2, page 4.

On July 7, 1998, Montana CFS was contacted by Shirley Corpe, Holly Cork's aunt. Ms. Corpe resided in Kalispell, Montana and informed DFS that Holly Cork and Angelo were now residing with her. EX 2, page 4. By December 1998, this placement was breaking down. CFS again received referrals about Holly Cork's treatment of Angelo. EX 2, page 4.

On February 4, 1999, Holly Cork and Angelo were placed at the Florence Crittenton Home in Helena, Montana by CFS. EX 2, page 4. Holly Cork refused to abide by the requirements of the Home, and engaged in conduct detrimental to Angelo. RP 73 line 2; RP 258, line 3; RP 258, line 8. As a result of Holly Cork's conduct and inappropriate care of Angelo, Angelo was removed from Holly Cork

and placed in foster care. RP 258, line 1.

A Petition for Permanent Legal Custody of Angelo was filed by the State of Montana on January 27, 2000. On April 14, 2000 a trial began regarding the termination of Holly Cork's parental rights. Findings of Fact and Orders were entered on September 29, 2000 which terminated Holly Cork's parental rights. EX 2, page 5.

Angelo was placed in foster care with David Nagel and Anita Bangert, husband and wife (hereafter Nagels) on June 21, 1999. RP 579, line 12. Angelo resided with the Nagels until April 2002. RP 75, line 21 through 76, line 3.

Angelo's father, Ricky Flores, was stabbed to death in a fight at a party. RP 275, line 20.

The Nagels were in a foster adopt program, and after Holly Cork's parental rights were terminated by the District Court, they began the adoption process with Angelo. RP 578-579, RP 583, line 3.

Holly Cork appealed the termination to the Montana Supreme Court claiming that she was not properly represented during termination proceedings by the State. The Supreme Court found that Holly

Cork should have been represented at the early stages of the termination process and reversed the termination. RP 74, line 15. RP 259, line 19.

The Montana Supreme Court did not make any determination that Ms. Cork was a fit parent. Instead, Holly Cork entered into a temporary investigative authority with Montana DPHHS on April 16, 2002. EX 112, EX 2, page 5, line 8-16. Angelo was returned to her care. Holly Cork returned to Washington with Angelo. All Montana actions were dismissed. EX 111.

Prior to Ms. Cork's return to Washington, she was advised by Angelo's Montana therapist Cheryl Ronish that she needed to get Angelo involved in counseling. RP 282, line 1, RP 291, line 1. Holly Cork promised to do so. RP 291, lines 9-12. Ms. Cork never did. RP 282, lines 18-24, RP 291, line 21. This continued counseling for Angelo was an expected component of the dismissal of the TIA. RP 513 line 14 through RP 514, line 3.

Holly Cork was also involved with psychologist Dr. Robert Page during the TIA process. Dr. Page performed a psychological evaluation of Ms. Cork.

RP 710, line 1. Ms. Cork was also advised by Dr. Page that she would need both personal individual counseling as well as parental support and group involvement following her return to Spokane. RP 724, line 22 through 725, line 8.

After returning to Washington, Holly Cork was again advised by a Washington CPS worker of the need to get Angelo in counseling (RP 283, line 9) and that problems would occur if she did not do so. RP 294, line 15. Ms. Cork never sought counseling after being so advised. RP 283, line 19. She made promises to do so, but never did. RP 296, line 8.

Ms. Cork was also referred to counseling by Angelo's school psychologist. RP 283, line 15; RP 177, line 4. In fact, Ms. Cork never sought counseling for Angelo until required by court order in this matter. RP 77, line 10. CP 51-53.

After Holly Cork returned to Washington, serious concerns quickly arose over her stability, the environment Angelo was placed in, and her care/treatment of Angelo. CP 1-8; EX 2; Ex 3; RP 78-80; RP 84, line 9; RP 86, line 21; RP 592-593.

Angelo's behavior was seriously deteriorating

at school, and he was labeled as a child in crisis by his teacher and school counselor. RP 176, line 23; RP 176, line 12; RP 166 line 14; RP 170, line 12; RP 187, line 19; RP 195, line 1; RP 195, line 8; RP 196, line 12; RP 197, line 15; RP 198, line 3. See generally RP 60-207.

A summons and petition for third party custody was filed by the Nagels on October 29, 2002 given their concerns over the treatment and care of Angelo. CP 1-8. Mary Ronnestad was appointed as the child's guardian ad litem, and because of her concerns over Angelo's behavior and well-being, she requested that Carol Thomas be appointed as the child's counselor. RP 115.

Court Commissioner Pro Tem Michael P. Price ordered Ms. Cork to comply with the counseling and indicated that if she did not do so, it would serve as a basis to transfer placement of the child to the Nagels. CP 51-53, page 2. Ms. Cork was not initially compliant in working with Carol Thomas despite the counseling order. RP 116, line 8.

Carol Thomas found that it was "in Angelo's best interest to be returned to the primary care of

Dave and Anita Nagel. If not placed in their primary care, great concerns exist regarding his emotional well-being, putting him at risk for increased depression, social withdrawal, excessive rebellion, self-destructive behaviors, and violent behaviors toward others." EX 3, August 15, 2003 report, page 9. Ms. Thomas reported very serious concerns regarding Ms. Cork's parenting. EX 3, page 7-8, conclusions and recommendations.

A motion for temporary order was filed on August 15, 2003 requesting that temporary custody of Angelo be transferred to the Nagels. CP 56-59. The motion was granted by Court Commissioner Steven Grovdahl on August 29, 2003. CP 138-142. Angelo began residing with the Nagels immediately thereafter and attended school at the Four Georgians School in Helena, Montana where the Nagels reside. CP 138-142, RP 596, line 8.

After placement with the Nagels, Angelo's behavior began to rapidly improve. EX 3, January 23, 2004 report of Carol Thomas. His school performance also rapidly improved and he became "right up there on top of his class" and was one of

the teacher's better performers. RP 309, line 14; RP 310, lines 9-13; RP 315, line 17. The child's Montana counselor Rob Dickey noted similar progress in his behavior. RP 330 line 19 to RP 331, line 15.

Both Angelo's counselor in Montana (Rob Dickey), and his counselor in Spokane (Carol Thomas) found that a parent-child bond existed between Angelo and the Nagels. EX 3, RP 332, line 16 through RP 349, line 25. Carol Thomas found "no evidence of an attachment or parent-child bond" between Holly Cork and Angelo. EX 3, August 15, 2003 report, page 7, conclusions.

After Angelo was placed with the Nagels in August 2003, Holly Cork made almost no efforts to see or even talk to her son. From August 2003 through February 2004, she called Angelo once. RP 370, line 22. In fact, she intentionally threw Angelo's phone number away. RP 371, line 4. She didn't call Angelo's school or try and talk with his counselor. Her lack of effort to contact her child continued up until trial. See RP 370-378.

On February 13, 2004, the Honorable Maryann C. Moreno made her oral ruling granting the

nonparental custody petition and ruled that Angelo would be primarily placed with the Nagels. RP 811. The nonparental custody decree and parenting plan were entered on March 31, 2004. CP 468-469, CP 443-452. This appeal was then filed on April 21, 2004. CP 478.

ARGUMENT

I. THE WASHINGTON COURTS HAVE SUBJECT MATTER JURISDICTION IN THIS MATTER WHERE THE APPELLANT FILED AN ANSWER ADMITTING TO ANGELO'S RESIDENCE IN THIS STATE FOR MORE THAN SIX MONTHS AT THE TIME OF THE FILING OF THE PETITION, WHERE NO OTHER STATE THAN WASHINGTON COULD BE THE HOME STATE, AND WHERE ALL RELEVANT EVIDENCE TO THIS ACTION WAS LOCATED IN WASHINGTON.

Jurisdiction in child custody matters is governed by the Uniform Child Custody Jurisdiction Act (UCCJA), codified in Washington as RCW 26.27. As a general rule, the UCCJA does confer matter jurisdiction to the home state, if such a home state exists. The issue of home state is defined by RCW 26.27.201(a) which provides that:

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 reside in that state;

By Holly Cork's own admission, Angelo resided in Washington for six months or more before the filing of the third party custody action. The Nagels filed their third party custody petition on October 29, 2002. They alleged at section 1.4 that the child resided in this State for six consecutive months prior to commencement of this action, and that Washington is the home state. CP 1-8.

On January 3, 2003, Holly Cork filed her response, admitting that Washington was the home state and that the child had resided in this state for six consecutive months. CP 9-11, page 1 section 1.4. Holly Cork was in the best position to know when the child had moved to this state with her. Washington is accordingly the home state.

"Averments in a pleading to which a responsive pleadings is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." CR 8(d). The rule is that a matter which is not denied or which is expressly admitted (as in this case) is considered

to be established for the purpose of the case, and no further proof on that issue or element is required or permitted. See Neilson v. Vashon Island School District, 87 Wn.2d 955, 958 (1976) which held that a statement of fact made by a party in a pleading is an admission that such fact exists, and is admissible against such party in favor of his adversary.

Holly Cork is bound by her admission and the trial court was entitled to rely on this admission in determining that Washington was the home state of Angelo at the time the petition for nonparental custody was filed. See the Findings of Fact, section 2.3. CP 459-467. Note that at section 2.3, Judge Moreno specifically handwrote in and initialed the provision "This subsection remains in" after counsel for Holly Cork attempted to cross out the finding of home state jurisdiction.

A. No parent or person acting as a parent continued to reside in Montana so as to confer Montana with home state jurisdiction.

In her motion to dismiss the nonparental custody provision, Holly Cork argued that pursuant

to the UCCJA, Montana was the home state, had exclusive continuing jurisdiction, and that Washington was without subject matter jurisdiction. CP 199-330. While it is indisputable (based on Holly Cork's own admissions in her response) that Washington was the child's home state, it is worth noting that under RCW 26.27.201, it is impossible to confer home state jurisdiction to Montana.

Holly Cork's claim to Montana jurisdiction is refuted by the very first paragraph of RCW 26.27.201(a) which provides that:

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 reside in that state;

Certainly, Angelo was not residing in Montana at the time this nonparental custody action was filed. This fact was never controverted by any party. CP 9-11. Thus, the first basis for a finding of Montana as a home state is not met.

The other possible basis for a finding that Montana is a home state would be if Angelo had been absent from Montana for less than six months, but a

parent or person acting as a parent continues to reside in that state. The father of Angelo Cork is deceased. CP 459-467, Findings of Fact section 2.5(14). It is undisputed that Holly Cork resided in Washington at the time the petition was filed. CP 9-11, CP 459-467, Findings of Fact section 2.5(10). No parent or person acting as a parent remained in Montana and thus it is impossible for Montana to be a home state under any basis.

This issue is controlled by the "Definitions" section of the UCCJA, codified at RCW 26.27.021 (13) which provides as follows:

- (13) "person acting as a parent means a person, other than a parent, who:
- (a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
 - (b) Has been awarded legal custody by a court or claims a right to legal custody under the laws of this state.

While the Nagels obviously meet the requirements of subsection (a), the statute by using the word "and" requires that both subsections be met in order to qualify as a person acting as a parent. It is not disputable that subsection (b)

is not met here. The Nagels have never been awarded legal custody by any Montana court and no evidence was presented of such. The Nagels have made no claim that they have a right to legal custody under the laws of the State of Montana, nor had Holly Cork made such a claim.

Irrefutably, the Nagels are not a "person acting as a parent" for purposes of this statute. As Angelo was not residing in Montana at the time this action was commenced, and as no parent or person acting as a parent resided in Montana, Montana is without any claim to home state status.

B. There is no jurisdictional relevance as to whether the trial court was making an initial custody determination or modifying a prior Montana custody determination.

Holly Cork argues that Montana had continuing jurisdiction because of the entry of a prior order making a custody determination. The term "prior custody determination" is well defined. RCW 26.27.021(8) provides that:

(8) "Initial determination" means the state in which a child custody determination is made.

A child custody determination is accordingly defined at RCW 26.27.021(3) as:

(3) "Child custody determination" means a judgment, decree, parenting plan, or other order of the 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. The term does not relate to child support or other monetary obligation of the child.

The statute thus requires the existence of a court order. Holly Cork, who now asserts that a prior child custody determination was made, provides no such order. In fact, none exists as the dependency was reversed by order of the Montana Supreme Court. The question is asked, "Is this reversal a dismissal?"

The answer lies in the fact that the Montana Supreme Court reversed the case and the State was faced with the determination of whether to re-file the dependency action against Ms. Cork, appoint new counsel for her, and move to terminate her parental rights for a second time. Instead, the State chose to operate under a Temporary Investigatory Authority (TIA). This is offered by the respondent as a trial exhibit. See R110, R111, R112. As can

be seen, the TIA is not a court order, but a agreement between the Respondent Cork and CFS.

In any event, actual proof that this entire action is dismissed is filed by the Respondent as Exhibit R111. This is the order of dismissal which dismisses every aspect of the actual court case. It is signed by District Judge Dorothy McCarter on April 19, 2002.

Although a dependency action is defined as a child custody proceeding for purposes of the UCCJA as set forth at RCW 26.27.021(4), as noted above, the action was dismissed. Even if Holly Cork had actually produced any such order, or assuming *arguendo* that the order of dismissal or the TIA was a custody determination order, said order would be completely irrelevant in Washington's determination of jurisdiction. Montana's retention of exclusive continuing jurisdiction to modify its orders would be governed by RCW 26.27.211 which provides that:

(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 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 the state.

The key in this determination is the word "or" between subsections (a) and (b). If either condition exists, a state (Montana) does not have continuing jurisdiction. Here, it is indisputable that subsection (b) is not met. As addressed in this brief above at section I(A), neither Angelo, Holly Cork, or a "person acting as a parent" resided in Montana. Because subsection (b) cannot be met, Montana could not possibly have continuing jurisdiction even if a prior custody determination order actually existed.

This statutory requirement for a finding of continuing jurisdiction was fully addressed and decided in the seminal case of In re Marriage of Greenlaw, 123 Wn.2d 593 (1994). Greenlaw states, "The state in which an initial child custody decree was entered retains exclusive jurisdiction to

RESPONDENT'S APPELLATE BRIEF - 21

modify the initial decree so long as: 1) The decree was entered in compliance with statutory requirements; 2) one of the parents or other contestants continues to reside in the state in which the decree was entered; and 3) the child continues to have more than slight contact with the state in which the decree was entered. Id. at 604-605. As Holly Cork cannot meet such requirements, her claims of continuing Montana jurisdiction are without any merit under any circumstance.

C. Even if there were no home state, Washington still properly exercised jurisdiction as it had a very significant connection with Angelo and was not an inconvenient forum.

Respondent Cork next argues that Washington lacks a significant connection to the minor child and/or that Washington is an inconvenient forum. The issue of significant connection, only becomes relevant if this court were to find that there was no home state. The UCCJA addresses situations where no home state exists at RCW 26.27.201 (b) which provides that:

(b) A court of another state does not have jurisdiction under (a) of this subsection, or

a court of the home state 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;

The issue of "no home state" was further addressed in In re Payne, 79 Wn. App. 43 (1995). In Payne, the mother and father had left the State of Virginia and moved to Washington. They had been residing in Washington for a period of 5½ months. The father returned to Virginia and filed a custody action. The Payne court found that since the children were not residing in Virginia, and since the father had not remained a resident of Virginia during the six month period that the children were removed from the state, there was no home state. Payne at 51-52.

Since Montana could not possibly be a home state under any circumstance, Holly Cork attempts to now assert in her appeal that Washington was not a home state and that Washington lacked a

significant connection with Ms. Cork or Angelo. Even if a court were to ignore Holly Cork's admission to Washington home state status in her response to petition, and thus accept *arguendo* that there would be no home state, Washington still properly exercised jurisdiction as there existed a very significant connection to both Ms. Cork and Angelo. Conversely, no significant connection existed in Montana.

Initially, no party disputes that Ms. Cork and Angelo were residing in the State of Washington when this matter was served. RCW 26.27.201 (b) (i) is thus satisfied.

RCW 26.27.201 (b) (ii) then requires a showing of significant connection in order for the Washington courts to have properly exercised jurisdiction. Numerous facts illustrate this significant connection. In fact, Holly Cork's relevant parenting of Angelo was done entirely in Washington.

First, Angelo attended school only in Washington. EX 2, RP 190, and numerous other citations. Angelo's kindergarten teacher is in

Washington. RP 190. The school counselor is in Washington. RP 160. Both the teacher and counselor witnessed the child's emotional acting out in school and his emotional deterioration while in the care of Holly Cork and were the exclusive sources of such information to the Guardian ad litem and Court. RP 160 and RP 190.

The mother's live-in boyfriend, and father of her other child Chester, resided with her exclusively in Washington. EX 2, RP 91, line 11. Mr. Rich provided daycare for Angelo. RP 95, lines 5-11. There are substantial issues regarding Mr. Rich's adverse effect on Angelo. Mr. Rich's felony and misdemeanor criminal history and records of incarceration are in Washington. RP 94, line 1; RP 93, lines 16-25. Evidence of Mr. Rich's use of marijuana and Angelo's exposure to it are located exclusively in Washington. RP 173, line 15; RP 186, line 1.

Additionally, all evidence of Holly Cork's frequent residential moves and personal instability while caring for Angelo is located in Washington. RP 78, line 8 through RP 80, line 13.

Evidence of the mother residing with a convicted felon on home monitoring (possession with intent to deliver cocaine and 3-degree assault) is located exclusively in Washington. RP 86, line 21 through RP 88, line 18.

Evidence of significant police activity at and/or involving Holly Cork's residence (while caring for Angelo) is located exclusively in Washington. RP 84, line 6.

Evidence of CPS involvement with Ms. Cork while caring for Angelo is in Washington. RP 283, line 9; RP 734.

While Holly Cork now argues that Washington lacks a significant connection to the minor child and/or that Washington is an inconvenient forum, she admitted to these facts in her response to nonparental custody petition. CP 9-11 (page 1, admission to section 1.4 of the petition). Holly Cork has apparently changed her mind in making the current claims, but such claims are barred under the previously cited CR 8(d) and supporting cases.

Furthermore, Holly Cork's prior filed declaration entirely supports the fact that the

pertinent, relevant witnesses are located exclusively in Washington. In this prior declaration, Holly Cork states, "I moved to Washington because I have family ties in Washington and would get family support in Washington that I would not get in Montana." CP 34-37 (page 2, lines 1-3).

This nonparental custody petition was filed pursuant to RCW 26.10.030(1) which requires in pertinent part that "neither parent is a suitable custodian." There is no relevant information regarding Holly Cork's parenting of Angelo in the State of Montana. Her prior problems with, and involvement in, the Montana DFS and court system would have no relevance to her ability at the time the petition was filed to parent Angelo.

When Angelo was placed with Holly Cork after the Montana dependency was dismissed, she promptly returned to Washington with the child. There would be no current, relevant information in the State of Montana regarding Holly Cork's current fitness as a suitable custodian. Not surprisingly, Holly Cork fails to cite to any potential witness in Montana

pertinent, relevant witnesses are located exclusively in Washington. In this prior declaration, Holly Cork states, "I moved to Washington because I have family ties in Washington and would get family support in Washington that I would not get in Montana." RP 509-512 (page 2, lines 1-3).

This nonparental custody petition was filed pursuant to RCW 26.10.030(1) which requires in pertinent part that "neither parent is a suitable custodian." There is no relevant information regarding Holly Cork's parenting of Angelo in the State of Montana. Her prior problems with, and involvement in, the Montana DFS and court system would have no relevance to her ability at the time the petition was filed to parent Angelo.

When Angelo was placed with Holly Cork after the Montana dependency was dismissed, she promptly returned to Washington with the child. There would be no current, relevant information in the State of Montana regarding Holly Cork's current fitness as a suitable custodian. Not surprisingly, Holly Cork fails to cite to any potential witness in Montana

Corrected page filed 5/10/05

who could provide relevant information as to her current care of Angelo at the time the nonparental custody petition was filed.

As to the issue of an inconvenient forum, it is hard to imagine how litigating in the county of Ms. Cork's residence poses any legitimate hardships. In any event, such issues are properly raised near the outset of a matter. Respondent Cork was represented by attorney Kevin Stewart at the outset of this matter. CP 486-88; CP 9-11. Several custody/visitation related hearings transpired. CP 51-53, CP 138-142. A counselor was ordered for the child. CP 51-53. A guardian ad litem was appointed. EX 2. At no step in the process was the issues of inconvenient forum ever raised until a month before trial. CP 199-330.

One intent of the UCCJA is to prevent "forum shopping" when it comes to child custody. In this case, Holly Cork was happy to litigate in the Spokane County court until her case turned for the worse and she lost temporary custody. Only on the eve of trial did she raise issues of inconvenient forum, substantial connection, or jurisdiction

despite having previously admitted such issues in her response to petition. CP 9-11. Clearly, Holly Cork's actions are nothing more than an exercise in forum shopping.

II. HOLLY CORK WAIVED ANY ISSUE OF SUBJECT MATTER JURISDICTION, SIGNIFICANT CONNECTION, OR INCONVENIENT FORUM BY PERSONALLY APPEARING IN THIS MATTER, PARTICIPATING IN THE PROCEEDINGS, CLAIMING AFFIRMATIVE RELIEF, FAILING TO APPEAL VISITATION AND CUSTODY DETERMINATIONS, AND FAILING TO TIMELY APPEAL THIS COURT'S FINDING OF SUBJECT MATTER JURISDICTION.

RAP 5.2(a) requires that a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed, or (2) the time provided in section (e). Subsection (2) does not apply in this case.

On February 9, 2004, the trial court entered an order denying Holly Cork's motion to dismiss for lack of subject matter jurisdiction, significant contacts and/or inconvenient forum. CP 439-442. This was a final order. No appeal was taken until April 21, 2004. CP 478. As the 30 day requirement

is not met, Holly Cork's appeal is barred on any jurisdiction issue.

Holly Cork argues that subject matter jurisdiction can never be waived. As a general rule this is true. As we have seen, the UCCJA provides a very strict basis for subject matter jurisdiction at RCW 26.27.201. General principles of jurisdiction such as physical presence or long arm jurisdiction are not allowed.

However, the UCCJA also provides for waiver of subject matter jurisdiction at RCW 26.27.061. RCW 26.27.061 states:

A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with RCW 26.27.081 or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

Several important principals must be addressed. First, this statute applies whenever there has been a child custody determination. As has been addressed above, "child custody determination" is defined at RCW 26.27.021(3) and

includes temporary orders. The Spokane County Superior Court has entered both visitation orders and a temporary custody order in this matter. CP 138-142. Accordingly, this Court has made a child custody determination.

The second important principal is submission to jurisdiction. The statute states that any persons "who have submitted to the jurisdiction of the court and given an opportunity to be heard" are conclusively bound to the determination and all decided issues of law and fact. As illustrated by the Division III case below, this clearly includes subject matter jurisdiction.

In Marriage of Zadorozny, 70 Wn. App. 464 (1993), the wife was a United States citizen residing with her husband (a Canadian citizen) in Canada. They had one child while in Canada and the wife was pregnant with their second child. On August 24, 1989, the mother took the child to Colville to visit the maternal grandmother. On September 15, 1989, she informed her husband that she was not returning. On October 4, 1989, the husband filed for divorce in Canada seeking

custody. On November 13, 1989, the mother filed for custody in Stevens County, Washington. At this point the mother had been in Washington only 2 1/2 months and Canada was clearly the home state.

On January 10, 1990, the father appeared through counsel in the Washington court and moved the court for an order finding that the wife had wrongfully removed the child from Canada and ordering her to return him. This was denied. On October 12, 1990, the Superior Court entered a temporary custody order. The jurisdiction decision or temporary custody determination was not appealed. The father was granted custody of his children by the Canadian court on November 5, 1990. The Stevens County Superior Court honored its own decree and refused to honor the Canadian decree. Id. at 465-69.

The Court, citing RCW 26.27.120 (now RCW 26.27.061) held that the husband "appeared in that proceeding, received notice of all hearings, did not challenge the court's personal or subject matter jurisdiction or request that the court decline jurisdiction in favor of Canada, and did

not appeal any of the court's orders or its dissolution decree." Id. at 470. The Court held that the husband "cannot now attack the court's exercise of jurisdiction in the Stevens County dissolution proceeding." Id.

In the instant case, Ms. Cork appeared in the proceeding, received notice of all hearings, did not challenge the Court's personal or subject matter jurisdiction, and did not request that this Court decline jurisdiction until after a child custody determination had been made, which was not appealed. In addition, through her response, she counter-claimed for relief (seeking entry of a restraining order against Petitioners) thereby invoking the Court's jurisdiction. CP 9-11. She stipulated that the child had resided in Washington for six months at the commencement of the action. She admitted that significant evidence was located in Washington. She stipulated/admitted that Washington had jurisdiction. CP 9-11. She went far beyond the conduct of the father in Zadorozny.

Further, in the August 29, 2003 temporary custody order, Commissioner Grovdahl specifically

found jurisdiction for this court. CP 138-142. The court entered a custody decree. No appeal was taken. ~~This case is absolutely controlled by~~ Zadorozny and RCW 26.27.061. While it is very clear that Washington has enjoyed subject matter jurisdiction at all points in this proceeding, it is equally clear that any claim to a deficiency in subject matter jurisdiction has been waived by Holly Cork.

III. THERE WAS VERY SUBSTANTIAL EVIDENCE THAT HOLLY CORK WAS NOT A SUITABLE CUSTODIAN FOR ANGELO CHILD, THAT PLACEMENT OF ANGELO WITH HOLLY CORK WOULD DETRIMENTALLY AFFECT ANGELO'S GROWTH AND DEVELOPMENT, AND THAT CUSTODY OF ANGELO SHOULD BE AWARDED TO THE NAGELS.

An appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610 (1993). A trial court's custody disposition will not be disturbed on appeal absent a manifest abuse of discretion. Schuster v. Schuster, 90 Wn.2d 626, 632 (1978). A trial court abuses its discretion when its decision

RESPONDENT'S APPELLATE BRIEF - 34

is manifestly unreasonable or based on untenable grounds. In re Marriage of Kovacs, 121 Wn.2d 795, 801 (1993).

The standard to be applied by the trial court in third party custody cases was first articulated in In re Marriage of Allen, 28 Wn. App. 637 (1981). The Allen court 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. Allen held that the state may interfere with the parent's constitutional rights only if 1) the parent was unfit, or 2) the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. Id. at 647. The Allen court proposed the detriment to the child standard as a middle ground requiring more than the best interests, but less than parental unfitness. Id. at 649. The Allen court concluded that a finding of parental unfitness was not required in a nonparent custody proceeding. Id. See also In re Custody of Shields, 120 Wn. App. 108, 121 (2004).

The court in In re Custody of Stell, 56 Wn. App. 356, 365, (1989) held that the legislature, in adopting chapter 26.10 RCW, intended to incorporate Allen's judicial interpretation of the earlier statute. Like Allen, Stell determined that in a custody proceeding between a parent and a nonparent, the nonparent must show that the parents are unfit or that placement with an otherwise fit parent would detrimentally affect the child's growth and development. Stell, 56 Wn. App. at 365.

In another nonparent custody case, In re Custody of R.R.B., 108 Wn. App. 602 (2001), Division Two considered the constitutionality of the best interests standard set forth in RCW 26.10.100. In R.R.B., the trial court granted a nonparent custody concluding that while the parents were fit, placing R.R.B. in their custody would detrimentally affect her growth and development. Id. at 606.

The Allen rationale was explicitly approved in In re Custody of Shields, 120 Wn. App. 108, 122-23 (2004). The court concluded that "While the detriment standard does not require a showing of

parental unfitness, it does require a showing of actual detriment to the child's growth and development." Id. at 123. Additionally, the Shields court held that "a nonparent can establish standing against a parent who has physical custody of the child without demonstrating that the parent is unfit." Id. at 126.

In the instant case, the trial court specifically considered the requirements of the Shields case. RP 459-467, Finding of Fact 2.5(3). The inquiry thus turns to whether these findings are supported by substantial evidence and whether Holly Cork can show that the trial court's decision was manifestly unreasonable. The trial court's findings were supported by overwhelming evidence. The trial court set forth extensive findings at section 2.5(17) through section 2.5(59) which documented the complete lack of bond with Holly Cork, the "hatred, anger and rejection" of his mother by Angelo, and the severe detrimental effect of Ms. Cork's parenting on Angelo. RP 459-467. The degree of Angelo's suffering while in Ms. Cork's care goes well beyond the detrimental effect

on the child in the Shields case.

Each of the Court's findings are fully supported in the record. Particularly compelling as to the issue of detriment to the child was the testimony of Angelo's counselor Carol Thomas. Her testimony, as to her observations of Angelo, begin at RP 383. Ms. Thomas set forth her observation criteria at RP 385 and indicated that she gave the Nagels and Ms. Cork the same amount of observation. RP 385, line 24.

Based on her counseling and bonding observations, Ms. Thomas reported that Angelo demonstrated minimal eye contact with his mother and diverted his gaze. He demonstrated minimal engagement with his mother, rarely initiating interaction with her, appearing somewhat detached from her. RP 387, line 1. He expressed anxiety in his interaction with his mother as manifested through the distancing and the lack of social interaction. RP 391, line 6. Angelo did not feel free or safe to express his emotions with his mother. RP 393, line 3.

Angelo stated that he was angry with his

mother and disclosed that his mother yelled at him and spanked him. Angelo described feelings of being unloved and unwanted by Ms. Cork. Angelo disclosed his feeling of loneliness and sadness, He described fighting between his mother and Josh Rich and talked about emotionally being frightened by this and very scared. RP 405, lines 10-25.

Ms. Thomas found that one of the themes of Angelo in expressing fear is that Holly Cork was consistently yelling at him. RP 407, line 9. Ms. Thomas found Angelo's reports to be credible. RP 407, line 14. Contrast these findings with Ms. Cork's consistent denial of such conduct. RP 408, line 2-9.

Alarmingly, Ms. Thomas found that Angelo consistently expressed hatred, anger and rejection towards Ms. Cork. RP 408, lines 10-16. Angelo disclosed that Ms. Cork "just does bad, bad, bad stuff to me." "My mom says don't tell anybody or talk about it or they will tell the Judge." RP 409 line 9 through 410, line 19.

Angelo also disclosed that the mother's live-in boyfriend Josh Rich spanked him hard and yelled

at him. Ms. Thomas testified that Angelo's relationship with Mr. Rich did not appear healthy and that Angelo was fearful of Mr. Rich's anger. RP 411, lines 6-25.

Ms. Thomas testified that Angelo stated that "It's like being killed living with my real mom", and that this statement was his way of expressing that it was very distressful, that he was in despair living with them, very little hope. RP 413, lines 1-5. See also CP 459-4657, finding of fact 2.5(30). Ms. Thomas testified that Ms. Cork did not have a healthy relationship with Angelo. RP 413, line 23.

Ms. Thomas found it very disturbing that Angelo had such a negative sense of self while in Ms. Cork's care and that it manifested through his anger and his aggression. Angelo described himself in counseling as a bad kid. RP 414, lines 10-22.

Ms. Thomas concluded that Angelo's relationship with Holly Cork was basically characterized by lack of emotional connection and minimal social interaction. She found that Angelo was very distant and detached from her and found no

evidence of a parent/child bond. Angelo did not use his mother as a source of care, comfort, security, nurturing, or emotional support. He felt unloved by his mother and expressed extreme hatred for his mother. Angelo was unable to tell Ms. Thomas anything positive about his mother or any positive experiences that he had with his mother. RP 415, line 10 through RP 416, line 15. See also CP 459-467, finding of facts 2.5 (27), (28), (29), (30), (32), (35).

Angelo further expressed to Ms. Thomas extreme hatred, anger, and rejection towards his mother as a result of the distressful experiences he described while in her care, including her anger, yelling and spanking. He expressed fear and anger toward the boyfriend Josh Rich and identified the stressful experiences with him to include Mr. Rich's anger, his yelling, and his spanking. Ms. Thomas testified that Angelo expressed emotional distress regarding living with his mother and Josh Rich. RP 416, line 17 through 417, line 4. See also CP 459-467, finding of facts 2.5 (30).

Carol Thomas did find that Angelo had a very

healthy bond and interaction with the Nagels. RP 394, line 16 through RP 401, line 12. She concluded that Angelo had a significant social and emotional connection with them and that there was strong evidence of an attachment and a parent/child bond. She found that Angelo used the Nagels as a source of care, comfort, security, reassurance, nurturance, emotional support, regulation, help and negotiation for his developmental tasks. He also demonstrated differential preferential treatment towards them. discriminating towards them. RP 417, lines 8-19.

Ms. Thomas testified that there was no question in her mind that the Nagels were Angelo's psychological parents. RP 418, lines 20-24. See also RP 418, lines 9-19. This professional opinion was also shared by Angelo's counselor in Montana Rob Dickey. RP 332, line 16 through RP 349, line 25. See CP 459-467, Findings section 2.5 (58).

Ms. Thomas recommended that Angelo be returned to the primary care of the Nagels. RP 417, line 23. Ms. Thomas testified that if Angelo were not returned to the Nagels, she would be very worried

about increasing depression in Angelo, very concerned about his detachment and withdrawal, concerned about his rebellion and his possibility of self-destructive behaviors and continued violence towards others. RP 419, lines 8-13.

Ms Thomas defined her concern over self-destructive behaviors to arise from Angelo's negative sense of self and anger. RP 419, lines 16-18. She testified that these self-destructive behaviors could include drugs and alcohol, running away behaviors, putting themselves in risky situations where they could be physically harmed. As kids get older, risks could include carving on themselves, cut their bodies up, and eating disorders. RP 419, lines 16-25.

Ms. Thomas noted that Angelo was already showing some behaviors were he was already assaulting children, but testified that if he had not been returned to the Nagels, there would be a great increase in those behaviors. RP 420, lines 1-8. (Angelo was placed with the Nagels by temporary order on August 29, 2003, about 5 ½ months before trial. CP 138-142.) Ms. Thomas

testified that if the trial court were to return Angelo to Holly Cork, she would have concerns of increased depression, excessive rebellion, detachment, self-destructive behaviors, and aggressive violent behaviors toward others. RP 424, lines 14-17. She testified that Angelo would be at risk for totally detaching from everybody and everything and not willing to be in social and emotional connections with relationships with anyone. CP 424, lines 17-25. With regard to Ms. Thomas' testimony, see CP 459-467, Findings of Fact, section 2.5 (30), (31), (32), (33), (34), (35), (36), (37), (38).

Ms. Thomas found that Angelo was very happy after placement with the Nagels under the temporary orders and that there were many positive changes. RP 420, line 12 through 424, line 20. These findings were further supported by Angelo's Montana teacher who testified that his school performance and behavior rapidly improved and he became "right up there on top of his class" and was one of the teacher's better performers. RP 309, line 14; RP 310, lines 9-13; RP 315, line 17. The child's

Montana counselor Rob Dickey noted similar progress in Angelo's behavior. RP 330 line 19 through RP 331, line 15.

Substantial evidence, apart from the guardian ad litem and Carol Thomas' testimony exists to support the findings and conclusions of the trial court. Prior to Ms. Cork's return to Washington, she was advised by Angelo's Montana therapist Cheryl Ronish that she needed to get Angelo involved in counseling. RP 282, line 1, RP 291, line 1. Holly Cork promised to do so. RP 291, lines 9-12. Ms. Cork never did. RP 282, lines 18-24, RP 291, line 21. This continued counseling for Angelo was an expected component of the dismissal of the TIA. RP 513 line 14 through RP 514, line 3.

Holly Cork was also involved with psychologist Dr. Robert Page during the TIA process. Dr. Page performed a psychological evaluation of Ms. Cork. RP 710, line 1. Ms. Cork was also advised by Dr. Page that she would need both personal individual counseling as well as parental support and group involvement following her return to Spokane. RP

724, line 22 through 725, line 8.

After returning to Washington, Holly Cork was again advised by a Washington CPS worker of the need to get Angelo in counseling (RP 283, line 9) and that problems would occur if she did not do so. RP 294, line 15. Ms. Cork never sought counseling after being so advised. RP 283, line 19. She made promises to do so, but never followed through. RP 296, line 8.

Ms. Cork was also referred to counseling by Angelo's school psychologist. RP 283, line 15; RP 177, line 4. In fact, Ms. Cork never sought counseling for Angelo until required by court order in this matter. RP 77, line 10. CP 51-53.

Ms. Cork was not initially compliant in working with Carol Thomas despite the counseling order. RP 116, line 8. All of these facts support the trial courts findings. CP 459-467, Findings of Fact section 2.5 (46), (47), (48), (49), (50), (51), (52), (53), (54).

It is remarkable that the mother did not seek counseling given the serious emotional issues that Angelo was facing. It was obvious, or should have

been obvious to Holly Cork, that Angelo's behavior began seriously deteriorating, and he was labeled as a child in crisis by his teacher and school counselor. RP 176, line 23; RP 176, line 12; RP 166 line 14; RP 170, line 12; RP 187, line 19; RP 195, line 1; RP 195, line 8; RP 196, line 12; RP 197, line 15; RP 198, line 3. See generally RP 60-207. See also Findings of Fact section 2.5 (18), (19), (20), (21), (22), (23), (24). The trial courts findings are exceptionally well supported.

Importantly, the trial court observed "The court listened to the testimony and watched Ms. Cork. It appeared that, from the testimony anyway, that Ms. Cork's general attitude toward the situation with regard to Angelo is, at best, casual." Findings of Fact section 2.5 (45). Such observations are within the discretion of the trial court and should be afforded great weight on appellate review. Such observations are also highly supported Ms. Cork's almost complete lack of effort to even contact Angelo after he was placed with the Nagels under temporary orders.

As noted in the statement of facts, after

Angelo was placed with the Nagels in August 2003, Holly Cork made almost no efforts to see or even talk to her son. From August 2003 through February 2004, she called Angelo once. RP 370, line 22. In fact, she intentionally threw Angelo's phone number away. RP 371, line 4. She didn't call Angelo's school or try and talk with his counselor. Her lack of effort to contact her child continued up until trial. See RP 370-378. It is little wonder that Ms. Thomas found no evidence of a parent child bond between Holly Cork and Angelo.

The guardian ad litem testified to Ms. Cork's multiple moves in Washington while caring for Angelo, the police activity at one of her homes, that she resided with an individual on home monitoring following a conviction for felony drug distribution (cocaine) and third degree assault, and that she began living with her boyfriend Josh Rich after his release from prison on a burglary conviction. RP 78, line 8 through RP 80, line 13; RP 84, line 9; RP 86, line 21 through 87 line 21; RP 93, line 16. The court was justified in its findings of home instability. CP 459-467, Findings

of Fact section 2.5 (55).

All of the court's findings were supported by very substantial evidence. The report of proceedings contains further cumulative evidence that is not listed here given brief limits. The trial court appropriately concluded, based on the foregoing evidence, that "It is very clear that continued placement with the mother would detrimentally affect Angelo's growth and development." CP 459-467, Findings of Fact section 2.5 (57). The trial court properly found that the Nagels were Angelo's psychological parents. CP 459-467, Findings of Fact section 2.5 (58).

The facts of the case dramatically exceed the standards articulated in Shields, and fully comport with the requirements set forth in Allen and Stell.

Angelo was a child in severe emotional crisis who had already begun aggressively acting out. As Ms. Thomas indicated, placement of Angelo with his mother would have resulted in dire emotional consequences affecting Angelo's growth and development. The Nagels have met the third party custody standard under any possible interpretation.

IV. THE TRIAL COURT'S RELIANCE, IN PART, ON THE TESTIMONY OF THE CHILD'S COUNSELOR CAROL THOMAS OR THE GUARDIAN AD LITEM MARY RONNESTAD WAS AN APPROPRIATE EXERCISE OF DISCRETION.

A trial court's custody disposition will not be disturbed on appeal absent a manifest abuse of discretion. Schuster v. Schuster, 90 Wn.2d 626, 632 (1978). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Kovacs, 121 Wn.2d 795, 801 (1993).

Here the trial court properly relied on the testimony of Angelo's counselor Carol Thomas. Ms. Thomas' qualifications were thoroughly set forth at RP 381, line 1 through 382, line 23. In fact, counsel for Holly Cork stipulated to Ms. Thomas' expertise. RP 382, line 16.

Accordingly, the trial court found that "Carol Thomas is a very well credentialed counselor and has been a fixture in Spokane for some time. She is very well respected and the court respects what she has to say when she makes her conclusions. See also CP 459-467, finding of facts 2.5 (26).

The trial court further noted that the

testimony of Ms. Thomas was not rebutted by the testimony of the Respondent's expert Dr. Clay Jorgensen, and was not disputed by any expert. CP 459-467, Finding of facts 3.25(39) and (44). In fact, Dr. Jorgensen confirmed that Angelo was having severe traumatic grief associated with the loss of the Nagels who were basically the parents to Angelo. CP 459-467, Finding of Fact 3.25(42); See also RP 539. The court was entitled to rely on the testimony of Ms. Thomas.

The guardian ad litem qualifications are set forth at RP 69, line 1 through RP 70, line 14. The guardian ad litem articulated that she investigated this case understanding that it was within the parameters of a 26.10 action. RP 70, line 8. The trial court was entitled to rely on a guardian ad litem with 8 years experience and 360 cases completed, who was a member of the Spokane County guardian ad litem committee.

V. THE TRIAL COURT DID NOT ERR IN ADMITTING STATEMENTS OF THE CHILD MADE TO HIS COUNSELOR CAROL THOMAS.

ER 803(a)(4) provides an exception to hearsay

rules for statements made for the purposes of medical diagnosis. These include statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment. Carol Thomas, whose qualification are documented above, was appointed as Angelo's counselor by Commissioner Pro Tem Michael Price on June 18, 2003. CP 51-53 (section 2.2). See also CP 459-467, findings of fact section 2.5(25).

The order clearly addresses Angelo's need for counseling. It should be noted that this order for counseling with Carol Thomas was made pursuant to the request of Angelo's guardian ad litem Mary Ronnestad. RP 115 18-25.

During this trial, the court specifically required a foundation that Carol Thomas was working with Angelo as his therapist. RP 401, line 20 through RP 402, line 4. Ms. Thomas explained the purpose of the counseling to Angelo in terms that a

kindergarten aged child could understand and testified that Angelo understood that Ms. Thomas was there to help him and that Angelo partook of the counseling. RP 402, line 9 through RP 405, line 1. In particular, this is emphasized at RP 404, line 18 through RP 405, line 1.

Angelo was emotionally fragile and a child in crisis when he went to see Carol Thomas. RP 176, line 12; RP 176, line 23. As the statements made by Angelo were part of his counseling and treatment with Carol Thomas, such statements are admissible under ER 803(a)(4). The trial court did not err in allowing them into evidence.

CONCLUSION

The trial court had subject matter jurisdiction under any possible interpretation. Holly Cork admitted in her response that she and Angelo had resided in Washington for 6 months when served. Even if her admission were ignored, Washington still retained subject matter given its substantial contacts with Angelo and given that no other state could be the home state. Further,

Holly Cork waived any claim she may have had on jurisdiction or inconvenient forum issues.

The trial court's findings were supported by substantial evidence. The trial court properly relied on the testimony of Carol Thomas and the guardian ad litem. The trial court's placement of Angelo with the Nagels was done in full compliance with the case law requirements first articulated in Allen and clarified in Shields. Because of the court's action on behalf on Angelo, the facts indicate that Angelo has gone from a "child in crisis" while residing with Holly Cork, to a happy first grader operating at the top of his class while residing with Nagels. The Nagels, on behalf of Angelo, respectfully request that the decision of the trial court be affirmed.

Respectfully submitted,


David J. Crouse, WSBA #22978
Attorney for Respondents

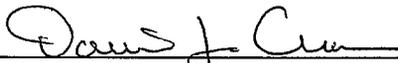
CERTIFICATE OF SERVICE

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

That on the 6th day of April, 2005, he served, via Spokane Messenger Service, a copy of the Respondent's trial brief to the persons hereinafter named at the places of address stated below which is the last known address.

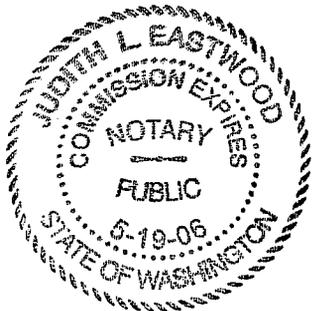
ATTORNEY FOR APPELLANT

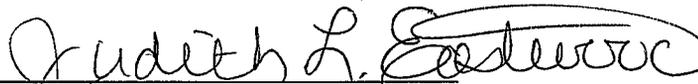
Andrea Poplawski
Attorney at Law
35 W. Main Street, Suite 300
Spokane, WA 99201



DAVID J. CROUSE

SUBSCRIBED AND SWORN to before me this 6th day
of April, 2005.





NOTARY PUBLIC in and for the
State of Washington, residing
in Spokane.
My Commission Expires: 5-19-06