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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

In re the Custody of:

BENJAMIN MATTHEW HOLT, A minor child,

MICHAEL J. HOLT,

Respondent\Cross-Appellant,

vs.

LAURIE L. HOLT

Appellant\Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COUNTY  
THE HONORABLE SCOTT COLLIER

BRIEF OF APPELLANT

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## I. INTRODUCTION

“The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). “A court can interfere only with a fit parent's parenting decision to maintain custody of his or her child if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development.” *Custody of Shields*, 157 Wn.2d 126, 144, ¶ 45, 136 P.3d 117 (2006). “[T]he requisite showing required by the nonparent is ‘substantial,’ [ ] and a nonparent will generally be able to meet this test in only “extraordinary circumstances.” *Shields*, 157 Wn.2d at 145, ¶ 46.

Given these constitutional impediments, this court must reverse the trial court's determination that the mother's former husband met this heightened standard and allowing him to proceed with his action for third party custody. The former husband cannot demonstrate that there would be actual detriment to the mother's child if “placed” with the child's only legal parent, particularly when

the former husband only seeks visitation with the child based on his allegation that *if* the mother were to terminate his contact with the child it would be detrimental to the child.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that adequate cause has been established. (Finding of Fact (FF) 2.4, CP 155)

2. The trial court erred in finding that “based upon all of the affidavits, declarations, and guardian ad litem report, the Court believes there is enough documentation set forth to proceed to trial on the non parental custody petition.” (FF 2.4, CP 155)

3. The trial court erred in finding that if “the Respondent/mother denies contact between Petitioner and minor child it would cause actual detriment to the minor child’s growth and development if the relationship between the minor child and Petitioner is not protected, and the court has concerns that the mother may withhold visitation contact in the future.” (FF 2.4, CP 155)

4. The trial court erred in entering its Order Re Adequate Cause (Nonparental Custody). (CP 154-155) (Appendix A)

5. The trial court erred in entering its Order Re: (a) Stay of Order of Dismissal of De Facto Parentage Action; (b) Visitation Schedule; (c) Passports; and (d) Dr. Kirk Johnson's Evaluations. (CP 156-59) (Appendix B)

### III. STATEMENT OF ISSUE

After dismissing the mother's former husband's petition to establish himself as a *de facto* parent, did the trial court err in finding adequate cause for his third party custody action based on concerns that "if the [mother] denies contact between [former husband] and minor child it would cause actual detriment to the minor child's growth and development" where there was no evidence that the mother had refused contact and the former husband admitted that the mother has always been "supportive" of the relationship?

### IV. STATEMENT OF THE CASE

**A. Laurie Is The Biological Mother Of Benjamin, Whose Biological Father Was Killed When She Was Three Months Pregnant. Laurie And Michael Married Shortly After Benjamin's Birth And Divorced Less Than Two Years Later In 2001.**

Laurie Holt and Michael Holt were in a relationship between 1993 and 1998, during which time their son Chandler, now age 15, was born. (CP 81, 82) After their relationship ended, Laurie began

a relationship with Benjamin Ensley. (CP 82) In late 1998, Laurie and Ensley were engaged to be married and Laurie became pregnant with Ensley's son, Benjamin, the subject of this action. (CP 82) Ensley was killed in a work-related accident when Laurie was three months pregnant with Benjamin. (CP 82)

Benjamin was born on August 10, 1999. (CP 81) Laurie and Michael resumed their relationship and married on September 9, 1999. (CP 19) Their reunion was short-lived due to Michael's gambling addiction, and Laurie and Michael divorced less than two years later in June 2001. (CP 19, 82)

**B. The Parties Entered Into A Parenting Plan And Child Support Order For Their Biological Son. No Orders Were Entered Pertaining To Laurie's Son Benjamin. Benjamin Frequently Visited Michael During His Biological Son's Residential Time.**

When the parties divorced, the parties entered into a parenting plan and child support order for their son Chandler, but not for Laurie's son Benjamin. (CP 19) Chandler resided the majority of the time with Laurie, and with Michael on alternating weekends and one overnight every week. (CP 19-20) After the parties' divorce, Laurie did not interfere with Benjamin's relationship with Michael. (CP 84) Although Benjamin was not subject to the

parties' parenting plan, Benjamin would occasionally visit Michael on the same schedule as Chandler. (CP 19) Michael described Laurie as "supportive" of their relationship. (CP 22) Even so, Laurie provided all Benjamin's parenting, without any assistance from Michael. (CP 86) Michael maintained Benjamin on his employer-provided health insurance, but did not pay any child support. (CP 86)

Laurie changed Benjamin's last name from "Ensley" to "Holt," the last name she retained when her marriage to Michael ended. (CP 20) At one point after the parties divorced, the parties discussed Michael formally adopting Benjamin, and met with an attorney. (CP 22) This idea was eventually dropped. (CP 22)

**C. After Laurie Sought To Relocate From Vancouver To Castle Rock In 2009, Michael Filed An Action To Establish Himself As A *De facto* Parent And For Third Party Custody.**

In 2009, the parties' son Chandler moved in with Michael – although the parties dispute whether the move was intended to be permanent or temporary. (CP 21, 83-84) Benjamin continued to visit with Michael on alternating weekends. (CP 21, 83)

In late 2009, Laurie began dating Spencer Partridge, who resides in Castle Rock. (CP 83) After Laurie expressed interest in

relocating to Castle Rock to reside with Mr. Partridge, Michael on February 23, 2010, filed a Non-Parental Custody Petition, asserting that he was the *de facto* parent of Benjamin. (CP 1, 4, 84) Michael also alleged that Laurie was not a “suitable custodian” for Benjamin solely because “the respondent/mother intends to immediately relocate the child to a situation that is unstable and not in the child’s best interests.” (CP 3) Michael’s stated concern was that Laurie’s decision to relocate to Castle Rock was not in Benjamin’s best interests because it would take him out of his current school, “which is the only school he’s ever attended, and [would] tak[e] him out of the current baseball program away from the children that he has grown up playing with.” (CP 23)

Michael’s proposed parenting plan provided that Benjamin would reside primarily with Laurie except for every other weekend, when Benjamin would reside with Michael. (CP 7) However, Michael included a provision that if Laurie were to move outside of Clark County, then Benjamin would reside primarily with Michael, with residential time with Laurie every other weekend. (CP 7)

Over Laurie’s objection, and before there had been a determination on adequate cause for the third party custody action,

a Clark County family court commissioner appointed a guardian ad litem to “investigate and report [on] all issues relating to development of a parenting plan.” (CP 102)

**D. The Trial Court Dismissed The *De Facto* Parentage Claim But Found Adequate Cause For Michael’s Third Party Custody Petition Because *If Laurie Denied Contact With Michael, It Would Be Detrimental To Benjamin.***

On Laurie’s motion, Clark County Superior Court Judge Scott Collier dismissed the portion of Michael’s petition seeking to establish himself as Benjamin’s *de facto* father. (CP 150) The hearing on the *de facto* parentage claim was held shortly after the Supreme Court issued its decision in ***Parentage of M.F.***, 168 Wn.2d 528, 228 P.3d 1270 (2010), which held that under facts nearly indistinguishable from this case the mother’s former husband could not be a *de facto* parent to her child over the mother’s objection. The trial court relied on ***M.F.*** to correctly hold that Michael was not a *de facto* parent of Benjamin. The trial court noted that Michael “did not seek any orders regarding Benjamin at the time of the Dissolution under RCW 26.10; or RCW 26.09.240 [statute allowing stepchildren to be made part of a parenting plan] that was in existence at that time.” (CP 148)

The trial court expressed “personal” reservations about the Supreme Court’s decision in *M.F.*, but felt compelled to abide by its decision in dismissing the *de facto* parentage action. (See 7/15 RP 6, 37, 41) After dismissing Michael’s *de facto* parentage action, however, the trial court “shifted” and found adequate cause had been established for Michael to pursue his third party custody petition. (CP 142; 7/15 RP 37)

The trial court noted that the “Guardian ad Litem has testified that it is in the child’s best interests to have a continued relationship with the petitioner Michael Holt.” (CP 142) Even though finding that Michael “has been actively involved with Benjamin and has had substantial visitation and involvement as voluntarily granted by [Laurie],” for purposes of dismissing the *de facto* parentage action (CP 148) the trial court found that “if the Respondent/mother denies contact between Petitioner and minor child it would cause actual detriment to the minor child’s growth and development if the relationship between the minor child and the Petitioner is not protected and the Court has concerns that the mother *may* withhold the visitation contact in the future.” (CP 142, emphasis added)

The trial court acknowledged that whether the mother would in fact interfere with the relationship was “speculative,” because to date Laurie had not cut off the relationship between Michael and Benjamin. (7/15 RP 21, 24) Even though Laurie had voluntarily been allowing residential time between Michael and Benjamin, the trial court ordered residential time between Benjamin and Michael in Vancouver, where Michael resides, including every other weekend with Michael returning Benjamin to school by 7:50 a.m. on Monday morning in Castle Rock, 50 miles away. (CP 144) During the week when Benjamin is not spending the weekend with Michael, Benjamin is required to reside with Michael overnight on Thursday in Vancouver, to be returned to school in Castle Rock on Friday morning. (CP 87, 144)

Laurie sought discretionary review of the adequate cause order. (CP 151) Michael sought, and was granted, CR 54(b) certification of the order dismissing his petition to establish himself as Benjamin’s *de facto* parent, and he appealed that order. (CP 160) This court granted review of both the adequate cause order and the order dismissing the *de facto* parentage action, designating Laurie as the appellant and Michael as the cross-appellant.

## V. ARGUMENT

### A. The Constitution Prohibits A Third Party Custody Action From Proceeding When There Is No Allegation That There Would Be Actual Detriment To The Child If Placed With His Only Legal Parent.

#### 1. The Former Husband's Inability To Prove That There Would Be Actual Detriment To The Child If Placed With The Child's Fit Parent Is Fatal To His Third Party Custody Petition.

A third party custody order deprives the legal parent of her “fundamental right [ ] to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060 (2000). Therefore, “[b]efore the courthouse doors will open to a third party petitioning for custody of a child,” the nonparent petitioner must “submit an affidavit (1) declaring that the child is not in the physical custody of one of his or her parents *or* that neither parent is a suitable custodian *and* (2) alleging specific facts that, if true, will establish a prima facie case supporting the requested order.” *Custody of E.A.T.W.*, 168 Wn.2d 335, 346, ¶ 20, 227 P.3d 1284 (2010). “The facts supporting the requested custody order must show[ing] that the parent is unfit or that placing the child with the parent would result in actual detriment to the child's growth and development.” *Custody of E.A.T.W.*, 168 Wn.2d 335, 348, ¶ 24, 227 P.3d 1284 (2010).

Here, there is no constitutionally sound basis for a third party custody order. Michael's petition did not allege (and it has never been alleged) that Laurie is not a fit parent. (See CP 1-5) Nor did Michael's petition allege that Benjamin's placement with Laurie would cause actual detriment to the child. (See CP 1-5) While Michael alleged that Laurie's plan to relocate with Benjamin to Castle Rock would place Benjamin in an "unstable situation" that was not in Benjamin's "best interests" (CP 3), Michael's proposed parenting plan, which he filed along with his petition for third party custody, conceded that Benjamin should continue to reside primarily with Laurie so long as she continues to reside in Clark County. (CP 7)

Michael's petition was impermissibly based not on Laurie's ability to parent, but on her choice of residence and what Michael perceived was in Benjamin's best interest, neither of which can be a basis for the State to interfere with the mother's constitutional rights. See ***Custody of S.C.D-L***, \_\_\_ Wn.2d \_\_\_, ¶ 7, \_\_\_ P.3d \_\_\_ 2010 WL 4491222 (Nov. 10, 2010) (a third party custody petition that does not allege that a parent is not fit or an "unsuitable custodian" and simply implies it would be in the child's best interest

to reside with a third party must be dismissed). Because the State may only interfere with a parent's constitutional right to parent if the parent is not fit or *placement* with an otherwise parent would cause actual detriment to the child, ***Custody of Shields***, 157 Wn.2d 126, 128, ¶ 2, 136 P.3d 117 (2006), the trial court was required to dismiss Michael's third party custody petition when he failed to allege or prove either basis for the parenting plan that he sought.

**2. The Mother Has A Constitutional Right To Determine The Level Of Contact Her Child May Have With A Non-Parent.**

The sole basis for the trial court's decision to allow the third party custody action to proceed was its determination that *if* the mother were to interfere with the relationship between Michael and Benjamin, it would be detrimental to the child. (CP 142) But because of the State's limits in interfering with a parent's fundamental right to parent, "it would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general populations merely because the judge might think himself more enlightened than the child's parents." ***Troxel***, 530 U.S. at 79 (*J. Souter, concurring*). When, as here, there is no allegation that the mother is not fit to make

decisions for her son, there is “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 child.” *Troxel*, 530 U.S. at 68-69.

The situation here is similar to that in *Troxel*, where the United States Supreme Court held that the court violated the mother’s fundamental rights by interfering with her decisions as to the appropriate amount of time that her children should visit with their grandparents. The Supreme Court held that the trial court’s order imposing a residential schedule with the grandparents violated the mother’s constitutional rights, because it “fail[ed] to accord significant weight to Granville’s already having offered meaningful visitation to the Troxels, show[ing] that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests.” *Troxel*, 530 U.S. at 72. “The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel*, 530 U.S. at 72-73.

The situation here is also similar to that in *Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000),<sup>1</sup> where Division One reversed an order granting third party custody to the child's paternal aunt over the mother's objection. In *Nunn*, the Court of Appeals held a third party custody order cannot be based on a trial court's determination that "it would be so much 'better' for the child to have a relationship with the nonparent and her friends and support group, against the wishes of a parent, as to render the objecting parent unfit, simply for objecting to the relationship." 103 Wn. App. at 888. The *Nunn* court held that "it would be an anomaly to consider an otherwise fit parent unfit simply for exercising her fundamental right as a parent to limit visitation of her children with third persons-even if [ ] those third persons are loving family members and close friends of family." 103 Wn. App. at 888.

Here, the basis of the trial court's decision finding adequate cause was its determination that the relationship between Michael and Benjamin was important, and that its continuation was in the child's best interests. The mother in essence agrees, and has consistently allowed contact between Michael and Benjamin. The

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<sup>1</sup> Abrogated on the issue of standing in *Custody of Shields*, 157 Wn.2d 126, 138, ¶ 29, 136 P.3d 117 (2006).

trial court's impermissible decision is based on its belief that it, rather than the mother, could make "a better decision" as to how much contact should be allowed. *Troxel*, 530 U.S. at 72-73. This is exactly the type of action by the State that the Supreme Court in *Troxel* held was forbidden. The trial court's order here is unconstitutional because it gives no weight to the mother's decisions regarding the amount of contact is appropriate between Michael and Benjamin, especially in light of her and Benjamin's recent relocation to Castle Rock, and subjects the mother to unwarranted judicial interference in her parenting decisions.

**B. The Trial Court's Adequate Cause Determination Was Impermissibly Based On Speculation That The Mother Might Terminate Contact Between Her Child And Her Former Husband.**

The "primary purpose" of the threshold requirement for adequate cause before a third party custody action may proceed is, "to prevent a useless hearing. A hearing under chapter 26.10 RCW is by its very nature disruptive to families, including parents and children. A useless hearing is thus an unnecessary disruption and an evil to be avoided." *Custody of E.A.T.W.*, 168 Wn.2d at 348, ¶ 23. Adequate cause requires "something more than prima facie allegations which, if proven, might permit inferences sufficient to

establish grounds for a custody change." **Marriage of Mangiola**, 46 Wn. App. 574, 577, 732 P.2d 163 (1987), *overruled on other grounds*, **Parentage of Jannot**, 149 Wn.2d 123, 126, 65 P.3d 664 (2003). "General and vague" allegations are insufficient to warrant a finding that adequate cause is established to support a third party custody action. See **Mangiola**, 46 Wn. App. at 578. A third party custody petition that merely implies that it would be in the child's best interests to reside with a third party must be dismissed because the "'best interests of the child' standard does not apply to nonparent custody actions." **Custody of S.C.D-L**, \_\_\_ Wn.2d at \_\_\_, ¶ 7.

Here, Michael's petition for third party custody was based entirely on his "general and vague" allegation that Laurie *might* terminate his relationship with Benjamin in the future, and that her relocation to Castle Rock with Benjamin would not be in his "best interests." (See CP 3-4) Neither of these allegations warrant a determination that the mother's behavior is such that "placing the child with the parent would result in actual detriment to the child's growth and development," thus allowing a third party custody action

to proceed. *Custody of E.A.T.W.*, 168 Wn.2d 335, 348, ¶ 24, 227 P.3d 1284 (2010).

Even if it were true that terminating the relationship between Michael and Benjamin would be detrimental to Benjamin, the trial court erred in allowing the third party custody action to proceed when it was undisputed that at the time the petition was filed there was no attempt by the mother to terminate the relationship. Further, Michael's allegations based on Laurie's relocation not only violated her constitutional rights but were a gross misuse of the third party custody statutes to obtain a residency restriction that the Relocation Act would not allow. See RCW 26.09.540 (Relocation Act does not allow the court to prohibit relocation based on an objection by a third party who has no rights under a court order for residential time).

Michael alleged that "at some point" before 2002, Laurie became angry at Michael and threatened that he could no longer see Benjamin. (See CP 20) But Michael also conceded that Laurie's "anger was short lived and she ended up apologizing and telling me she would never do that again." (CP 20) Michael also alleged that nearly two years prior to his filing his petition, Laurie

started to reduce contact with Benjamin. (CP 20) This apparently was during the period of the mother's short-term marriage to another man, which was dissolved in 2008. (CP 20-21) But as Michael also conceded, "Laurie has had a number of relationships since her divorce in 2008 from Mr. Jiganie. However, fortunately until now Laurie has not allowed these relationships [to interfere] with my relationship with Benjamin." (CP 21) Laurie confirmed that she did not intend to terminate the relationship between Michael and Benjamin: "I have never kept Benjamin from [Michael] even though [Michael] is not Benjamin's biological or legal parent." (Sub. No. \_\_, Supp. CP 54)

When Michael filed his petition in 2010, there was no allegation that Laurie had attempted to terminate Benjamin's relationship with Michael. Instead, Michael acknowledged that he has "continued to have Benjamin on alternating weekends from Thursday morning through Sunday or Monday and additional time as we agree and as makes sense." (CP 21) At most, Michael alleged that Laurie sought to reduce Benjamin's time with Michael – not terminate it. For example, his most current complaint at the time he filed his petition was that Laurie would only agree that

Benjamin could travel to Mexico with Michael for nine days, not fourteen days as Michael demanded. (CP 23) It is precisely this type of micromanagement of family relationships – a dispute over five days of vacation time with a non-parent – that the United States Supreme Court in *Troxel* intended to prevent. 530 U.S. at 72-73 (vacating an order providing more visitation to grandparents than the mother was willing to offer as unconstitutional because the matter involved a “simple disagreement” between the superior court and the mother as to her children’s best interests).

The trial court’s adequate cause order was based solely on impermissible speculation as to what the mother *might* do. The trial acknowledged that the mother had not terminated any contact between Michael and Benjamin: “[A]t this point Mr. Holt is still having contact with Benjamin, so it hasn’t happened yet.” (7/15 RP 21) The court also recognized that whether the mother will indeed attempt to terminate contact between Michael and Benjamin was “speculative:”

Do have to sit back and wait till she takes this action that you’re alleging? Because, you know, you’re saying she tried to do it in the past, we think she is going to try to do it here; they are saying, “that’s not my plan.” So because its speculative, do I change custody based upon that speculation? Because but for

– and I think you have to agree, if she was allowing regular enough routine contact that you wouldn't meet the Allen factors.

(7/15 RP 24) Despite the fact that any detriment to the child was merely speculative, the trial court nevertheless allowed Michael's third party custody action to proceed, and subjected Laurie to a temporary order requiring Benjamin to reside with Michael on specific dates and times over the objection of Laurie, Benjamin's parent.

Speculation as to the mother's future actions and how those actions might affect Benjamin is not a basis for the State to interfere with the mother's constitutional right to parent her child free from state interference. See *e.g. Dependency of T.L.G.*, 139 Wn. App. 1, 17, ¶ 24, 156 P.3d 222 (2007) (the statute allowing the court to limit visitation during a dependency action must be based on "an actual risk [of harm], not speculation"); see *Marriage of Wicklund*, 84 Wn. App. 763, 771, 932 P.2d 652 (1996) (when there was no evidence that the father engaged in "overt displays of inappropriate parental sexual behavior in the presence of minor children that would justify the sort of restrictions at issue," the trial court could not place restrictions on the father's residential time based on its

finding that it would not be in the children's best interests if they witnessed such activity); see also **Marriage of Grigsby**, 112 Wn. App. 1, 57 P.3d 1166 (2002). In **Grigsby**, similar to the trial court's rationale in this case, the trial court erroneously modified the parenting plan based on its concern that the mother *might* seek to relocate again and the trial court found it was necessary to change custody to "protect the children from emotional harm of any proposed relocation in the future." 112 Wn. App. at 16. Division One reversed the trial court's order modifying the parenting plan holding that "fear that a parent may decide to move in the future is not an appropriate basis for modification of a parenting plan." **Grigsby**, 112 Wn. App. at 16.

Allowing Michael's petition for third party custody to proceed based solely on speculation of what the mother might do in the future was error under a host of cases holding that the "much stricter" statutory and case law standard requiring a showing of actual detriment before the courts interfere with the rights of a child's parents is a constitutional imperative. See, e.g, **Parentage of C.A.M.A.**, 154 Wn.2d 52, 67-68, ¶¶ 31-33, 109 P.3d 405 (2005) (declaring unconstitutional RCW 26.09.240, which presumed

grandparent visitation in “best interests” of child); **Custody of Shields**, 157 Wn.2d 126, 149, ¶ 58, 136 P.3d 117 (2006) (detriment standard for stepparent custody under RCW 26.10.030; trial court erred in using “best interests” standard); see also **Custody of Stell**, 56 Wn. App. 356, 365, 783 P.2d 615 (1989) (detriment standard for psychological parent custody under RCW 26.10); **Marriage of Allen**, 28 Wn. App. 637, 647, 626 P.2d 16 (1981) (detriment standard for stepparent custody despite “best interests” standard in former RCW 26.09.190). Because there was no legal or factual basis for Michael’s third party custody petition, the trial court should have denied adequate cause and dismissed the petition.

**C. This Court Should Award Attorney Fees To The Mother For Having To Defend Against The Father’s Third Party Custody Action.**

Laurie asks this court for her attorney fees and costs for this appeal on the basis of her need and the Michael’s ability to pay attorney fees. RCW 26.10.080. This court has authority, “after considering the financial resources of all parties, [to] order a party to pay a reasonable amount for the cost to the other party of

maintaining or defending any proceeding under this chapter.” RCW 26.10.080; ***Custody of Nunn***, 103 Wn. App. at 889.

Attorney fees should be awarded in cases like this, where a single mother is forced to defend against an action by a former spouse. Michael's answer to Laurie's motion for discretionary review makes clear that he had hoped that the cost of litigation would discourage Laurie from defending her constitutional right to parent her child free from state interference, and he could just “win.” (Response to MDR 10-11: “it does not really make sense that the mother, with her limited resources, would pursue costly litigation if she did not intend to terminate the relationship”). As even the dissent in ***Troxel*** recognized, “if a single parent who is struggling to raise a child is faced with visitation demand from a third party, the attorney’s fees alone might destroy her hopes and plans for the child’s future.” 530 U.S. at 101 (*J. Kennedy, dissenting*). Because there is no factual basis or legal basis for Michael’s demand for custody of Laurie’s son, he should be required to pay the attorney fees she has incurred defending the integrity of her family. Laurie will comply with RAP 18.1(c).

**VI. CONCLUSION**

This court should reverse the trial court's order finding adequate cause, dismiss the third party custody action, and award the mother her attorney's fees and costs.

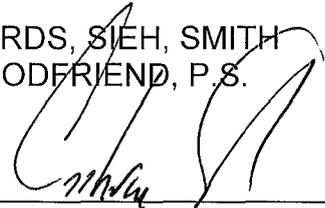
Dated this 15<sup>th</sup> day of November, 2010.

LAW OFFICE OF ROBERT M.  
VUKANOVICH

By: 

Robert M. Vukanovich  
WSBA No. 28847

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Catherine W. Smith  
WSBA No. 9542  
Valerie Villacin  
WSBA No. 34515

Attorneys for Appellant

10 NOV 17 PM 12:08

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

That on November 15, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Carolyn M. Drew Attorney at Law 510 E McLoughlin Blvd Vancouver, WA 98663-3357	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Patricia Novotny Attorney at Law 3418 NE 65th St Ste A Seattle, WA 98115-7397	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Robert M. Vukanovich Attorney at Law 211 E McLoughlin Blvd Vancouver, WA 98663-3368	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

**DATED** at Seattle, Washington this 15th day of November, 2010.

  
\_\_\_\_\_  
Carrie Steen

COPY  
ORIGINAL FILED

AUG 20 2010

Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLARK

In re the Custody of:

BENJAMIN MATTHEW HOLT  
A minor child

MICHAEL J. HOLT  
Petitioner

and

LAURIE L. HOLT  
Respondent/Mother

NO. 10-3-00456-1

ORDER RE ADEQUATE CAUSE  
(NONPARENTAL CUSTODY)

GRANTED (ORRACG)

CLERK'S ACTION REQUIRED

I. Basis

- 1.1 A petition requesting custody of child be granted to Petitioner has been presented to the court.
- 1.2 A hearing was held on June 4, 2010.

II. Findings

*The Court Finds:*

2.1 Jurisdiction

This Court has jurisdiction over the proceeding and the parties.

2.2 Service on Nonmoving Party

The nonmoving parties were served with a copy of the Nonparental Custody Petition, Summons, on February 24, 2010.

1  
2 2.3 Time Elapsed Since Service on the Nonmoving Party

3 More than 20 days have elapsed since the date of service on all nonmoving parties  
4 served within the state of Washington; and more than 60 days have elapsed since the  
5 date of service on all nonmoving parties served outside the state of Washington; and  
6 more than 90 days have elapsed since date of mailing to all nonmoving parties served  
7 by mail.

8 2.4 Adequate Cause Finding

9 Adequate cause for hearing the petition has been established by Court Order after a  
10 hearing ~~or by stipulation of all parties.~~

11 The Guardian ad Litem has testified that it is in the child's best interest to have a  
12 continued relationship with the petitioner, Michael Holt. Based upon all of the affidavits,  
13 declarations and guardian ad Litem report, the Court believes there is enough  
14 documentation set forth to proceed to trial on the non parental custody petition. The  
15 Court finds that if the Respondent/mother denies contact between Petitioner and minor  
16 child if the relationship between the minor child and the Petitioner is not protected, and  
17 the Court has concerns that the mother may withhold the visitation contact in the future,

*it would cause actual detriment to the minor child's growth  
and development*  
18 Ill. Order

19 *It is Ordered:*

20 The matter is set for hearing or trial at a date or time to be established.

21 Dated: \_\_\_\_\_

*/s/ Scott A. Collier*

22 HON. SCOTT COLLIER

23 Presented by: \_\_\_\_\_

24 Approved for entry; Notice of Presentation  
25 Waived:

26 CAROLYN M. DREW, WSB#26243  
27 Attorney for Petitioner

28 ROBERT VUKANOVICH, WSB#28847  
29 Attorney for Respondent

30 Approved by Guardian Ad Litem:

31 \_\_\_\_\_  
32 JEAN WALLER, WSBA#22333  
33 Guardian Ad Litem

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AUG 20 2010

Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLARK

In re the Custody of:

BENJAMIN MATTHEW HOLT

A minor child

MICHAEL J. HOLT

Petitioner

and

LAURIE L. HOLT

Respondent/Mother

NO. 10-3-00456-1

ORDER RE: (a) STAY OF  
ORDER OF DISMISSAL OF DE  
FACTO PARENTAGE ACTION;  
(b) VISITATION SCHEDULE; (c)  
PASSPORTS; and (d) DR. KIRK  
JOHNSON'S EVALUATIONS

THIS MATTER having come before the Honorable Scott Collier on review of Guardian ad Litem report and adequate cause on non parental custody petition, Petitioner's motion to stay enforcement of dismissal of the de facto parentage action, and Petitioner's motion to set summer visitations for minor child, the Court having reviewed the records and files herein, testimony of the Guardian ad Litem, and oral argument of counsel, it is now hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. An Order of Adequate Cause shall be entered in the non parental custody action.

4/29/2010

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2           2.       The Petitioner's Motion for Stay of enforcement of Order of Dismissal of  
3 the de facto parentage action is denied, as the Court is proceeding under the  
4 Petitioner's non parental custody action.

5           3.       The Petitioner's Motion to Establish Visitation pending <sup>the non-parental custody</sup> trial is granted as  
6 follows:

7           a)       For the summer of 2010, the visitation between the Petitioner and  
8 Benjamin shall be aligned with the visitation of his brother Chandler such that the boys  
9 will be on the same schedule. Benjamin shall visit with Petitioner for the summer on an  
10 alternating weekly basis, from Sunday to Sunday, such that the boys are together  
11 throughout the summer visitation schedule (with the exception of any weeks that  
12 Chandler is not residing with his father, ~~Petitioner herein Michael Holt, due to camp~~).  
13 The summer schedule shall commence on July 16, 2010.

14           b)       At the commencement of the school year as defined by the Castle Rock  
15 School District, Benjamin shall continue to have visitation with the Petitioner from Friday  
16 at 6 PM through Monday morning when the Petitioner shall take the child to school in  
17 Castle Rock. In addition, on the week following the Petitioner's weekend visitation the  
18 child shall reside with the Petitioner from Thursday after school through Friday morning.  
19 Notwithstanding the foregoing sentence, if child does not have school on that Friday  
20 morning, ~~then until 6 PM Friday~~, and Petitioner is not working, Petitioner shall have  
21 visitation from Thursday after school through Friday at 6 PM. ~~Furthermore, the child  
22 shall follow the same Holiday schedule as Chandler Holt.~~

23           c)       Either Petitioner or Sue Boyd may pick the child up during Petitioner's  
24 residential time. The Respondent shall ensure that Michael Holt and Sue Boyd are  
25 listed as acceptable parties to pick up and deliver the child to and from school.

          d)       The exchanges for the residential time for the children shall occur half-way  
between Castle Rock and Vancouver, except for Monday mornings when the Petitioner  
shall take the child to school. During the school year, when Petitioner has Friday to  
Monday, the parties shall meet half-way between Castle Rock and Vancouver on said  
Friday and Petitioner shall return the child to school on Monday morning. When  
Petitioner has the child after school on Thursday until Friday, Petitioner shall pickup and

1 deliver the child.

2 e) The holiday and special occasion schedule for Benjamin shall mirror the  
3 schedule set forth for Chandler in the Temporary Parenting Plan entered on march 24,  
4 2010.

5 f) The Petitioner shall be allowed to take Benjamin on vacation out of the  
6 country however this shall not interfere with Benjamin's schooling unless mutually  
7 agreed or by Court Order.

8 4. The Petitioner shall deliver the passport he has obtained for Benjamin to  
9 Respondent, however, Respondent shall relinquish the passport to Petitioner when  
10 needed for travel. Petitioner shall relinquish the passport to Respondent when needed  
11 for travel.

12 5. The Petitioner's request to appoint Dr. Kirk Johnson to perform an  
13 evaluation in this matter and in the companion case regarding Chandler Holt, Clark  
14 County Cause No. 10-3-00455-3, is granted at his option. Prior to said evaluation,  
15 Petitioner's attorney shall prepare an Order directing the scope of Dr. Johnson's  
16 evaluation. For purposes of the evaluation of Benjamin, Dr. Johnson's inquiry shall be  
17 focused on the question of whether actual detriment would result in the termination of  
18 the relationship between the Petitioner and Benjamin.

19 6. For the evaluation with regard to Chandler Holt in the companion case, Dr.  
20 Johnson's focus will be on integration on the issue of whether Chandler has been  
21 integrated into the Petitioner's household with the consent of the other parent. Prior to  
22 said evaluation, Petitioner's attorney shall prepare an Order directing the scope of Dr.  
23 Johnson's evaluation. Dr. Johnson may have access to the Guardian ad Litem at his  
24 discretion.

25 7. The Petitioner shall be required to pay the costs of Dr. Johnson's  
evaluation should he retain his services for this purpose.

**/s/ Scott A. Collier**

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. SCOTT COLLIER

Presented by:

Approved for entry; Notice of  
Presentation Waived:

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CAROLYN M. DREW, WSB#26243  
Attorney for Petitioner

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ROBERT VUKANOVICH, WSB#28847  
Attorney for Respondent

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