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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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In re the Custody of:

LMS,

FAUALUGA SIUFANUA and  
BILLIE SIUFANUA, Appellants,

and

TONY SAMOA FUGA and  
LISA LYNNETT SIUFANUA, Respondents.

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OPENING BRIEF OF APPELLANT

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### **Assignments of Error**

- A. It was error for the court to deny adequate cause and dismiss the grandparents' Petition for Nonparental Custody.
- B. It was error not to find that LMS would suffer actual detriment to her growth and development upon being removed from the only home she had ever known and placed with a strange family in another state.
- C. It was error not to find that Mr. Fuga is an unfit parent.
- D. It was error not to find that limitations were warranted against Mr. Fuga on the basis of abandonment and domestic violence since substantial evidence was provided that supported both findings.
- E. It was error not to appoint a Guardian ad Litem, not only because RCW 26.10.130 specifically allows it, but also because both parties had agreed to it.

### **Issues Pertaining to Assignments of Error**

- 1. Did the trial court abuse its discretion by denying adequate cause and dismissing the grandparents' Petition for Nonparental Custody?
- 2. Did the trial court abuse its discretion by not finding that LMS would suffer actual detriment if placed in the father's home?

3. Did the trial court abuse its discretion by not finding that Mr. Fuga is an unfit parent?
4. Did the trial court abuse its discretion by refusing to find a basis for limiting factors against Mr. Fuga?
5. Did the trial court abuse its discretion by refusing to appoint a guardian ad litem even though the parties had agreed to one?

### **STATEMENT OF THE CASE**

At issue in this case is the custody of a child, LMS, who resided with her maternal grandparents in Washington State in the same home with sibling-like children for almost all of her nine-year old life, who had not seen her father for eight years, and who was ripped away from the only home and parental figures she had ever known just weeks after the father appeared and demanded to take her away to Southern California. The trial court denied adequate cause on the grandparents nonparental custody petition, and the grandparents now seek review of that decision in this Court.

### **Factual Background**

In December of 2005, a daughter, LMS, was born to Lisa Siufanua (her mother) (hereinafter “Ms. Siufanua”) and Tony Fuga (her father) (hereinafter “Mr. Fuga”), an unmarried couple then residing in Washington State. CP 2. After the birth, the parties resided with Ms.

Siufanua's parents, Billie Siufanua and Faualuga Siufanua, the petitioners/appellants in this matter (hereinafter "grandparents"). CP 27. At that time, Mr. Fuga was facing charges of domestic violence/assault against Ms. Siufanua regarding an incident that occurred on April 27, 2005, which Ms. Siufanua was pregnant with the parties' child. CP 5, 27-37. This was one of many such incidents where Mr. Fuga was violent, as the grandparents further described incidents where Faualuga Siufanua had to intervene to stop Mr. Fuga's abuse of Ms. Siufanua and to protect her, at which point Mr. Fuga even became violent with Mr. Siufanua. CP 6.

Mr. Fuga moved to California when LMS was about one year old, and he remained there ever since. CP 3, 27. Ms. Siufanua remained with her parents in their home, as did LMS, and although Ms. Siufanua moved in and out of her parents' home, LMS remained with her grandparents from 2005 through 2014 when this matter began. CP 5-6, 27.

During the nine years she resided with her grandparents, Mr. Fuga had, at best, minimal contact with LMS. CP 5, 27. He travelled to Washington at times, but did not attempt to see LMS or express an interest in doing so. CP 5. He made comments that "he wants nothing to do with the child and has voiced that he would do anything to be rid of the child and the child support that comes along with being a father." CP 6. Over the years, he did not attempt to learn information about her life, including

her academics, extracurricular activities, or “any aspect of her life.” CP 5. In 2008, he married his current wife in California, who was pregnant with their child, before LMS turned three years old. CP 27. On December 18, 2011, he posted a comment to LMS on Facebook acknowledging that he had not seen her since 2006, saying:

Im gonna write this 2night bcuz 2morrow is ‘back 2 work i go’ Its been 5 years since Ive seen you or heard your voice.Im not gonna lie I honestly forgot about your bday.how could I?? I failed u as a Dad n Im sorry, TRUST me when I say that I feel real bad. . . . IM SOO SORRY that you went through soo many years without a Daddy,and I know I cant give them back to you . . . But times do change and its gonna be hard for me to see you but thats okay.

CP 39. In this post, Mr. Fuga commented that he had forgotten LMS’ birthday, but in reality his message was sent the day before her birthday, raising a question as to whether he knew the actual day of her birth. CP 2.

In 2012, Ms. Siufanua began receiving medical assistance from the state, at which point the Department of Social and Health Services pursued Mr. Fuga via a paternity action for child support. CP 27. Up until that point, he had not provided any financial assistance or child support. CP 27. As part of this paternity case, an order was entered that awarded Ms. Siufanua custody of LMS. CP 27. Also in 2012, the grandparents and Ms. Siufanua travelled to California, during which LMS met Mr. Fuga’s extended family for a brief 30-minute visit. CP 27.

Throughout the nine years that LMS resided with her grandparents, they provided all of her care. CP 28. They described their efforts to treat her as their own daughter, describing their efforts to:

invest in her education, attend school conferences, field trips and plays/performances that she is in. As with all young children, we changed her diapers, held her and comforted her when she felt ill, patched her up when she fell down, and encouraged her to become a responsible child. We protected her when her mother turned to an unhealthy lifestyle and insisted on Lisa leaving our home should she continue in her ways as our granddaughter did not and should not need to be exposed to this lifestyle.

CP 28. They further described how they “provided stability and structure for” LMS by ensuring she attended school regularly, providing a stable and secure living environment, and making sure her medical and dental needs are met. CP 6. The grandparents also described how LMS referred to them as “mom” and “dad,” and that she had no memory of her father. CP 28. They cared for LMS as they did the other children in their home, whom LMS saw as siblings. CP 28.

On October 3, 2014, when LMS was nine years old, Mr. Fuga appeared at the grandparents’ home, demanding to take the child back to California with him. CP 6. He made verbally abusive comments about Ms. Siufanua in front of LMS, who was terrified. CP 6. When the grandparents refused, he left, and two days later, he appeared at their home again with the police, once again demanding that LMS be given to

him. CP 6. The police did not require the child to leave with him, and they asked him to leave. CP 6. The grandparents described how this traumatized LMS, as Mr. Fuga was a “stranger coming to take her away” from “everything and everyone she knows . . . .” CP 14, 28. Shortly thereafter, on October 9, 2014, Mr. Fuga appeared at LMS’ school, misrepresenting a court order and saying that he was allowed to have lunch with LMS, as a result of which the school contacted the grandparents to resolve the issue. CP 14. Mr. Fuga also filed a Petition for Modification, alleging that Ms. Siufanua was incarcerated, so he should be LMS’ primary parent and child support should be paid to him. CP 14.

### **Procedural Background**

The grandparents filed a Petition for Nonparental Custody on October 24, 2014, alleging that the child did not reside with either parent, both parents are unfit, neither parent is a suitable custodian for LMS, and that LMS would “suffer actual detriment (harm) to her growth and development if she lives with either of the respondents.” CP 5. The petition requested that Mr. Fuga’s visitation be limited on the following bases: 1) “Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions”; and 2) “A history of acts of domestic violence as defined in RCW 26.50.010(1) or an

assault or sexual assault which causes grievous bodily harm or the fear of such harm.” CP 4. Regarding adequate cause, the petition alleged that “[t]he child is not living with either parent. The child has been living with the petitioner’s [sic] for her entire life” and that “neither parent is a suitable custodian.” CP 5. The relief requested was for a residential schedule, support, payment of fees, and a continuing restraining order. CP 7.

The same day they filed the petition, the grandparents also filed a Motion/Declaration for Ex Parte Restraining Order. CP 12-15. They requested custody of the child as well as the following: 1) that this case be consolidated with the biological parents’ paternity case; and 2) that the respondents have limited, supervised visitation. CP 13. The information filed in support of the motion contained the facts set forth in the petition (and in this brief) as well as the following: “[T]he status quo for the past nine (9) years needs to be maintained so that this child’s life is not completely turned upside down without a full and fair hearing on the facts of this case.” CP 15.

An Ex Parte Restraining Order was issued on October 24, 2014, which restrained both Lisa Siufanua and Tony Fuga from the maternal grandparents and the child. CP 8-11. This order restrained the respondents from coming to the home of the petitioners, restrained the

respondents from removing the child from the state of Washington, and maintained custody of the child with the grandparents until the hearing. CP 10.

Mr. Fuga accepted service of the Summons, Petition, Ex Parte Order, and other accompanying documents on October 29, 2014. CP 16. He also filed a Response to Petition, which admitted that he resided in San Diego County, California. CP 19. He asserted that he “has not engaged in willful abandonment of the child in any way at any time. There is no history of domestic violence or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.” CP 19. He requested that he be allowed to remove the child from the state. CP 19. Regarding where the child has resided, he asserted that the child lived with her mother apart from the maternal grandparents and with the mother and father apart from the maternal grandparents. CP 20. He did not provide dates of these alleged periods of residence. CP 20. Mr. Fuga further requested child support, the tax exemptions, and a continuing restraining order against the petitioners. CP 20.

Mr. Fuga thereafter filed a Motion to Deny Adequate Cause/Dismiss the case, as part of which he claimed that he left when the child was three, not one, and that the reason he was not with her until she was nine was because he did not know where she was and that the

grandparents had hidden her whereabouts from him. CP 26. In response, the grandparents provided Mr. Fuga's Facebook comment, which was posted on December 18, 2011, and which stated "Its been 5 years since Ive seen you or heard your voice." CP 39. Five years from December 18, 2011, would be December 18, 2006, which was one year after LMS was born, not three. CP 2, 19. Further, the petitioners pointed out that when LMS did turn three years old in 2008, Mr. Fuga had already met and impregnated his current wife, whom he married in 2008. CP 27.

Regarding Mr. Fuga's claim that he could not locate LMS during his absence, the grandparents declared that LMS resided in the same home in which she lived before Mr. Fuga left – the same home the grandparents had occupied for about 20 years and the same home in which Mr. Fuga resided as well before he left. CP 26, 28. This was the same home where Mr. Fuga arrived in October of 2014 with the police. CP 26, 28. LMS lived in that home during the entirety of Mr. Fuga's eight-year absence from Washington. CP 26. It was also apparent that Mr. Fuga was able to locate the child at school after he went there to see her. CP 14. Further, the grandparents pointed to the Facebook message from 2011, noting that Mr. Fuga made no queries in it as to where LMS was located, and he made no comments in it about trying to find her. CP 39. They also noted that

they had both held steady employment with King County, Billie Siufanua since 1989 and Faualuga Siufanua since 1987. CP 6.

In response to Mr. Fuga's claim that he had no history of domestic violence, the grandparents provided statements from neutral third-party witnesses who described Mr. Fuga's assault against Ms. Siufanua as well as his attempt to cover it up. CP 27-37. One witness describe seeing a "physical assault," wherein Mr. Fuga "gave a backhanded blow to the face of" the mother. CP 30. Another witness described seeing Mr. Fuga "put both hands around [the mother's] neck and was pushing her back into the wall," and then saw him take his arm back, "ready to punch the woman." CP 31. When the witnesses tried to intervene, Mr. Fuga told them to "mind our own business." CP 31. Other witnesses recounted seeing the same scene, after which Mr. Fuga was led away by police in handcuffs. CP 34. Mr. Fuga's account of the incident to police did not match any of the witness' statements, claiming the parties were just yelling at each other and he only "grabbed her backpack." CP 36. The grandparents provided evidence of the issuance of a bench warrant for Mr. Fuga's failure to comply with his domestic violence treatment requirements as well as the requirement to appear at a hearing. CP 5, 37.

On November 14, 2014, Pro Tem Commissioner Rhe Zinnecker issued an Order re Adequate Cause, denying the petition and dismissing

the matter. CP 58-61. The Order stated that “More than 20 days have elapsed since the date of service,” CP 59, although at that time only 16 days had passed since the date of service, CP 16. The court further determined that adequate cause had not been established, stating “There is no evidence that the father is an unfit parent. He is willing and able to take custody of the child and has not abandoned the child. The child has a relationship with the father and thinks of the father as her father. There has been no showing of actual harm that would occur with the child in the father’s custody. He has a stable home and is parenting two other children who are doing well.” CP 61.

The grandparents filed a Motion for Revision on November 19, 2014, which was heard by Judge Suzanne R. Parisien on December 12, 2014. CP 174-75. Counsel for the grandparents argued to the trial court that the commissioner had wrongfully conflated the requirement of parental unfitness with the finding of actual detriment, and that

there is definitely sufficient evidence to support a finding that at least at this time and on the information that the Court has before it, that placement of the child with her father will cause actual detriment to her, emotionally at the very least. . . . the child has had very, very limited contact with her father since she was three-years old at the oldest, if not even before that. That she has resided primarily with her maternal grandparents or her mother for her entire life. . . . that she has never resided with her father primarily, that she has never resided in California, which is the state that she will move to, um, in just a week or two. She has

little to no relationship with the children that she will be residing with and the stepmother that she will be residing with. And we know that the father has at least one documented incident of committing acts of domestic violence . . . [a]nd that was an act of domestic violence against the child's mother.

RP 8. Counsel note that “she will be, by operation of her no longer living with her maternal grandparents, taken away not only from those grandparents and from the children who reside in her home, like siblings to her, but also from her mother.” RP 9. “And while it is clear and not really in dispute that the child's mother is facing certain challenges at this time that make her not really up to the task of being Leila's full time parent, between the two parents, I think it's pretty clear that she is the person that this child has the strongest bond to, because she was raised primarily with her mother.” RP 9-10. Counsel for Ms. Siufanua also argued “there is fault or omission on the part of Mr. Fuga in that he abandoned the child for a substantial number of years. It's his actions that created this void of an emotional attachment to the child.” RP 27.

Regarding the court's question about not proving actual detriment will, in fact happen, counsel argued that the denial of a guardian ad litem meant there was no mechanism “in place to know that this child will not suffer actual detriment as a result of this move . . . . The father, as a parent, is virtually unknown to the Court. And that's not going to be fixed by a home study.” RP 13.

Regarding a comment from the court about whether the grandparents made it difficult for the father to see the child, counsel noted that it was the grandparents who took the child to California and arranged the visit with Mr. Fuga's family. RP 28. The grandparents were not to blame for the fact that Mr. Fuga left and stayed away. RP 28.

The trial court denied the revision, stating that the grandparents had not met the "very high burden of proving either parents are unfit, child has no suitable parent at that time, or there will be an actual detriment to the child." RP 12. "Adequate cause is actually a pretty high standard." RP 14.

Regarding actual detriment, the court did find that "it will be emotionally difficult for her. It's a big adjustment. That does not say actual detriment." RP 13. "[T]he only thing that anyone has really stated is that they have a limited relationship . . . [a]nd . . . a 2005 . . . domestic violence charge." RP 12. "And actual detriment . . . that's a strong burden, too. It's not it will possibly be unsettling. It will be emotionally difficult. It will be excruciatingly painful to be separated from the grandparents. I believe all of those things that I just said are true. That's not actual detriment." RP 15. "It's not the father versus the grandparents. I venture to guess right now that, um, if that was the standard, the child

would want to stay here. Her family is here; her friends are here; her school is here. Her whole life is here. That's not the standard." RP 20.

Regarding the request to appoint a guardian ad litem, the court found that even though the parties had agreed on the appointment of a GAL, the "home inspection . . . which was done in a foster care arrangement or adoption, would be sufficient to establish that the home is a safe place for the child. I believe that's a precaution she considered. And I find that to be adequate, too." RP 15.

The court's final decision was: "Having reviewed everything that's been submitted, and heard from the parties, I really understand the issues here, um, and the, uh, differences of interpretation of the various statutes and case law. But I do not find any reason to revise Commissioner Zinnecker's ruling in this case. I'm going to affirm it." RP 34. On December 12, 2014, the Court then signed an Order on Motion for Revision of Commissioner Pro Tem Rhe Zinnecker's Order, denying the Motion for Revision and stating that the Order re Adequate Cause shall remain in full force and effect. CP 174-175. The grandparents subsequently appealed on January 9, 2015. CP 180-82.

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## ARGUMENT

### A. Standard of Review

Adequate cause determinations for nonparental custody cases under RCW chapter 26.10 are reviewed for an abuse of discretion. *In re Marriage of Maughan*, 113 Wn. App. 301, 306, 53 P.3d 535 (2002); *In re Custody of Stell*, 56 Wn. App. 356, 366, 783 P.2d 615 (1989). A trial court abuses its discretion when the “discretionary decision is based on untenable grounds or untenable reasons or is a manifestly unreasonable decision.” *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). “Untenable reasons” mean that the court “applied the wrong legal standard or the facts do not establish the legal requirements of the correct standard.” *Id.* A trial court’s findings will be upheld if substantial evidence supports them. *In re Custody of Shields*, 158 Wn.2d 126, 138-39, 136 P.3d 117 (2006). Evidence is substantial “if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

### B. It was an abuse of discretion to deny adequate cause and dismiss the grandparents Petition for Nonparental Custody.

Parents have a constitutionally protected right to parent their children, but those rights are outweighed when they conflict with a child’s welfare. *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16

(1981). “Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference, they are not absolute and must yield to fundamental rights of the child or important interests of the State.” *Id.* (quoting *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260). “When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail.” *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346 n.4, 227 P.3d 1284 (2010). “If the parents’ actions threaten the child’s welfare, the state’s interest takes precedence.” *In re Marriage of Allen*, 28 Wn. App. at 646. “Just as parents’ constitutional rights are long established, it is also true that children have rights regarding their well-being that are important factors properly guiding courts’ custody decisions. Recognition of these rights is not offensive to the constitution.” *In re Custody of E.A.T.W.*, 168 Wn.2d at 346. “[W]here circumstances are such that the child’s growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.” *In re Marriage of Allen*, 28 Wn. App. at 647 (citations omitted).

Moreover, our courts have recognized that a child’s welfare does depend on maintaining stability with the child’s primary parental figures

in her life, even if those parental figures are not related by blood. *See In re Parentage of L.B.*, 155 Wn.2d 679, 693, 122 P.3d 161 (2005). Our core nonparental custody cases “support the proposition that Washington common law recognizes the significance of parent-child relationships that may otherwise lack statutory recognition. . . . individuals may comprise a legally cognizable family through means other than biological or adoptive.” *Id.* As a result, our law has long recognized not only that a nonparent may be an appropriate custodian of a child when the biological parents are unfit, but also that there are circumstances when even placement of the child with a fit parent would otherwise be detrimental, especially when that placement means the child is taken away from a nonparent to whom that child is attached like a biological parent.

In the event a nonparent wishes to obtain custody of a child, that person must file a petition “in the county where the child is permanently resident or where the child is found,” and the petition must specifically alleged that “the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” RCW 26.10.030(1); *In re Custody of Stell*, 56 Wn. App. at 366. In order to seek a custody order, the nonparent is further required to set “forth facts supporting the requested order.” RCW 26.10.032(1). A nonparental custody petitioner must pass through an adequate cause threshold, at

which point the court is required to “deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.” RCW 26.10.032(2).

The petitioners bear the burden of proving their case by clear and convincing evidence as is also required in dependency or termination cases. *In re Custody of C.C.M.*, 149 Wn. App. 184, 205-06, 202 P.3d 971 (2009). However, there is some question as to whether this rationale still applies, as the reasoning outlined in *Custody of C.C.M.* in support of the clear and convincing evidence standard came from the permanency afforded to nonparental custody decrees by virtue of the strict requirements of RCW 26.09.260. *Id.* There, this Court determined that because modification of a custody decree per RCW 26.09.260 requires a showing of a substantial change in circumstances only of the non-moving party or the child, it would be very difficult for a parent to ever successfully establish adequate cause for a major modification of the custody decree. *Id.* However, in light of the decision in *Custody of T.L.*, which held that portion of RCW 26.09.260 unconstitutional as applied to nonparental custody cases, 165 Wn. App. 268, 284, 268 P.3d 963 (2011), nonparental custody orders are easier to modify and do not have the same permanence as dependency and termination cases.

Adequate cause for hearing the petition means “a showing ‘sufficient to support a finding on each fact that the movant must prove in order to modify; otherwise, a movant could harass a nonmovant by obtaining a useless hearing.’” *In re Custody of E.A.T.W.*, 168 Wn.2d at 347 (citing *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004)). In fact, the primary purpose of the adequate cause requirement is to prevent a useless hearing. *Id.* at 348. To establish adequate cause, the petitioner must allege not only that the child is not in either parent’s custody or that neither parent is a suitable custodian, but also the basis for the nonparental custody order itself. *Id.* at 342. However, as part of setting forth facts in support of the nonparental custody order, the nonparent must “set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent.” *Id.* at 339. Actual detriment has been defined as “something greater than the comparative and balancing analyses of the ‘best interests of the child’ test. Precisely what might outweigh parental rights must be determined on a case-by-case basis.” *In re Custody of Anderson*, 77 Wn. App. 261, 264, 890 P.2d 525 (1995). It is a middle ground, “requiring something more than a showing of best interests, but less than parental unfitness.” *In re Marriage of Allen*, 28 Wn. App. at

649. The focus of the actual detriment is on the impact to the “child’s growth and development.” *In re Custody of E.A.T.W.*, 168 Wn.2d at 339.

What will result in actual detriment to a child’s growth and development is determined on a case-by-case basis, *In re Custody of Anderson*, 77 Wn. App. at 264, but neither the parties nor the court are required to predict and prove the unknown future without reference to past actions, *In re Custody of B.M.H.*, 179 Wn.2d 224, 238, 315 P.3d 470 (2013). The court is allowed and encouraged to “speculate about future possibilities in making determinations about domestic relations. Concern about future action is not necessarily impermissibly speculative for findings of actual detriment.” *Id.*

Even if a parent is currently “fit,” continuing damage from past unfitness and the child’s present needs can still be a basis for a finding of actual detriment. For example, in *Mahaney*, two children resided with their paternal grandmother by agreement of the parents due to the parents’ use of alcohol and illegal drugs. *In re Mahaney*, 146 Wn.2d 878, 882, 51 P.3d 776 (2002). The father died several years later, and the mother made some attempts to have the children returned to her, but ultimately she had minimal contact with the children during the nine years they resided with their grandmother. *Id.* at 882-83. The mother claimed that after the children began living with their grandmother, she became sober and

remained sober, married, planned to open her own restaurant, and was active in her community. *Id.* at 883.

The grandmother petitioned for nonparental custody of the children, claiming that they still suffered from the effects of living with their mother and her abandonment. *Id.* at 884. After the trial court granted the petition for nonparental custody and ordered services for the mother with the intent at reunification with the children, the mother appealed. *Id.* at 886. The Court of Appeals reversed the decision after finding that it did not comport with the strict requirements of ICWA. *Id.* The Supreme Court reversed the Court of Appeals and upheld the nonparent custody on several bases. *Id.* at 898. Of note was their discussion about whether nonparental custody could be appropriate without a showing that the mother was “presently” an unfit parent. *Id.* at 894. The Court noted that “the court can take into consideration emotional and psychological damage from prior unfitness of a parent and the child’s current special needs for treatment and care.” *Id.* Further, the court was “entitled to examine the lack of a bond to the parent and the presence of a bond to the children’s grandmother, who has been their parent figure for most of their lives.” *Id.*

In addition to looking at the effects of the biological parents’ past behavior, the court can also look at whether the nonparent has become a

psychological parent or closely bonded to the child. For example, in *Custody of Shields*, the child at issue's parents were divorced, and the father was given custody of the child, with the mother to have liberal visitation, although she did not exercise most of the visitation available to her. *In re Custody of Shields*, 157 Wn.2d at 129. Eventually, the mother moved from Washington to Oregon, and for the next five years, her visitation consisted of about four weeks per year. *Id.* at 130. The father remarried and adopted his new wife's eight-year old daughter. *Id.* at 129. The couple also had another child of their own, and the siblings were generally raised together. *Id.* at 130. When the child was 10, the father died during an accident at home, and the mother took the child to Oregon to live with her and attend bereavement counseling. *Id.* at 131.

Shortly after the father's death, his wife petitioned for nonparental custody of the child, claiming that the mother was not a suitable custodian. *Id.* The court appointed a guardian ad litem to investigate, who determined that the child should reside with his stepmother and siblings on the basis that the stepmother had become a "psychological parent" to the child, the child was closely bonded to her and his siblings, the child wanted to live with his stepmother and siblings, that his mother had limited contact with his stepmother and siblings during the time he resided

in Oregon, and that there was a potential problem for the child to start acting out once he entered adolescence. *Id.* at 133.

After trial, the court determined that the nonparental custody petition should be granted and ordered that the child be returned to the stepmother and his siblings. *Id.* at 136. On appeal, the Court of Appeals affirmed the decision, and the mother petitioned for review to the Supreme Court. *Id.* at 137. The mother argued that a finding of parental fitness is required before custody can be given to a nonparent, and that no such finding was alleged or made. *Id.* at 142-43. The Court acknowledged the validity of the support of the nonparental custody petition, but because it appeared the trial court relied on the best interests of the child standard, the court remanded the case to the trial court for a consideration of the facts in light of the correct standard. *Id.* at 150.

The court also considered the bond between the nonparent and the child in *Custody of Stell*. There, two parents shared custody of a child, but the father stopped visiting the child when the mother's boyfriend became threatening. *In re Custody of Stell*, 56 Wn. App. at 358. Three years later, the father initiated proceedings to gain custody of the child on the basis that the child was being abused in the mother's home. *Id.* The child lived with his paternal grandparents during the proceeding, and even though the father was awarded custody, the child continued to live with his

grandparents because the father did not make enough money to care for the child himself and because the grandparents lived closer to the child's therapist. *Id.* at 359. The father did live with the child and his grandparents at times. *Id.* About a year later, when the child was 4.5 years old and after the child demonstrated behavioral problems and difficulty proceeding in therapy, the child started living with his aunt (the father's sister) in California, where he started doing remarkably well and began calling his aunt "mom." *Id.* The father visited the child once and called occasionally. *Id.* The child continued to live with his aunt for about two years until the grandparents decided to keep the child after he spent the night with them. *Id.* at 360.

The aunt then petitioned for nonparental custody, and the court found adequate cause to go forward with her petition. *Id.* At trial, the mother presented evidence from mental health professionals that placing the child with the father would be detrimental to him in light of the fact that the child identified with his aunt as a "mom," that the father was not able to provide a stable and consistent home for the child, and that despite the father's clear love for the child, the history of inconsistent parenting had damaged the child such that removing him from his aunt's care would be detrimental to him. *Id.* at 361.

At trial, the aunt's petition for custody was denied on the basis that she had not proved the father was unsuitable or unfit. *Id.* at 362. The court also denied the aunt's request for appointment of a guardian ad litem. *Id.* On appeal, the court held that the aunt was not required to prove the father was unfit, but as an alternative, that "circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Id.* at 364 (quoting *In re Marriage of Allen*, 28 Wn. App. at 646-47). As part of determining that the aunt had proven the child would be detrimentally affected if placed with the father, the court noted that there was no support for a claim that just because the father had found steady employment, that he would suddenly be able to care for a child he had never really cared for before, noting that it was speculative at best. *Id.* at 368.

Further, the court noted that it was error to dismiss the professionals' opinion that the aunt had become the child's psychological parent, which was a consideration that "cannot be ignored in custody disputes such as" that one. *Id.* at 369. The aunt was the only person able to provide the son with stable and consistent parenting. *Id.* Further, the court found that it was error for the trial court to have denied the appointment of a guardian ad litem, finding that it "was, at the very least, ill-advised. A trial court should appoint a guardian ad litem or an attorney

for a child if it would assist the court in determining the custody issue.” *Id.* at 370 (citing *In re Marriage of Nordby*, 41 Wn. App. 531, 534, 705 P.2d 277 (1985) (superseded on other grounds by RCW 26.09.187)).

Similarly, the court held that it was error not to consider the opinion of other professionals, stating that “it seems to us that in this most difficult of all problems, the custody of children, the trial court should seek all the light available.” *Id.* (quoting *Atkinson v. Atkinson*, 38 Wn.2d 771, 771, 231 P.2d 641 (1951)). They specifically noted that the refusal to seek information and guidance from these professionals was “all the more unjustifiable where the trial court’s custody decision was based on its claim of insufficient evidence of detriment.” *Id.* at 370. As a result, the court reversed the trial court’s decision and remanded for a new trial as well as the appointment of a guardian ad litem. *Id.* at 371. The court noted that this would mean a change of custody for the child and the prolonged resolution of the proceedings, and that the court is typically reluctant to change custody on appeal “because of the trial court’s unique opportunity to personally observe the parties,” the trial court did abuse its discretion because “there is simply no evidentiary support or explanation for the court’s conclusion that [the aunt] failed to meet her burden of proof on the issue of detriment . . . .” *Id.* at 366.

Similarly, the court may also “take into consideration emotional and psychological damage from prior unfitness of a parent and the child’s current special needs for treatment and care.” *In re Mahaney*, 146 Wn.2d at 894. For example, in *Marriage of Allen*, a married couple had a child who was deaf. *In re Marriage of Allen*, 28 Wn. App. at 639. Custody was initially awarded to the mother, but after she was unable to care for the child’s special needs, she gave custody to the father. *Id.* at 639-40. The father met and married a woman who had three children, and they raised their children together for four years until they divorced. *Id.* at 641.

As part of the divorce, the stepmother requested custody of the child, and even though a parenting investigation determined that both the father and the stepmother were suitable parents, the trial court awarded custody of the child to the stepmother. *Id.* at 640. The court found that the stepmother had been instrumental in getting the child training in sign language as well as special assistance at school, and not only did she learn sign language, but her other three children learned as well so that the child was able to communicate with his siblings and stepmother fluently. *Id.* The father knew some sign language, but not as much as the stepmother and the other children. *Id.* at 641.

The father appealed the court’s decision, claiming that the nonparental custody decree was improper as he was not found to be unfit.

*Id.* The Court of Appeals noted that fit parents have a constitutionally protected right to parent their children, but “where circumstances are such that the child’s growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.” *Id.* at 647.

In that case, the Court of Appeals held that the child’s growth and development would be detrimentally affected by placement with the father due to his lack of sign language skills and the lack of interaction and communication that would happen in the father’s home. *Id.* Further, the court determined that the child had “become integrated into the family unit formed by the marriage of [the father] and [the stepmother] and [the father’s] adoption of her three children.” *Id.* at 648. Specifically, the court noted that:

[w]here the reason for deferring to parental rights the goal of preserving families would be ill-served by maintaining parental custody, as where a child is integrated into the nonparent’s family, the de facto family relationship does not exist as to the natural parent and need not be supported. In such a case, custody might lie with a nonparent.

*Id.* The court acknowledged that this was made quite important by the legislature regarding modifications to custody per RCW 26.09.260, which sets forth a very high burden of proof to modify child custody unless the child has become integrated into the family seeking to modify the custody

arrangement. *Id.* The court noted that “it was formerly thought that blood ties between parent and child were extremely important. Now it is learned that kinship is not as important as stability of environment and care and attention to the child’s needs.” *Id.* (quoting *In re Welfare of Aschauer*, 93 Wn.2d 689, 697-98, 611 P.2d 1245 (1980)). Based on this reasoning, the court held that:

In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent’s right to custody is outweighed by the state’s interest in the child’s welfare. There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the ‘best interests of the child’ test. Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown.

*Id.* at 649. Further, by keeping the child with the stepmother,

the continuity of that family unit could be retained. There is more to that relationship than the local school could provide, even with the tutor: the everyday living relationship between the stepmother, the three children and [the child]. Disrupting that relationship would have deeply disturbed [the child]. [The father’s] parental rights were properly outweighed under these facts.

*Id.* The nonparental custody decree was upheld. *Id.* at 639.

However, our courts have established some boundaries to what it means to be unfit or that find that a child will face actual detriment. For example, in *Custody of B.M.H.*, a man helped raise from birth his stepson, whose biological father had died before he was born. *In re Custody of*

*B.M.H.*, 179 Wn.2d at 229-30. The parties divorced when the child was around two years old, and while a parenting plan was established for the parties' biological child, the mother's son also went along on the same every-other-weekend visitation schedule with his half-sibling. *Id.* at 230. For about five to six years, the father was heavily involved in his stepson's life, and the parties even considered having the father adopt the child, although they ultimately decided against it as it would have terminated the survivor benefits the child received from his biological father. *Id.* at 231.

About nine years after their divorce, the father filed a nonparental custody petition that alleged the mother was an unsuitable custodian for the child because she had met another man and planned to move the child out of the area to live with the new man. *Id.* at 230-31. He claimed that this would disrupt the close relationship he had with the child, and he showed that on some occasions, the mother had limited his contact with the child already. *Id.* at 231. He further claimed that decreasing his contact with the child would be detrimental to the child's growth and development. *Id.* at 233.

The trial court found adequate cause on the petition, which the court of appeals upheld, and on review, the Supreme Court dismissed the petition, holding that the mere threat alone that the mother might disrupt contact with the stepfather after moving about 50 miles away did not meet

the actual detriment burden. *Id.* at 235. While the Court acknowledged that it is proper to look forward and determine what possible consequences might occur, a possible decrease in visitation without any other circumstances was insufficient to prove actual detriment. *Id.* at 239. Accordingly, the nonparental custody petition was dismissed. *Id.* However, the Court did remand the case for a determination of whether the stepfather could be considered the child's de facto parent. *Id.* at 240, 244.

Further, it is not satisfactory to simply say the nonparent is able to provide the child with a better home. For example, in *Custody of S.C.D-L*, the father was granted custody of the child over the mother when she was about two years old. *In re Custody of S.C.D-L*, 170 Wn.2d 513, 515, 243 P.3d 918 (2010). A couple years later, he married a new woman, and they moved to California. *Id.* The child's behavior declined and became oppositional, compulsive, depressed, and self-mutilating. *Id.* The father arranged for his mother to care for the child, where she remained for several years and with whom her behavior improved. *Id.* Over the years, the child did spend prolonged periods of time with the father, and after five years of living predominantly with her grandmother, the father took the child back to live with him. *Id.* at 515. The next month, the paternal grandmother filed for and obtained nonparental custody of the child on the

basis that it was in the child's best interests to reside with the grandmother. *Id.* at 516.

Of note was that the petition did not allege that the father was unfit or an unsuitable custodian, but rather that it would just be better for the child to reside with the grandmother. *Id.* Also of note was that the child had resided with the father for several months before trial without issue. *Id.* The Supreme Court reversed the nonparental custody on the basis that the "best interests of the child" standard does not apply to nonparent custody actions, and that the petition did not satisfy the statutory requirements by not alleging that the child was in the grandmother's custody (the child had already returned to the father's custody), and there were no allegations that the father was an unsuitable custody or an unfit parent. *Id.* Therefore, the petition was dismissed. *Id.* at 517.

It is also not appropriate to grant nonparental custody on the basis that the nonparent is able to provide a "superior" home. For example, in *Custody of Anderson*, the parents divorced, and the mother was awarded custody of their daughter, while the father was allowed only supervised visitation due to his substance abuse and mental health issues. *In re Custody of Anderson*, 77 Wn. App. at 262. The mother relocated the child to Alaska without providing the father notice, after which she was held in contempt. *Id.* As part of that proceeding, the father was allowed to travel

to Alaska with his sister and bring the child back to Washington, where the daughter lived with her aunt for about three months before the mother requested her return. *Id.* at 262-63.

The aunt petitioned for nonparental custody, which was granted despite a guardian ad litem report that determined the mother was a fit parent. *Id.* at 263. The trial court reasoned that the aunt and uncle were simply able to provide a better home. *Id.* The trial court compared the mother to the aunt and uncle and found that the aunt was able to offer the child “a superior home environment and a greater opportunity for optimum growth and development.” *Id.* The only detriment the court found would be the lost opportunity of that superior home environment. *Id.* at 264. In reversing the nonparental custody order, the court of appeals held that the loss of a superior home environment does not qualify as “actual detriment” and did not satisfy the legal requirements for a nonparental custody decree, and the trial court had abused its discretion in making such an order. *Id.* at 266.

In sum, our courts have not held that a parent can simply disappear from a child’s life or otherwise inflict or allow damage to be done to a child or allow the child to establish a parental bond with another person and then reappear, years later, and expect that restarting the full parental relationship will not result in actual detriment to the child.

C. **It was error not to find that LMS would suffer actual detriment to her growth and development upon being removed from the only home she had ever known and placed with a strange family in another state.**

This is not a case wherein the grandparents are saying that they can simply offer LMS a better home, or that they would be better parents for her. This is a case where the trial court's order rips a child away from the only home she has ever known and the only family she has ever known and places her with a stranger. Mr. Fuga is, indeed a stranger, as he has lived in another state for the better part of a decade with only minimal contact with the child, Ms. Siufanua, or the grandparents for all of that time. But for biology, Mr. Fuga is not too different from any other stranger that LMS may have met a few times.

On the most basic level, it is obvious why it would be detrimental to LMS to remove her from her home and from the people she calls "mom" and "dad." They changed her diapers, raised her from a baby, were part of all of her "firsts" - first words, first crawl, first walk, first day in school, first recital, etc. They took her to the doctor and the dentist, went to parent/teacher meetings, and were, for all intents and purposes, her parents for all of her life. This is critical, and is quite a distinction from other cases where the nonparents were involved for a short period and wanted to remain that way.

These grandparents did not just help care for LMS most recently; they cared for her for her entire life. It would be detrimental to LMS' growth and development to take her away from this home. All of our custody laws and considerations as well as the cases cited above focus on the importance of stability for a child. The trial court even acknowledged that it would be an adjustment for LMS that would no doubt be excruciating. But this case really goes further than that. Shifting a visitation schedule, or moving to another town qualify as an adjustment. It seems impossible to imagine how a child could have any more of a disruption than removal from this home would cause. Not only does she lose the people whom she calls "mom" and "dad," but she loses her home, her siblings in that home, contact with her mother, Ms. Siufanua, her school, her friends, her activities, her doctors, her dentists, and every other relationship and setting in this state.

Instead, within a matter of weeks, she is taken to a new state where she has never lived before, put in a home where she has never before, and forced to live with complete strangers who already have their own children and their own lives. She has to start a new school, make new friends, see new dentists and doctors, start new activities, and all the while, come to grips with a man who says he is her father but, for all she knows, stayed away from her for eight years in order to live with another

set of children in another state. It seems impossible to imagine a more disruptive and detrimental change in a child's life outside of death of her family.

On top of this are the issues with Mr. Fuga. First, Mr. Fuga was not being honest as part of his materials, which is easily ascertained by the main thrust of his responses, that he left LMS when she was three (which contradicts the Facebook posting) and that he did not commit domestic violence (which directly contradicts the neutral, third party statements describing his physical violence against Ms. Siufanua). The last time he was in Washington was when he faced these domestic violence charges, and he has been a stranger to the parties and to the state ever since. If he cannot be honest about his past, not even now, then there is even more reason to question what will happen to a child sent to his care.

Second, Mr. Fuga did abandon LMS, and that he has now decided to "re-start" his relationship with her does not undo the damage from his eight-year absence from her life. There is a very good reason that the legislature made it a limiting factor for a parent to have abandoned a child; if it were possible to just put it in the past and forgive it as Mr. Fuga wishes, then, logically speaking, then no one who ever abandoned a child and came back would ever be subject to a limitation based on abandonment.

Now, Mr. Fuga argues that he did not abandon the child by saying his efforts to see her were “rebuffed.” This perhaps could excuse a short absence from her life, but not eight years. For a short time period, it would make sense if he could not reach her, could not find her, and had to pursue a private investigator or remedy via the court in order to obtain access to her. But it does not take eight years to find a child who is located exactly where Mr. Fuga left her - in her grandparents’ home where she has lived for all of her life and where the grandparents have lived for almost 20 years. It does not take eight years to find people who own a home and have worked in the same jobs since the 80s.

Additionally, in 2011 when Mr. Fuga apologized for not seeing LMS for five years, he made no comment about trying to find her or trying to see her again, and he also did not ask her where she was located. In 2012, when the state established child support, Mr. Fuga had an opportunity via the court to ask for visitation or reunification with LMS. He did not do so. Finally, the fact that he was able to find LMS at her grandparents’ home when he appeared there in October of 2014 demonstrates that he had the ability to find her.

Moreover, that he was able to go see her at her school also proves that he was able to locate her there as well. In sum, even if we assume that Mr. Fuga made an attempt to see LMS that was rebuffed, no doubt

due to his history of domestic violence with the family as well as his absence, he did not do what a reasonable parent would do when trying to obtain contact with his child. He abandoned LMS, and it is worth mentioning that it was only after he was required to pay child support for her that he sought to change custody.

Furthermore, Mr. Fuga does have a history of domestic violence, which he has also denied in this proceeding. The grandparents provided proof of the charges against him, the witness statements, and his attempt to deny what had happened despite those statements. The grandparents also described other incidents of physical violence where Mr. Siufanua was forced to intervene in order to protect Ms. Siufanua. More recently, they described Mr. Fuga's behavior when he appeared at their home in October of 2014. He was abusive then, and when they refused to do as he asked, he showed up at their home again with the police. This is abusive, controlling, intimidating behavior that raises a question as to whether he still has the same domestic violence problems that he did when he lived in Washington. The fact that he acted this way in front of the child further demonstrates that he is not able to control his behavior in what under any circumstances is a difficult, terrifying, surprising situation for a young child.

For all of these reasons, this case is more similar to those cases wherein our courts have upheld a finding of actual detriment and distinguishable from those where our courts have not found actual detriment. For example, in *Mahaney*, the court noted that even though the mother's abandonment had ended since she wanted to resume custody, the child was still suffering from the effects of the previous abandonment, the lack of a bond between the child and her mother, and the presence of a bond between the child and her grandmother that would be detrimental to the child if broken.

In the instant case, even though Mr. Fuga's abandonment has ended in the sense that he wants to resume custody of LMS, there is no doubt that she has suffered and will suffer from his absence in her life, and that is not something that is simply undone by his return. Further, substantial evidence was presented that the child saw her grandparents as her "mom" and "dad" and had established those bonds with them. In both this case and in *Mahaney*, the parent was gone for a similar amount of time - eight years in this case, nine in *Mahaney*. It is not unreasonable to assume that it would similarly be detrimental to LMS to lose that relationship with the grandparents.

This case is also similar to *Stell*, the father saw the child sporadically over several years while the child resided with his parents and

then his sister, the nonparental custodian. The court found that the bond between the child's aunt and the child was strong enough that she had become his "psychological parent," and he called her "mom." These facts were sufficient to bypass adequate cause and move forward to a trial, as it was error to assume the father would be a fully capable parent when he had never demonstrated as much before, and it was error to dismiss the relationship between the child and his aunt or "mom." Similarly, in this case, it should be error to assume that Mr. Fuga will suddenly become a fit parent for LMS when he has never done so before, and even more importantly, it should be error to dismiss her relationship with the grandparents here in Washington and the resulting detriment from decreasing that attachment.

In contrast, this case is distinguishable from those wherein there was no finding of detriment to the child. First and foremost, if the primary purpose of the adequate cause threshold is to avoid a useless hearing, then that evil has arguably been avoided here, as the grandparents' efforts to maintain a custody relationship they have had for eight years as well as ensure the safety and well being of that child do not have the indicia of a "useless" hearing or of efforts to simply harass Mr. Fuga. Second, the grandparents have not asked the Court to make a simple "best interests of the child" comparative analysis between their home and Mr. Fuga's home

as was denounced in *Custody of S.C.D-L* and *Custody of Anderson*. In both of those cases, the courts held that the finding of detriment or unfitness was unsupported because the trial court had simply determined that the nonparent could be a better parent or provide a better home, which was not enough to satisfy the requirements of a nonparental custody petition. In this case, however, the grandparents have not alleged that they could provide better opportunities than Mr. Fuga or that they are better parents, *per se*, but rather that it would be detrimental to remove LMS from their custody and place her with her father because of her attachment to the grandparents.

Further, this case is distinguishable from *Custody of Anderson*, wherein the concern that the mother might disrupt contact with the stepfather/putative nonparental custodian was insufficient for a finding of actual detriment. Unlike this case, both the mother and the stepfather had maintained a relationship with the child for several years, although the mother had always been the child's primary residential parent (as opposed to Mr. Fuga, who has not). Additionally, the mother sought only to move the child about 50 miles away from the stepfather, which would likely diminish the every other weekend visitation he had maintained, but not disrupt it as much as a move from Washington to southern California as in this case. On the whole, *Anderson* only focused on the potential

diminishment of the stepfather's contact with the child without any other allegations, while still maintaining the child's primary residential attachment (the mother). In the instant case, LMS not only loses her primary residential attachment altogether (the grandparents) but also moves an exponentially larger distance away.

In sum, it was error for the trial court to determine that this kind of upheaval under these circumstances would not result in actual detriment to LMS. This is specifically distinguishable from the published cases that did not find actual detriment.

**D. It was error not to find that Mr. Fuga is an unfit parent.**

It is worth noting that Mr. Fuga's absence from LMS' entire remembered life should be a basis for a finding that he is unfit. Our statutes describe quite a bit in terms of parenting functions, *see* RCW 26.09.004(2), but regardless of the definition used, the most critical element of a fit parent acting as a fit parent is that the parent is *there* for the child. Without even seeing the child or participating in the child's life, a parent is not even performing that most basic function that has to comprise the core of fit parenting. That Mr. Fuga spent so much time away from LMS, and that he sought to take her away from the only family she had ever known so abruptly and severely, only demonstrates that he does not make sound parenting decisions.

E. **It was error not to find that limitations were warranted against Mr. Fuga on the basis of abandonment and domestic violence since substantial evidence was provided that supported both findings.**

As part of the nonparental custody proceeding, the court can also impose restrictions and limitations against a parent, and in fact it is required that visitation be limited “if it is found that the parent seeking visitation has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions . . . (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1).” RCW 26.10.160. It is not necessary to wait for actual harm to accrue before imposing these restrictions, only that substantial evidence shows that a danger of damage exists. *In re Marriage of Chandola*, 180 Wn.2d 632, 645, 327 P.3d 644 (2014).

F. **It was error not to appoint a Guardian ad Litem, not only because RCW 26.10.130 specifically allows it, but also because both parties had agreed to it.**

The focus of an adequate cause hearing is whether the petitioners have set forth allegations, which *if proven*, would support a finding of parental unfitness or actual detriment to the child. A guardian ad litem or parenting investigator is helpful in terms of gathering that additional information so that the court can make a fully informed decision. Also as part of the nonparental custody proceeding, the court can appoint an

attorney to represent the interests of the child “with respect to custody, support, and visitation,” RCW 26.10.070, and the court can also order “an investigation and report concerning custodian arrangements for the child, or may appoint a guardian ad litem pursuant to RCW 26.12.175. . . . In preparing the report concerning a child, the investigator may consult any person who may have information about the child and potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis.” RCW 26.10.130.

Our courts have endorsed the use of guardians ad litem in order to flesh out the facts, especially when the allegations, if proven via that additional information, would support a basis for nonparental custody. IN *Custody of Stell*, for example, the court found error in the trial court’s refusal to appoint a guardian ad litem. *In re Custody of Stell*, 56 Wn. App. at 370 (citing *In re Marriage of Nordby*, 41 Wn. App. at 534). “A trial court should appoint a guardian ad litem or an attorney for a child if it would assist the court in determining the custody issue.” *Id.* They specifically noted that the refusal to seek information and guidance from these professionals was “all the more unjustifiable where the trial court’s custody decision was based on its claim of insufficient evidence of detriment.” *Id.* As a result, the court reversed the trial court’s decision

and remanded for a new trial as well as the appointment of a guardian ad litem. *Id.* at 371.

In this case, the refusal to appoint a guardian ad litem, especially in light of the fact that the parties all agreed to the appointment, was error. Mr. Fuga appeared suddenly after his eight-year absence, and the adequate cause hearing was scheduled in less than 20 days after he was served with the paperwork. The parties did not have the opportunity to conduct discovery or depositions, nor did they have the benefit of an investigation into Mr. Fuga's current life and situation in California. The allegations raised by the grandparents indicate that Mr. Fuga has had a long history of problems with domestic violence and minimizing his behavior - behavior that was demonstrated most recently with his behavior in front of the child as well as his denials of his past behavior before the court.

That the grandparents were not able yet to provide more information is understandable, as they had not had the time to prepare for the hearing as they would have had for a trial, at which point they could have presented all of their evidence after conducting discovery. A guardian ad litem would have been incredibly beneficial to informing the court about the case, and before entirely disrupting a child's life and placing her in a strange home with strange people, taking time to have an expert look into the situation seems most appropriate. Just as in *Stell*, it

makes little sense to fault the grandparents for not providing more information while at the same time refusing a guardian ad litem who would provide that exact information. Therefore, just as in *Stell*, the case should be remanded for the appointment of a guardian ad litem and trial.

G. **This court should reverse the trial court's decision, find adequate cause to proceed on the petition for nonparental custody, and allow this matter to proceed to trial.**

While it is understood that “[a]ppellate courts are generally reluctant to disturb a child custody disposition because of the trial court’s unique opportunity to personally observe the parties,” *In re Custody of Stell*, 56 Wn. App. at 366 (citations omitted), it should be noted that the court’s opportunity to personally observe the parties is much less in an adequate cause hearing based on affidavits where no live testimony was taken. The trial court may have been able to observe the parties briefly, but not to hear them speak or be cross-examined about their testimony. This Court sits roughly in the same position as the trial court, and the grandparents request on behalf of LMS that this Court do everything possible to ensure that a well-informed, careful decision is made about LMS’ care and custody.

**CONCLUSION AND REQUEST FOR FEES**

For the reasons set forth above, the grandparents/appellants respectfully request that this Court reverse the trial court’s decision

dismissing the case and denying adequate cause, and remand the case for proceeding to trial. Pursuant to RAP 18.1, the grandparents request attorney fees for the necessity of filing this appeal. Further, RCW 26.10.080 specifically provides that “[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.” RCW 26.10.080. In this case, the grandparents supported Mr. Fuga’s child for eight years without question or contribution from Mr. Fuga, and they defend these proceedings only because they love LMS and want to see her avoid the devastation of being ripped from the only home she has ever known.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

McKINLEY IRVIN, PLLC



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**PROOF OF SERVICE**

Kendra Lytle certifies as follows:

On June 5, 2015, I served upon the following a true and correct copy of this Brief of Appellant via U.S. Mail:

Philip C. Tsai  
Tsai Law Company, PLLC  
2101 Fourth Avenue, Suite 2200

Seattle, WA 98121

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED AND DATED this 5<sup>th</sup> day of June, 2015, at Tacoma, WA.

  
Kendra Lytle