IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Custody of:	)	**No. 28445-0-III**
SAMARA CHEYENNE DANIELS-LITTELL,	)	
Child.	)	
EDNA MICHELE LITTELL,	)	
Respondent,	)	**Division Three**
v.	)	
AARON ANTHONY LITTELL,	)	
Appellant,	)	
SARA ANN DANIELS,[†]	)	
Respondent.	)	**UNPUBLISHED OPINION**

Sweeney, J. —The natural father of a minor child appeals a superior court judgment awarding custody of the child to a nonparent (the child's paternal grandmother).

[†] Ms. Daniels is not a party to this appeal.

The father first challenges the adequacy of the showing made by the nonparent to support her petition for a full hearing on custody and the court's decision to shorten the time for notice of that show cause hearing. But the petition ultimately proceeded to full hearing with evidence, argument, and a resolution by the trial court. So even if we passed on the propriety of the show cause procedure, there is no effective relief we could now provide. The court's decision to award custody to the nonparent is either correct or it is not correct, regardless of any flaws in the initial show cause procedure. The father also challenges the adequacy of the trial court's findings and conclusions to support the decision to award custody to the nonparent. He maintains that the court applied the wrong standard. We conclude that the court applied the correct standard (actual detriment to the child) and the findings here support the conclusions and ultimate decision to award the nonparent custody. We therefore affirm the judgment of the trial court.

FACTS

Sara Ann Daniels[1] gave birth to Samara in 1996. Samara lived with her mother until she was approximately two years old. In approximately 1998, paternity testing confirmed that Aaron Littell is Samara's father. Samara began to live full time with Aaron almost immediately after the paternity determination. In 2000, Aaron married a

[1] We use first names for clarity because some of the parties share a last name.

woman other than Samara's mother. Aaron gained custody of Samara in 2001. And in summer 2002, Aaron, his wife, and Samara moved to California. Samara's teacher reported concerns about Samara's behavior to California's child protective services agency shortly after the move to California. In December 2002, Aaron and his mother, Michele,[2] who lives in Spokane, agreed that Michele would take custody of Samara until the end of the 2002-03 school year.

At the time Michele and her partner took over care of Samara, Aaron provided Michele with a list of Samara's behavioral problems. The list set out nearly 50 behaviors that had intensified since Samara's move to California. They included self-mutilation, frequent mood swings, extreme lack of conscience, pathological lying, depressed moods, stealing, compulsive behavior, and sleep disturbances.

Michele placed Samara in counseling and enrolled her in public school in Spokane. Her behavior improved. Samara's mother visited Samara in Spokane in late 2002 but has had no contact since. Samara returned to Aaron and his wife in California in July 2003. Later that summer, Aaron informed Michele that it was not working out for Samara at his home in California. Michele and her partner drove down to pick up Samara

[2] Although the Respondent's Brief refers to Edna Michele Littell as "Edna," the parties refer to Ms. Littell as "Michele" throughout the trial transcript. Report of Proceedings (RP) at 1-301. And Ms. Littell introduces herself as "E. Michele Littell" at the beginning of her testimony. RP at 141.

and returned to Spokane in time for her to start second grade in September 2003. Aaron next visited Samara in Spokane in December 2006. Aaron maintained regular telephone contact with Samara throughout the time she lived with Michele.

The relationship between Aaron and Michele began to deteriorate by 2006. Aaron says that Michele resisted his efforts to have Samara visit or return permanently to California. In December 2007, Aaron travelled to Spokane, picked up Samara, and took her back to California.

Michele petitioned for nonparent custody on January 3, 2008. Michele did not file an affidavit in support of her petition. Her petition represented that she wanted custody of Samara because she was concerned about the child's wellbeing. She also alleged that Aaron removed Samara from Michele's care primarily to avoid paying the increased child support award that the State was seeking in fall 2007. Michele asked the court to shorten the time for the adequate cause hearing from 60 to 20 days. The court did so. But the court later continued the adequate cause hearing, at Aaron's request, until February 1.

A court commissioner found adequate cause to proceed to trial and ordered Aaron to return Samara immediately to Spokane. The court commissioner also ordered the appointment of a guardian ad litem, but no guardian ad litem was ever appointed. The court commissioner further provided that Aaron was allowed to have visitation with Samara during spring break and summer 2008. The parties cooperated and Samara returned to California to stay with Aaron

and his wife and Samara's step-siblings during summer 2008 prior to trial.

Aaron, Michele, Michele's long-time partner, and Aaron's father testified during the August 2008 trial. Aaron testified that Samara thrived during the time she lived in California just prior to trial in summer 2008. Samara also attended counseling when she was in California over summer break.

The court concluded that placing Samara with Aaron would detrimentally affect her and that it is in Samara's best interests to reside with Michele. Aaron appealed directly to the Washington Supreme Court. The Supreme Court determined that the case presented no novel legal issues and transferred it to this court.

DISCUSSION

Aaron assigns error to the court's decisions on the procedure used to find adequate cause for a full hearing on custody. He argues that the court improperly shortened the time for the hearing from 60 days to 20. And he argues that Michele failed to make the necessary statutory showing that the child is not in the physical custody of either parent or that neither parent is a suitable custodian. RCW 26.10.030(1). But even were we to assume that the preliminary procedure, necessary to warrant a full custody hearing, was flawed, the question is what we should do about it now.

This dispute proceeded to a full hearing. Both sides presented evidence. The court entered appropriate findings of fact and conclusions of law and a judgment that awarded custody of Samara to her

grandmother, Michele. If that decision was legally supportable—the findings are supported by the evidence, and the findings support the court's legal conclusions—then it makes no sense to reverse and remand for the statutory show cause hearing (RCW 26.10.032) to determine whether adequate cause for a hearing exists. They have already had a full hearing, and that hearing made it clear that cause exists. If, on the other hand, we conclude that the findings are not supported by the evidence, or that the court's findings do not support the conclusions that ultimately result in the award of custody to the grandmother, then again it makes no sense to remand for a show cause hearing. We simply dismiss the petition and remand for entry of an order to return custody to the father. Our analysis of this preliminary procedural matter would be different if we were asked to review these preliminary decisions before the full custody hearing. But that is not the case here. Accordingly, we turn our attention to the hearing itself and the court's judgment.

Aaron contends that the court applied the wrong standard—the best interests of the child standard. What standard the court applied and whether that standard was legally correct are both questions of law that we will review de novo. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.3d 1182 (2005). Likewise, whether the court's findings of fact support the court's conclusions is a question of law that we will review de novo. *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007). Aaron does not challenge the court's findings of fact, so

they are verities on appeal. *In re Marriage of Knight*, 75 Wn. App. 721, 732, 880 P.2d 71 (1994).

First, our review of this record, including the court's findings, suggests that the court did not apply the "best interests of the child" standard rejected by the Supreme Court in *In re Custody of Shields*.[3] In custody disputes between parents, a court determines the child's best interest by deciding which parent offers the child the better home environment. *In re Custody of Anderson*, 77 Wn. App. 261, 264, 890 P.2d 525 (1995). By contrast, in disputes between a parent and a nonparent, Washington law requires a heightened standard to determine whether to award custody to the nonparent. *Shields*, 157 Wn.2d at 142. The heightened standard follows from a parent's constitutional right to the custody of his or her children, as Aaron correctly maintains. *Anderson*, 77 Wn. App. at 264; *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981). Therefore, a nonparent seeking custody must establish either that the parent is unfit or that "circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Allen*, 28 Wn. App. at 647. "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." *Id.* at

[3] *In re Custody of Shields*, 157 Wn.2d 126, 149-50, 136 P.3d 117 (2006).

649. The fact that the form on which the trial court entered its findings uses the "best interests" language is not determinative. *In re Custody of A.C.*, 137 Wn. App. 245, 262, 153 P.3d 203 (2007), *rev'd on other grounds*, 165 Wn.2d 568, 200 P.3d 689 (2009).

The trial court here found:

> When [Samara] was in an environment that provided the stability of regular school, activities, and a stable home, she was able to function at a high level and with a degree of academic and activity success. The petitioner has met her burden and has established that the respondent is not a suitable custodian. *There would be actual detriment to the child's growth and development, if placed with respondent.* The respondent's parenting history, from disputing paternity, moving forward with a pattern of turmoil, lack of real parenting history, coupled with the child's traumatic California environment with serious counseling and academic and acting out needs, and Child Protective Services' involvement, provides sufficient evidence of detriment.

Clerk's Papers (CP) at 55 (emphasis added).

Aaron argues that Michele failed to show that there are *still* problems with Samara in California and that placement with the father would be a detriment now. Br. of Appellant at 10. But there is no statutory or case law requirement that the detriment to the child be recent. The question is simply whether the court's findings that there will be actual detriment to the child are supported. *Allen*, 28 Wn. App. at 647. Aaron's factual arguments that Samara's problems while in his custody were in the past and, specifically, that substantial weight should be given to the testimony supporting that assertion are matters for the trial judge sitting as the fact finder. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 451, 177 P.3d 1152 (2008).

We will not reweigh those factual determinations. *In re Disciplinary Proceedings Against Vanderveen*, 166 Wn.2d 594, 604, 211 P.3d 1008 (2009).

The evidence at trial showed that Samara originally came to live with Michele in late 2002 because, at the age of six, she exhibited nearly 50 serious behavioral problems while living with Aaron in California. Those problems included self-mutilation, frequent mood swings, extreme lack of conscience, pathological lying, depressed moods, stealing, compulsive behavior, and sleep disturbances. Those behaviors began to improve while she received one-on-one attention from Michele and gained regular access to counseling and other treatment. Samara returned to Aaron and his wife in summer 2003, and her behavioral problems resurfaced. Aaron asked Michele to take Samara at the end of the summer because it was not working out for Samara at his home. Back in Spokane, Samara thrived academically and socially in public school and engaged in extracurricular activities.

The trial court's findings carefully trace Samara's behavioral and mental health challenges, their relation to the detrimental circumstances Samara experienced in California, and her improvement while in Spokane. Aaron does not challenge those findings. The trial court also found that Samara's behavior regressed when she returned to California in 2003. And when Aaron brought Samara back to California in December 2007, "there was an overarching ambiguity as to whether the child should go to public school or should be home schooled." CP at

55. The trial court reasoned that that ambiguity and the looming presence of Child Protective Services indicated that the detriment had not yet been resolved. The court also determined that Aaron is not a suitable custodian for Samara. These findings support the trial court's conclusion that placement with Aaron would result in actual detriment to the child. And that is all the showing the statute requires. *Allen*, 28 Wn. App. at 647.

We conclude that the court applied the correct standard. And any challenges to the show cause procedure were adequately resolved by the full hearing on the merits of the petition. We, therefore, affirm the judgment of the trial court awarding custody to Samara's grandmother, Michele.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Sweeney, J.

Kulik, A.C.J.

Korsmo, J.