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Division III
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COA No. 35974-3-III

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

In re C. S., child.

WAYNE JANKE,

Petitioner,

and DORIS STRAND,

Respondent,

v.

RONALD SIMON AND TERESA SIMON,

Appellants.

BRIEF OF APPELLANTS

Kenneth H. Kato
WSBA No. 6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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6. Background Record Checked

The Court has (unless stated otherwise below):

- Checked the judicial information system for any information or proceedings relevant to placement of the children;
- Reviewed the report of the GAL and relevant information regarding CPS history and criminal record.

8. Are there valid reasons why the children should not live with a parent?

Yes. At the time this case was filed:

The child was not living with either parent.

Neither parent was a suitable custodian.

And,

The child will suffer actual detriment (harm) to his growth and development if he lives with either parent.

See additional findings in paragraph #16 herein.

9. Should the children live with Petitioner?

Yes, it is in the child's best interests to live with the Petitioner because:

See additional findings in paragraph #16 herein.

...

16. Other findings or conclusions:

1. The court has considered the testimony of the parties at trial, the court file to date, the reports of the GAL, the testimony of the GAL, including reports of experts, testimony of witnesses, evidence presented, memorandum of parties, pertinent case law, and all other relevant information provided to the court, including at the prior trial, and all relevant case law.

7. On April 24, 2015, the parties entered into an agreed order placing [C.S.] in the exclusive care of Doris Strand and Wayne Janke. [C.S.] has remained in the care of petitioner since that time.

8. Neither Mr. Simon nor Mrs. Simon has satisfied the court ordered requirements for visitation or to change the placement of [C.S.] back to their care. The court had provided a means and pathway for reintegration and reunification and change of placement on as far back as September 2015.

9. Neither Mr. Simon nor Mrs. Simon has followed through with visitation or reintegration which would lead to a change of placement despite the passage of nearly 3 years since the filing of this action.

10. Mr. Simon testified at trial that he and Ms. Simon have engaged in counseling. This Information was not shared with the GAL.

13. After June 2017, there were no further attempts by the Simons at therapeutic reunification sessions between [C.S.] and the Simons with Dr. Dietzen or any other counselor. The court was not offered a reasonable explanation as to why these had not occurred and was unable to determine the reason why these

sessions had not occurred.

18. Dr. Dietzen opined that reintegration at this time would cause actual detriment to [C.S.].

19. Elizabeth Raleigh has provided counseling services to [C.S.] for over 2.5 years. Ms. Raleigh believes that reunification with the Simons will cause trauma for [C.S.].

20. The Simons presented no evidence to rebut the opinions of Ms. Raleigh, Dr. Dietzen or the GAL regarding detriment to [C.S.] if he were to be placed immediately with the Simons.

21. The Simons' abusive use of conflict has caused detriment to [C.S.].

22. Mrs. Simon has engaged in multiple and continuous efforts to create unnecessary and abusive conflict between the parties which caused actual detriment to [C.S.].

29. Approximately 4 visits between [C.S.] and Mr. Simon occurred. The court was not offered a reasonable explanation as to why these visits stopped and was unable to determine the reason why these sessions had not occurred.

31. The conduct of the Simons prior to and throughout this litigation has caused unnecessary and avoidable drama, trauma, and harm to [C.S.].

32. The stress of this case may have caused [C.S.'s] stomach issues, negatively affected his grades, and has caused absences from school.

33. The conduct by the Simons has had a detrimental effect on [C.S.'s] mental health as evidenced by both Ms. Raleigh and Dr. Dietzen.

34. The Simons have not followed through on the visitation authorized and ordered by the court that is essential to the reunification process.

35. [C.S.] has suffered actual harm due to the respondents' actions/inaction.

36. Doris Strand has established by clear, cogent, and convincing evidence that [C.S.] will suffer actual detriment if placed with Mr. Simon.

37. Doris Strand has established by clear, cogent, and convincing evidence that [C.S.] will suffer actual detriment if placed with Mrs. Simon.

38. It is in [C.S.'s] best interests to remain with the petitioner and engage in reunification counseling in an effort to reunite him with the Simons. The transcript of July 18, 2017 and January 18, 2018 are incorporated herein by reference.

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Yes, it is in the child's best interests to live with the Petitioner because:

See additional findings in paragraph #16 herein.

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16. Other findings or conclusions:

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Issues Pertaining to Assignments of Error

1. Did the court err by entering its findings and conclusions on non-parent custody petition and final non-parent custody order granting custody of C.S. to Doris Strand because actual detriment was not proven by clear, cogent, and convincing evidence?

(Assignment of Error A).

2. Did the court err by entering the specific findings of fact set forth verbatim in assignment of error B because substantial evidence does not support them? (Assignment of Error B).

3. Did the court err by denying the motion for reconsideration because it abused its discretion? (Assignment of Error C).

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Case 36141-1-III

A. The court erred by granting the GAL's motion for final discharge and payment of fees and thereafter entering

judgment against the Simons.

Issues Pertaining to Assignment of Error

1. Did the court err by granting the GAL's motion for final discharge and payment of fees and thereafter entering judgment against the Simons? (Assignment of Error A).

II. STATEMENT OF THE CASE

Cases 35974-3-III and 36399-6-III

Doris Strand's de facto parentage petition was denied and she appealed in case 35055-0-III. (350550 CP 658). Findings, conclusions, and order on de facto parenting had been filed on January 6, 2017. (350550 CP 658). The de facto appeal is linked, but not consolidated with case 35974-3-III. Trial on Ms. Strand's non-parent custody petition was held in July 2017. (CP 974 [citations to the record are in 359743, unless otherwise specified]).

After the trial, the court made an oral ruling on July 18, 2017, where Wayne Janke, a petitioner with Ms. Strand, was dismissed. (RP 320; CP 343). The court found the Simons were fit parents. (RP 320, 322). The court understood they were in counseling with Suzanne Kolbe, something it had first heard about in the non-parent custody trial, and was concerned that information was not shared with the GAL. (RP 322). Since the Simons were fit parents,

the court stated the only issue was whether placement with them would result in actual detriment to C.S. (RP 323). It noted the child had been living with Ms. Strand for some two years, but that fact was not something it needed to consider. (*Id.*).

The court further stated C.S. had been seeing Dr. Mary Dietzen regarding reunification and she “figured he was ready for reunification.” (RP 323). It stated there were no records, however, from Dr. Dietzen, who recommended that C.S. go through at least 20 reunification sessions before moving home with the Simons and that he live elsewhere immediately prior to the reunification counseling sessions. (RP 324). Dr. Dietzen believed there was some alienation by Ms. Strand. (*Id.*). The court addressed actual detriment, noting no experts testified as to that issue:

[Our GAL], believes that immediate placement would cause actual detriment. And none of the experts came in to say yay or nay to that. (RP 325).

The court told the parties it would withhold a ruling until perhaps January 2018 with the goal of reunification and dismissing the non-parent custody petition. (RP 344). Reflecting its oral ruling, the court entered an order deferring decision and reunification on July 21, 2017. (CP 342). The order stated the court would monitor this

matter and have bi-monthly reviews as to the status of the reunification counseling and the cooperation of all parties and C.S. (CP 343). The reunification counselor for the Simons and C.S. was to be April Cathcart, unless objected to by the GAL. (*Id.*).

The GAL did object to Ms. Cathcart being the reunification counselor. (CP 390). At the hearing on August 25, 2017, the Simons asked for the GAL's immediate discharge from her duties as her investigation was done; she had testified extensively at two trials; and there were no obligations left for her to perform. (RP 372). Regarding C.S.'s visits with the Simons, the court stated it was going to start setting visits, would stay involved to move things along toward reunification, and "would tell you folks that there's going to be another visit and when it's going to be." (RP 387-88, 391, 392, 393). There would be no biweekly reviews as suggested by Mr. Simon's counsel because the court itself would determine when visits would take place and follow up with court orders. (RP 393-94). The court then entered an order regarding instructions on reunification that allowed the Simons and C.S. to continue sessions with their respective counselors, Ms. Cathcart and Elizabeth Raleigh. (CP 475). But the court would "not appoint a reunification counselor." (*Id.*). It also ordered a visit between Mr. Simon and

C.S. for August 28 and for the GAL to file a declaration about her views after this visit. (CP 475, 476.). The court's order stated "it is anticipated that visits will thereafter expand in frequency and duration to include Ms. Simon per further court order." (CP 476).

After the visit, the court held a hearing on August 30, 2017, where it confirmed it would be in control of the visits:

Okay, so as I said the other day, I was going to take a hands-on approach here and monitor this situation and start getting regular visits going with Mr. Simon and his son. And I understand that the visit on Monday happened, it was at Starbucks. I want to set another visit this week. (RP 398-99).

A review hearing was held on January 18, 2018, where the court orally granted Ms. Strand's petition. (CP 947). An order was entered that day for choosing a reunification counselor, but did not expressly grant the non-parent custody petition. (CP 671, 936).

On January 26, 2018, the court instructed Ms. Strand's attorney, who was retained after the trial, to prepare appropriate documents reflecting its ruling on the non-parent custody petition. (CP 798). That was done and the Simons objected to the proposed findings and conclusions and final order. (CP 857). On March 14, 2018, the court entered findings and conclusions on non-parent custody petition and the final non-parent custody order granting Ms.

Strand's petition. (CP 961, 968). The Simons' motion for reconsideration was denied by the court on September 21, 2018. (CP 2339). They appealed. (CP 974, 2528).

Cases 36860-2-III and 36943-9-III

On March 8, 2019, the Simons moved for relief from the final non-parent custody order based on newly-discovered evidence. (CP 2890). It was supported by declarations, particularly that of Corrie Amsden, who was the GAL's legal assistant. (CP 2665, 2823, 2846, 2850, 2853). The trial judge recused herself on her own motion. (CP 2894). Ms. Amsden had filed a grievance with the WSBA and a complaint to the Judicial Conduct Commission concerning ex parte communications between the trial judge and the GAL about court-ordered visits between Mr. Simon and C.S. (CP 2850). Her grievance and complaint provided in part:

17. On October 17, 2017, according to [the GAL], while at the Spokane County Courthouse, [she] went to [the judge's] chambers, indicating "While I was at the Spokane County Superior Court, I stopped by [the judge's] chambers to discuss the status of the Strand v. Simon case (case no. 15-3-03130-1)." I told her Doris Strand contacted me and that [C.S.] filed for emancipation (case no. 17-2-03739-1). [The judge] wants us to file a declaration stating there have been no visits since the last visit and that no one has contacted me. Once we file the declaration she will file her final order."

18. On October 17, 2017, upon her return from the court, [the GAL] relayed to me that she communicated with [the judge] and she was instructed by [the judge] to file a declaration.

19. The declaration [the judge] instructed us to file, according to [the GAL], was to inform the court there had been no visits with the Simons and their son and that no party had been in contact with [the GAL]. (CP 2854).

Ms. Amsden also stated the GAL was aware the communication with the judge was ex parte and she was not supposed to do it. (CP 2856). Ms. Amsden also stated the GAL told her she did not tell the judge no because she would deny the GAL's fee motion. (*Id.*). The concern was the judge's instruction to the GAL in that ex parte communication was potentially harmful to the Simons. (CP 2855). As it turned out, the failure to visit was cited by the judge as one of the reasons for granting the non-parent custody petition. (CP 964-66).

The court denied the motion for relief on May 9, 2019. (CP. The Simons moved for reconsideration, which the court denied on June 14, 2019. They appealed. (CP 3601, 3617).

Case 36141-1-III

The GAL filed a motion for her final discharge and payment on April 17, 2018. (CP 1526). It was granted on May 14, 2018,

\$24,379.21. (CP 1532). A letter decision regarding a judgment on the order was filed by the court on August 13, 2018. (CP) The court's letter stated in part:

I have entertained numerous objections to the GAL fees during the course of this case and have revisited those as well as the responses filed to the instant motion. Oral argument is unnecessary with regard to any amounts owing to the GAL. I do not intend to delay entry of the judgment previously ordered, and in accordance with CR 54 and 58 the proposed Judgment has been signed and entered. (CP 1764).

Judgment was accordingly entered. (CP 1785). The Simons appealed. (CP 1556, 1787).

III. ARGUMENT

Cases 35974-3-III and 36399-6-III

A. The challenged findings of fact are not supported by substantial evidence and must be reversed.

A court's findings of fact must be supported by substantial evidence. *In re Welfare of Sego*, 82 Wn.2d 736, 740, 513 P.2d 831 (1973). To conclude substantial evidence supports factual findings, there must be a sufficient quantity of evidence in the record to persuade a reasonable person the declared premise is true. *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the findings are unsupported by

substantial evidence, they must be reversed. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), review denied, 148 Wn.2d 1023 (2003). None of the challenged findings of fact are supported by substantial evidence.

Finding 6 stating background checks were performed is unsupported by any evidence as the issue was not explored at trial. (CP 962). Moreover, the record contains emails between the trial judge and the family law administrator showing conclusively that statutorily-required background checks were not performed. (CP 1900-03). The finding cannot stand. *In re Marriage of Griswold, supra*.

Finding 8 stating that, at the time the case was filed, neither parent was a suitable custodian is unsupported by substantial evidence. (CP 962). The court found both of the Simons were fit parents. (RP 320, 322). The finding further provided the child would suffer actual detriment to his growth and development if he lives with either parent. (CP 962). There is no substantial evidence to support the finding because no independent or expert testimony was introduced at trial regarding actual detriment. *In re Custody of A.L.D.*, 191 Wn. App. 474, 504, 363 P.3d 604 (2015). Such

evidence is required by *A.L.D.* and none was introduced by Ms. Strand. This finding must be reversed.

Finding 9 provided it was in the child's best interests to live with Ms. Strand. But this issue was not raised or addressed at trial. Accordingly, nothing in the record supports this finding as the Simons were fit parents and there was no independent or expert testimony to support a finding of actual detriment. Without it, the court could not determine whether it was in C.S.'s best interests to reside with Ms. Strand. She introduced no reports of experts as evidence or called an expert witness at trial. Substantial evidence does not support this finding. *In re Custody of A.L.D., supra.*

Finding 16.1 states in relevant part that "reports of experts" were considered by the court in making its decision. (CP 963). The record shows that no reports of experts were introduced or admitted at trial and no experts testified. The trial court recognized this failing:

[O]ur GAL believes that immediate placement would cause actual detriment. And none of the experts came in to say yay or nay to that. (RP 325).

And the court had already determined by order that the GAL was not an expert. (CP 1138). Expert testimony is necessary to find

actual detriment. *In re Custody of A.L.D.*, 191 Wn. App. at 504.

There was none. This finding must be reversed.

Finding 16.7 is deficient as it does not reflect that the agreed order was merely temporary and that C.S. remained in Ms. Strand's care because the Simons were not awarded custody even though they prevailed in the de facto parentage trial. (CP 964). The finding is thus incorrect, unsupported by substantial evidence, and must be reversed. *In re Marriage of Griswold, supra*.

Findings 16.8 and 16.9 state the Simons did not satisfy the court-ordered requirements for visitation as a means toward reintegration and reunification of C.S. back to their family. (CP 964). To the contrary, the record shows the trial court took control of visits and their scheduling and only Mr. Simon was permitted visits. (RP 384-89; CP 950-51). After some 4 sessions with C.S., the court did not schedule any more visits even though it told the parties it would take control of the situation, would tell the parties when the next visit would take place, and did not want Simons' counsel to schedule biweekly reviews of any visits or make motions to do so. (RP 343, 392-93, 398-99). Mr. Simon followed the court's instructions and did all he could to meet the requirements for visitation and reunification. The Simons were in

counseling with Suzanne Kolbe every Thursday since April 2016. (RP 292). As substantial evidence does not support the court's findings, they must be reversed. *In re Marriage of Griswold, supra*.

Finding 16.10 states Mr. Simon testified at trial that he and Ms. Simon had engaged in counseling. But to the extent the finding further provided this information was not shared with the GAL, the record belies the finding. (CP 964). The fact that the Simons were in counseling appears numerous times in the record. The GAL was present at those hearings where this information was shared, so she was fully aware the Simons were in counseling from at least December 15, 2016. (350550 RP 1450-55; RP 13, 32, 69-70, 87-89, 95, 254-55, 258, 292-95). The record indisputably shows the GAL knew the Simons had engaged in counseling. This finding is not supported by substantial evidence and cannot stand. *In re Marriage of Griswold, supra*.

Finding 16.12 is unsupported by substantial evidence as Dr. Dietzen did not testify at trial. Nor did she provide a report. This finding that the reunification session in June 2017 was difficult for C.S. and Dr. Dietzen recommended 20 more reunification sessions before moving back to the Simons' home was related by the GAL in her testimony. (RP 69-70). Substantial evidence does not support

this finding – only that the GAL testified to it. Finding 16.12 must be reversed. *In re Marriage of Griswold, supra.*

Finding 16.13 that the Simons made no further attempts at therapeutic reunification sessions with any counselor after June 2017 and offered no reasonable explanation why to the court is not supported by substantial evidence. (CP 964). The Simons were in counseling with Ms. Kolbe since April 2016. (RP 292). The court was well aware C.S. did not want to participate in reunification counseling or to be in contact with his parents. (RP 75-76, 87, 212-14, 225-26, 250-55). The reasons why there were no further sessions between the Simons and C.S. are reflected in the record. Thus, substantial evidence does not support this finding, which must be reversed. *In re Marriage of Griswold, supra.*

Finding 16.18 that Dr. Dietzen opined reintegration at this time would cause actual detriment to C.S. is unsupported by substantial evidence. The only testimony on actual detriment was the GAL's opinion. (RP 72). But she was not an expert. (CP 1138). Dr. Dietzen neither testified nor did a report. But it should be noted that she did sign a report on August 17, 2017, right after the trial, and it contains no opinion as to actual detriment, contrary to how the GAL testified. (CP 2742-43). The record is devoid of

any such opinion attributed to her, so the finding must be reversed.

In re Marriage of Griswold, supra.

Finding 16.19 regarding Elizabeth Raleigh's belief that reunification with his parents would cause trauma for C.S. is similarly unsupported by any evidence. She neither testified nor did a report. Indeed, the GAL testified she did not speak to Ms. Raleigh. (RP 91-92). There is no evidence supporting this finding and it must be reversed. *In re Marriage of Griswold, supra.*

Finding 16.20 that the Simons presented no evidence rebutting the opinions of Ms. Raleigh, Dr. Dietzen, or the GAL "regarding detriment to [C.S.] if he were to be placed immediately with the Simons" is unsupported by substantial evidence as neither Ms. Raleigh nor Dr. Dietzen testified. And the GAL was not an expert and thus unqualified to give an opinion as to actual detriment, which needed to be established by expert testimony. *In re Custody of A.L.D., supra.* The court's finding places the burden of disproving actual detriment on the Simons when the burden was on Ms. Strand, the petitioner. This is also error. The finding must be reversed. *In re Marriage of Griswold, supra.*

Findings 16.21, 16.22, 16.23 all relate to the abusive use of conflict by the Simons, causing actual detriment to C.S. (CP 965).

Since actual detriment must be established by expert testimony and no expert testified at trial, these findings are not supported by substantial evidence and must be reversed. *In re Custody of A.L.D., supra; In re Marriage of Griswold, supra.*

Finding 16.29 provides in relevant part that no reasonable explanation was offered why visits between Mr. Simon and C.S. stopped. (CP 966). But the court full well knew why they stopped, that is, it did not schedule any further visits even though the court took matters into its own hands and told the parties it would schedule visits. (RP 343, 392-93, 398-99). That is the reason why they stopped. This finding is not supported by the record and cannot stand. *In re Marriage of Griswold, supra.*

Findings 16.31, 16.33, and 16.35 all relate to the Simons causing actual detriment or harm to C.S. by their actions/inactions. (CP 966). Again, no expert testified as to actual detriment as required by *In re Custody of A.L.D.*, 191 Wn. App. at 504. The court's order specifically stated the GAL was not an expert. (CP 1138). Without expert testimony, no evidence supports these findings of actual detriment or harm. The findings must be reversed. *In re Marriage of Griswold, supra.*

Finding 16.32 that the stress of the case may have caused C.S.'s stomach problems, falling grades, and numerous absences from school is totally speculative and unsupported by any independent or expert testimony as required by *A.L.D.* (CP 966). Findings cannot be based on speculation as they were here. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Substantial evidence does not support this finding, which must be reversed. *In re Marriage of Griswold, supra*.

Finding 16.34 that the Simons had not followed through on visitation is incorrect. (CP 966). Only Mr. Simon was allowed visitation, not Ms. Simon. He made every visit set by the court, which had total control over scheduling the visits and failed to follow through with any more after the 4 visits. (RP 343, 392-93, 398-99). The record shows the fault, if any, was the court's and not the Simons'. The finding is unsupported by substantial evidence and must be reversed. *In re Marriage of Griswold, supra*.

As for findings 16.36, 16.37, and 16.38, they are not really findings of fact, but are conclusions of law and should be treated as such. *In re Smith*, 93 Wn. App. 282, 286, 968 P.2d 904 (1998). Because the court's critical findings are not supported by substantial evidence, these conclusions do not flow from the

findings. In light of *In re Custody of A.L.D.*, Ms. Strand did not prove actual detriment by clear, cogent, and convincing evidence as stated in findings 16.36 and 16.37 since no independent or expert testimony established the detriment or harm. 191 Wn. App. at 504. In finding 16.38, the court determined it was in C.S.'s best interests to remain with Ms. Strand. (CP 966). That standard is a consideration under RCW 26.10.100, but it is constitutional only when the requirement that the parents be unfit or placement with the parents causes actual detriment to the child's growth and development is added. *In re Custody of Shields*, 157 Wn.2d 126, 145, 136 P.3d 117 (2006). As the Simons were fit parents and Ms. Strand failed to prove actual detriment through expert testimony, the best interests standard is inapplicable. *Id.* Findings 16.36, 16.37, and 16.38 are conclusions of law that do not flow from the court's findings and are erroneous.

B. The court erred by granting non-parent custody to Ms. Strand because she did not prove actual detriment by clear, cogent, and convincing evidence.

Parents have a fundamental right to autonomy in child rearing decisions. *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120

S. Ct. 2054, 147 L. Ed.2d 49 (2000). Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the due process and equal protection clauses of the Fourteenth Amendment, and the Ninth Amendment to the United States Constitution. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972). The custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State cannot supply or hinder. *Id.*

Short of preventing harm to the child, the “best interest of the child” is insufficient to be a compelling state interest overruling a parent’s fundamental rights. *In re Custody of Smith*, 137 Wn.2d at 15-16. Only under “extraordinary circumstances” is there a compelling state interest justifying interference with parental rights. *In re Custody of Shields*, 147 Wn.2d at 145. The superior court may issue a custody order granting nonparental placement only if it finds the parent is unfit or placement with the parent would result in actual detriment to the child’s growth and development. *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013). Here, the court found the Simons were fit parents and the only

issue was if placement of C.S. with them would result in actual detriment. (RP 323).

Whether placement with a parent will result in actual detriment is a highly fact-specific inquiry and when actual detriment outweighs parental rights is determined on a case-by-case basis.

In re Custody of Shields, 157 Wn.2d 143. in *A.L.D.*, the court stated:

When this heightened standard is properly applied, the requisite showing required by the nonparent is substantial and a nonparent will be able to meet this standard in only “extraordinary circumstances.” 191 Wn. App. at 500 (citing *In re Custody of Shields*, 157 Wn.2d at 145).

The petitioning party must prove actual detriment by clear, cogent, and convincing evidence. *In re Custody of A.L.D.*, 191 Wn. App. at 501. A trial court’s custody decision will not be disturbed on appeal absent a manifest abuse of discretion. *Id.* at 504.

The facts show that Ms. Strand did not establish placement with the Simons would result in actual detriment to C.S. *In re Custody of A.L.D.*, 191 Wn. App. at 504. Indeed, she failed to offer any independent or expert testimony showing actual detriment to C.S. as required. *Id.* Furthermore, the fact that parents do not have physical custody of the child alone does not show they are

unfit or actual detriment would result from placing the child with the parent. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 344-45, 227 P.3d 1284 (2010). The Supreme Court noted in *B.M.H.*, that in each case when appellate courts upheld a finding of actual detriment to the child, the child had “significant special needs” that a parent could not fulfill. 179 Wn.2d at 239. It is undisputed that C.S. is not a special needs child. This case is not the extraordinary case that merits denying the parents’ constitutional right to the care and companionship of their son.

There was no showing by clear, cogent, and convincing evidence of actual detriment to C.S. by independent or expert testimony. The GAL, not an expert, believed immediate placement would cause actual detriment. But the court noted no experts had testified regarding that key, and only, issue. (RP 325). Its challenged findings were unsupported by substantial evidence so the conclusions of law do not flow from them. *In re Smith*, 93 Wn.2d at 286. A court abuses its discretion when the decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Custody of L.M.S.*, 187 Wn.2d 567, 574, 387 P.3d 707 (2017). Ms. Strand’s evidence fell far short of showing actual detriment by clear, cogent, and convincing evidence. Thus, the

court abused its discretion by granting custody to her as the decision was based on untenable grounds or reasons. Like *A.L.D.*, The court must be reversed and the non-parent custody petition dismissed.

C. The court abused its discretion by denying the Simons' motion for reconsideration.

The Simons moved, among other things, for reconsideration. (CP 1803). The standard of review on a trial court's decision on a motion for reconsideration is abuse of discretion. *Singleton v. Naegeli Reporting, Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008). By basing its custody decision on findings that were not supported by substantial evidence and Ms. Strand failed to prove actual detriment by clear, cogent, and convincing evidence, the court erred by denying reconsideration as its decision was not based on tenable grounds or reasons. *In re Custody of L.M.S.*, 187 Wn.2d at 574. The order denying their motion for reconsideration gives no reasons for doing so, save a recitation incorporating the court's oral ruling. (CP 2339). In any event, its oral ruling was embodied in its written findings – neither of which was supported by substantial evidence. The court erred by denying their motion.

Cases 36860-2-III and 36943-9-III

Based on newly-discovered evidence showing fraud and collusion, the Simons moved for relief from the final non-parent custody order. (CP 2890). The main point is that there was ex parte communication between the trial judge and the GAL, unknown to the Simons until almost a year after the final order, with regard to the visits between C.S. and Mr. Simon. (CP 2851). The judge wanted the GAL to do a declaration stating there had been no visits since the last; no one had contacted the GAL; and once the declaration was filed, the judge would enter a final order. (CP 2854). It cannot be disputed that an ex parte communication did take place between the judge and the GAL. (See CP 2863, 2867-69). WSBA senior disciplinary counsel stated:

Although a GAL is not a party or the lawyer for a party, a GAL “shall not have ex parte communications concerning the case with the judge(s) and commissioner(s) involved in the matter except as permitted by court rule or by statute.” GALR 2(m); see also RCW 26.12.187 (GAL shall not engage in ex parte communications with judicial officer, except as permitted by court rule or statute for ex parte motions). We know of no court rule, statute, or other law that permits an ex parte communication between a GAL and a judge about the status of court ordered visitation. CJC 2.9(1), which applies to judges, not lawyers, permits an ex parte communication “for scheduling, administrative, or emergency purposes, which does not address sub-

stantive matters,” but only “[w]hen circumstances require it.” Even assuming that [the GAL’s] October 18, 2017 conversation with [the judge] was merely “for scheduling [or] administrative . . . purposes,” and that it did not “address substantive matters,” there is no indication that any “circumstances require[d]” an ex parte communication rather than one included the parties or their lawyers. And although the April 30, 2015 order appointing the GAL authorized her to “report factual information regarding the issues ordered to be reported or investigated to the court,” nothing in that order suggests that she was permitted to make such reports in ex parte communications contrary to the general rule GALR 2(m) and RCW 26.12.187. (CP 2868-2869).

Nonetheless, the WSBA decided not to take further action on the grievance and dismissed it. (CP 2869).

Although couched in terms of fraud and collusion, the basis for the Simons’ motion for relief was the bias of the trial judge and her ex parte communication with the GAL showing at minimum a violation of the appearance of fairness. The Simons had already sought discretionary review after the August 25, 2017 hearing in which they claimed the judge was biased against them and/or had violated the appearance of fairness, requiring her recusal. That motion was denied by this court. (COA No. 35580-2-III).

The judge’s subsequent ex parte communication with the GAL violated the appearance of fairness. The judge should have recused herself since due process, the appearance of fairness, and

the Code of Judicial Conduct (CJC) require disqualification if the judge is biased against a party or her impartiality may reasonably be questioned. *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996).

CJC 2.11(A)(1) provides in pertinent part:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) the judge has a personal bias or prejudice concerning a party. . .

The judge's ex parte communication with the GAL instructing her to prepare a declaration regarding court-ordered visits, which later served as a reason for granting non-parent custody to Ms. Strand, showed bias and prejudice against the Simons and, at very least, a violation of the appearance of fairness. The judge's conduct would lead a disinterested observer to reasonably question her impartiality. *Id.* Instead of staying involved in the case and making a decision on the non-parent custody petition, the judge should have recused herself from further participation.

Comment 2 to CJC 2.11 mandates disqualification even without a motion to disqualify:

(2) A judge's obligation not to hear or decide

matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

Comment 1 provides that “under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any specific provisions of paragraphs (A)(1) through (5) apply.” The judge exercised her discretion in making its deferred ruling on the non-parent custody petition and reunification. In her ex parte communication with the GAL, however, the judge expressed an opinion as to the merits, particularly with respect to the important court-ordered visits, the lack of which the judge preordained as she failed to follow through with her stated intention of keeping a hand in the visits and by scheduling them herself. (RP 343, 392-93, 398-99). The result granting nonparental custody to Ms. Strand followed the “finding” of no visits. See *State v. McEnroe*, 181 Wn.2d 375, 386-87, 333 P.3d 402 (2014). This inaction on visits was contrary to the judge’s intent to reunify the Simons with C.S. and dismiss the petition. (RP 343).

The CJC requires the judge to recuse herself from further participation in the case. She did not and made her decision granting the non-parent custody petition. The judge did subsequently recuse herself, but only after the custody decision.

(CP 2894). The Simons did not know of the ex parte contact until nearly a year after the final order. Aware of these circumstances because they were in the record before him, the new judge hearing the motion for relief, whether under CR 59 or CR 60, erred by denying it and therefore abused his discretion. *Singleton*, 147 Wn. App. at 612. Relief is warranted. By the same token, the judge abused his discretion by denying reconsideration of its order because it was based on untenable grounds and reasons. *In re Custody of L.M.S.*, 187 Wn.2d at 574.

Case 36141-1-III

The court granted the GAL's motion for final discharge and payment. (CP 1532). The amount of fees ordered to be paid by the Simons was \$24,379.21. (CP 1533). As stated by the court, it took into consideration all responses by the Simons to prior requests for fees as well as their responses to the motion for final discharge and payment. (CP 1784).

The GAL stated she had not been paid by the Simons since February 24, 2016 and Ms. Strand since April 12, 2016. (CP 1527). She requested additional fees of \$44,925.27, to be paid 50-50 by the Simons and Ms. Strand. (*Id.*). Including some unpaid back

fees, the court ordered the Simons to pay \$24,379.21 and judgment was later entered. (CP 1533, 1785).

On November 20, 2015, the court increased the GAL's fees to a maximum of \$35,000 total, with no further fees allowed. (CP 1056). It further ordered the Simons to pay 50% and Ms. Strand to pay 50% with "final allocation to be determined at trial." (CP 1057). In her declaration of March 31, 2016, however, the GAL stated she had billed an additional \$20,000 in fees. (CP 1240, 1241). In any event, the court's order of June 17, 2016, provided that the GAL's motion for fees was reserved for trial and her obligations for investigation were complete. (CP 1487).

The court subsequently considered the Simons' objections to the fees based on billings for time spent on the case before the GAL was even appointed, excessive billing, billing for services not rendered, double billing, improperly handling money in trust accounts, and failing to provide monthly billings. (See, e.g., CP 43, 87, 98, 112, 189, 204, 313, 1430, 1546, 3114). Mr. Simon also filed a response to the GAL's final motion for fees on April 20, 2018. (CP 1546). His stated position was that all previous requests and orders merged and were of no further effect based on *Furgason v.*

Furgason, 1 Wn. App. 859, 860-61, 465 P.2d 187 (1970). Ms.

Simon joined in his response. (CP 1550).

Furgason dealt with temporary support orders in a dissolution. There were delinquent payments under the temporary orders, but the payments were not enforceable upon entry of a final dissolution decree. 1 Wn. App. at 860. Similarly, the prior orders of the court capping GAL fees at \$15,000 and then raising the cap to \$35,000 were temporary, not final, orders just as in *Furgason*.

When the court entered its May 14, 2018 order on final discharge and payment, that order was the final order. The previous orders, which were not final and clearly temporary in that the cap kept changing, merged into that final May 14, 2018 order so the GAL is limited to the \$24,379.21 in fees. But the Simons had already paid that to the GAL so they had no further obligation for her fees.

Furgason supports their position. Moreover, the court's order increasing the GAL fee cap by \$20,000 to \$35,000 is also erroneous under *Furgason* as it merged with the final discharge and payment and is subject to review under RAP 2.4(b) as it prejudicially affected the court's later May 14, 2018 order on GAL fees. (CP 1056). The court exacerbated its error by entering the May 14, 2018 order granting the GAL's final motion for discharge

and payment of an additional \$24,379.21. The Simons had already paid that amount and more, so they do not owe anything else. The court's order on final discharge and payment must be reversed.

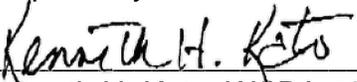
Furgason, supra.

IV. CONCLUSION

Based on the foregoing facts and authorities, the Simons urge this court to reverse the trial judge's final non-parent custody order granting custody to Ms. Strand and to dismiss the non-parent custody petition, and/or reverse the trial judge's denial of the Simons' motion for reconsideration, and/or reverse the new judge's denial of their motion for relief and motion for reconsideration of that denial; and to reverse the trial judge's May 14, 2018 order granting the GAL's final discharge and payment of an additional \$24,379.21 in GAL fees.

DATED this 23rd day of January, 2020.

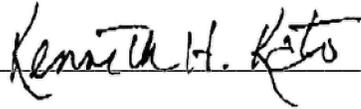
Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellants
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January 23, 2020, I served a copy of the Brief of Appellants through the eFiling portal on Patricia Novotny, Thomas Cochran, Matthew Daley, and Spencer Harrington at their email addresses.



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