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NO. 66321-6

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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In re the Custody of K.L.S

Karen Leigh Simonsen, Petitioner  
(RESPONDENT)

v.

Christopher Robert Simonsen, Alleged Father,

and

Kristine Raye Gillio, Respondent Mother,  
(APPELLANT)

---

Appeal from the Superior Court of Snohomish County  
The Honorable Gerald L. Knight

No. 09-3-02658-2

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**APPELLANT'S OPENING BRIEF**

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ORIGINAL

**TABLE OF CONTENTS**

INTRODUCTION.....1

ASSIGNMENTS OF ERROR.....2

STATEMENT OF THE CASE.....3

ARGUMENT.....11

A. THE MOTHER’S DUE PROCESS RIGHT WAS VIOLATED WHEN THE TRIAL COURT PLACED THE CHILD WITH THE NONPARENT AFTER IT FOUND THE MOTHER FIT AND MADE NO FINDING THAT PLACEMENT WITH THE MOTHER WOULD CAUSE ACTUAL DETRIMENT TO THE CHILD.

B. THE TRIAL COURT’S USE OF “THE BEST INTERESTS OF THE CHILD” STANDARD AND PLACEMENT OF THE EVIDENTARY BURDEN ON THE MOTHER IS ERRONEOUS IN THE CUSTODY DISPUTE BETWEEN THE MOTHER AND A NONPARENT.

C. A FIT PARENT SHOULD NOT BE DEPRIVED OF HER CHILD UNDER WASHINGTON STATE LAW BECAUSE OF POVERTY.

CONCLUSION.....18

**TABLE OF AUTHORITIES**

**CASELAW**

*In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689(2009).....11, 12.

*In re Custody of Anderson*, 77 Wash. App. 261, 890 P.2d 525 (1995).  
.....14,15.

*In re Custody of CCM*, 149 Wash. App. 184, 202 P.3d 971(2009).....  
.....11,12,13,14,15.

*In re Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006).....  
.....11, 12, 13, 14, 17.

*In re the Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998).....  
.....11, 12.

*In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007)..  
.....15.

*In re Neff*, 20 Wash. 652, 56 P. 383 (1899).....  
.....15.

*In re Warren*, 40 Wn.2d 342, 243 P.2d 632 (1952).....  
.....15.

*Washington State Coalition for the Homeless v. Department of Social  
and Health Services*, 133 Wn.2d 894, 949 P.2d 1291 (1997).....16.

*Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1998).....  
.....11.

*Troxel v. Granville*, 530 US 57, 63, 120 S. Ct. 2054 (2000).....  
.....11, 14.

**CONSTITUTIONAL PROVISIONS**

Wash. Const. art. I § 3.....11.

U.S. Const. amend V.....11.

U.S. Const. amend XIV .....11.

**STATUTES**

RCW 26.09.....13.

RCW 26.09.187.....13.

RCW 26.10.....12.

RCW 26.44.020.....15.

RCW 26.50.010.....15.

**REGULATIONS AND RULES**

WAC 388-400-0005.....16.

WAC 170-290-0001.....16.

WAC 170-290-0015.....16.

WAC 388-505-0220.....16.

## INTRODUCTION

Kristine Gillio (“the mother”) was in a 12 year abusive relationship with the alleged father, Christopher Simonsen. RP 143:4-7. Katlyn Simonsen is her nine year old daughter. RP 135:10-11. In October 2009, the nonparental custody action was brought by Mr. Simonsen’s mother, Karen Simonsen. RP 140:7-9, RP 146:20-25, RP 147:1-7, and RP 180:5-8. Mr. Simonsen never established paternity of the child and an order of default was entered against him. RP 176:13-19.

The trial was heard on July 6, 2010 before the Honorable Judge Gerald L. Knight. RP 2. During the trial court’s oral ruling, Judge Knight did not make a finding that the mother was unfit or that actual harm would result to the child if she was placed in the mother’s care. RP 176-187. The Court emphasized the mother’s poverty and failure to have a home with abundant space. RP 179-181.

Final Orders were entered on November 2, 2010. In the Findings of Fact and Conclusions of Law, the trial court found that the mother was a fit parent. CP 124:2 of 4. However, the court erred in its application of the law by concluding it was in the child’s best interest to be placed with Ms. Simonsen due to the mother’s poverty. CP 124:2 of 4. The mother requests the appellate court to reverse the trial court’s error of law and vacate the nonparent custody decree so that her child can be returned.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred when it made the conclusion of law that it was in the child's best interest to be placed in the custody of Ms. Simonsen when the court found that Ms. Gillio, the mother, was a fit parent.
2. The trial court erred in concluding that Ms. Simonsen should be awarded custody because Ms. Gillio, the fit parent, was unable to financially provide for the child.

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

1. In a nonparental custody action is the correct standard of law for determining custody the best interests of the child standard or is the correct standard clear and convincing evidence that the parent is unfit or actual detriment will occur to the child if placed with the parent?
2. When a parent is not afforded deference in a nonparental custody action is this a violation of the parent's due process right?
3. Given the heightened standard in non-parental custody actions, should the court place the child in the custody of the non-parent when the court found the mother, although a fit parent, is simply impoverished?

## STATEMENT OF THE CASE

Katlyn Simonsen, age nine, resided with her mother, Kristine Gillio, from birth until February 2009. RP 137:24-25 and RP 138:1-17. Fleeing domestic violence, in February 2009, the mother left the house she shared with the alleged father, Christopher Simonsen, and his mother, Karen Simonsen. RP 137:10-22 and RP 138:10-22.

Although the mother tried to take her child with her, she was prevented by Mr. Simonsen obtaining a restraining order against her. RP 140:24-25. Even after Mr. Simonsen's restraining order was dismissed due to his failure to appear for the hearing, the mother continued to be prevented from having contact with her child. RP 141:3-23. When the mother called to speak to the child she was not allowed to talk to her child. RP 141:22. She was told that the child did not want anything to do with her. RP 145:19-25. The mother also understood she could only see the child if Mr. Simonsen was present. RP 141:22-23. Wanting contact with her child, the mother returned to her relationship with Mr. Simonsen. RP 146:1-7.

The couple then moved in with Ms. Simonsen's father and the mother became his caretaker. RP 146:8-10. The child remained in Ms. Simonsen's care and continued to attend school near her residence. RP 49:12-17, RP 51:8-15 and RP 150:13-15. The child spent the weekends

and the summer with the mother. RP 146:10-19. In October 2009, the mother and Mr. Simonsen became homeless. RP 58:12-14 and RP 146:20. The mother and Mr. Simonsen moved in with her cousins. RP 110:7-18. After living with the mother and her cousins for not more than three weeks, Mr. Simonsen was told to leave. RP 151:13-15. When the mother tried to get her child, Ms. Simonsen, the alleged paternal grandmother, filed her nonparental custody action in order to obtain primary custody of the child in October 2009. RP 146:20-25 and RP 147:1-8.

The Guardian Ad Litem (“GAL”) was one of eight witnesses who testified at trial on July 6, 2010 before the Honorable Judge Gerald L. Knight. RP 3-169. The other witnesses included Ms. Simonsen who was represented by counsel, the mother who was pro se, and the mother’s five witnesses. RP 48-169. The court recognized that Mr. Simonsen was defaulted out and paternity was never established. RP 176:13-19. The court never addressed visitation for Mr. Simonsen. RP 176:22-24.

Ms. Simonsen’s testimony consisted mainly about the following: 1) the mother left the child in her care; 2) the mother might have theft charges filed against her; 3) the mother has no job, income, a car, or a license; and 4) the house where the mother stays is not large enough and could have mold or mildew. RP 57:14-20 and 145:4-16, RP 57:1-13, RP 64:1-8, RP 84:1-8, RP 87:3-14. Ms. Simonsen also testified about the

extracurricular activities the child was able to participate in while in her care such as swimming lessons, the Girl Scouts, and horseback riding.

The GAL's testimony was based on her investigation since her appointment and the recommendations she made in her three reports. RP 4-48. The GAL testified that she never referred to the mother as "an unfit parent." RP 29:10-12. The GAL testified that she never identified any actual detriment that would happen if the child lived with the mother in any of her reports. RP 29:13-16.

The GAL testified that the child did not have any fears or reservations about the mother. RP 18:5-9. There was no evidence from the GAL that the mother was ever found to be neglectful or abusive to the child. RP 38:3-11. There was no evidence from the GAL that the mother's family members who were around the child had criminal convictions or were abusive to the child. RP 45: 17-25 and RP 46:1. The GAL admitted that the mother had no criminal convictions at the time of trial. RP 38:15-17.

All three GAL reports were used as exhibits and admitted during trial. RP 5-24 and Ex. 3,4, and 5. None of the GAL reports reported concerns about the mother's parenting. The GAL initially testified about her initial report she filed in January 2010 and the recommendations she made in the report. RP 7-13:1-6. The GAL conducted only one home visit

with the mother. RP 29:17-22. The GAL's recommendation, which was similar in all three of her reports, was that the mother obtains a job, separate housing, submit to drug testing, and cooperate with the theft investigation. RP 13:1-6 and Ex. 3.

After the GAL's January 2010 recommendations, the mother submitted to a UA and a hair follicle test to prove her sobriety. RP 7:2-16 and Ex. 5. The GAL testified to the mother's accomplishment of this. RP 7:2-16.

The GAL testified about a supplemental report she published in May 2010, when the mother filed a motion to increase her residential time. RP 15:5-9 and Ex. 4. Before completing this supplemental report, the GAL only interviewed child. RP 29:23-25 and RP 30:3-11. The child communicated that she wanted to spend the entire weekend with the mother. RP 35:3-7.

In preparation for trial, the GAL submitted a final report in June 2010. RP 20:18-22 and Ex. 5. Before writing this report, the GAL again only interviewed the child. RP 21:1-2. The GAL's final recommendation was that it is in child's best interests to reside with Ms. Simonsen, as the mother was unemployed, shares housing with extended family, and might be charged with theft at some future date. RP 21-22:1-5 and Ex. 5.

At trial, the GAL did not change any of her final recommendations even though she testified that the mother did have a home in which the child has her own bedroom though the mother was not a homeowner or a renter. RP 37:12-20. The GAL could not provide evidence that the mother failed to provide the child with adequate nutrition, help the child with homework, provide the child with clothing, and attend to the child's hygiene while in her care. RP 37:21-25 and RP 38:1-5.

The mother testified there was no basis for a nonparental custody action. The mother lives in a stable and loving environment with extended family where the child has her own room. RP 147:9-17. The home where she lives is a nice place with a large back yard that is surrounded by a fence. RP 147:16-19.

The mother testified that she has been unsuccessful when looking for work, but that she was registered to attend college in the fall. RP 147:12-15. Although the mother had no earnings, she received financial assistance from her family and from Department of Social and Health Services ("DSHS") in monthly food assistance in the amount of \$200.00. RP 163:4-7. The mother testified that regardless of her lack of income, she still was able to provide food, clothing, housing, and transportation for her child. RP 148:19-23, RP 148:5-7, RP 162:16-25, and RP 163:1-3.

The mother testified about her family's history of providing her with transportation and her option of using public transportation. RP 148:8-12.

The mother testified about her parenting while the child has been in her care. RP 143:19-25, RP 144:1-9, RP 147:20-25 and RP 148.

Although the GAL never recommended S.T.E.P parenting classes through Providence Hospital for the mother, the mother also testified that she was soon to complete S.T.E.P parenting classes. RP 164:9-12, RP 165-166:1-22.

During its oral ruling, the trial court never made a finding that the mother was unfit or that actual harm would occur to the child if she was placed in the mother's care. RP 176-187. The court emphasized the fact that the mother, at the time of trial had no job, no car, and no driver's license, had possible pending felony theft charges, and was living with family members in a small house. RP 179-181.

#### THE COURT:

[T]he mother since October of 2009 has been living with her cousin, his wife, and Kristine's mother, who at the minimum spends the nights that Kristine has her daughter, and that's Saturday night, Saturday afternoon from apparently three p.m. to Sunday at three p.m., and that her mother then has been minimally staying in this relatively small house. And the reason why I say that, what I've heard, it's a two-bedroom house, sounds like it's fairly small. So the testimony has been that the cousin and his wife sleep in one bedroom, that the other bedroom, when the daughter is there, she sleeps in that bedroom, and that her mother and her

maternal grandmother sleep in the living room. Got to be pretty crowded quarters. RP 179:8-22.

That the mother doesn't have a driver's license. Doesn't have a job. That she's allowed to stay there with her cousin for cleaning up around the house and maybe outside. Apparently her source of income is that she doesn't have any income, and that for her room and board, if you will, she works it off, or works around the cousin's house. RP 179:23-25 and RP 180:1-4.

The alleged paternal grandmother is asking that she be the primary care provider for the child. The mother is asking that she be the primary care provider for the child. RP 180:5-8.

This would have been a lot closer case if, indeed the mother has no criminal history, if she didn't have this pending criminal felony charges, which apparently they aren't yet, they may be filed; that if from the date that Mrs. Simonsen filed this petition the mother came before the court here having a job, having abundant quarters for the daughter, showing a lot of interest in the daughter's activities, such as school, going to conferences, teacher conferences about the child and all those things, it would have showed more to me, ma'am, if you came before me with that on your plate. RP 180:9-21.

You've come before me and presented a plan of having your daughter return to you as the primary care provider when you're barely getting by, living at your cousin's, as described, with no job, no car, no license, and a plan that may be a concrete plan, it may be pie in the sky, of going to school and getting some education so that you can get some job in this economy, or what have yo[u.] RP 180:22-25 and RP 181:1-4.

During its oral decision, the trial court made statements about the possibility of the child and the mother reuniting. RP 182:10-13 and RP 184:1-10.

THE COURT:

[I] cannot see, Ms. Gillio, in good conscience with what's been presented to me, I can't see granting your request of placing Katlyn back with you. Not today. Maybe some other day, but not now. RP 182:10-13.

THE COURT:

[T]his parenting plan with that modification will be the parenting plan. It holds hope for you, Ms. Gillio, of getting your life more on track and having more suitable accommodations than you have now. Then I can see the extended time during the summer and school break and stuff like that of making it a lot more time with your daughter, and that's putting you on the path, if you're serious about it, of perhaps reuniting the daughter with the mother. RP 184:1-10.

On November 2, 2010, final orders were entered. The Final Parenting Plan contained no RCW 26.10.160 limitations against the mother. CP 126:2 of 7. In the Findings of Fact and Conclusions of Law, the trial court's finding was that the mother was a fit parent, but the child was placed with Ms. Simonsen. CP 124: 2 of 4. The court made no finding of actual detriment to the child if placed with the mother. CP 124:2 of 4. The court concluded the placement was in the child's best interest due to the mother's inability to financially provide for the child. CP 124:2 of 4.

## ARGUMENT

- A. THE MOTHER'S DUE PROCESS RIGHT WAS VIOLATED WHEN THE TRIAL COURT PLACED THE CHILD WITH THE NONPARENT AFTER IT FOUND THE MOTHER FIT AND MADE NO FINDING THAT PLACEMENT WITH THE MOTHER WOULD CAUSE ACTUAL DETRIMENT TO THE CHILD.

A parent has a constitutionally protected right to the custody of his or her children. *Troxel v. Granville*, 530 U.S. 57, 63, 120 S.Ct. 2054 (2000); *In re Custody of C.C.M.*, 149, Wash. App. 184, 201, 202 P.3d 971 (2009); *In re the Custody of A.C.*, 165 Wn.2d 568, 579, 200 P.3d 689 (2009). The U.S. Supreme Court has long recognized that a parent's constitutionally protected right to rear her child without state interference is not only a fundamental "liberty" interest, but even a fundamental right to privacy inherent in the Constitution. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3; *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982); *In re Custody of Smith*, 137 Wn.2d 1, 27, 969 P.2d 21 (1998).

"State interference with a parent's fundamental right to autonomy in child-rearing is subject to strict scrutiny." *In re the Custody of Shields*, 157 Wn.2d 126, 144, 136 P.3d 117 (2006). A parent's due process right is violated unless state interference is justified. *Smith*, 137 Wn.2d at 15. State interference is justified only if the state can show that the

interference is narrowly tailored to meet a compelling state interest. *Shields*, 157 Wn.2d 126 at 144, *Smith*, 137 Wn.2d at 15-16. The State's interest in interfering with a parent's fundamental right may be found compelling only in two very narrow circumstances: if the parent is unfit or if placement with that parent would result in actual detriment to the child *In re the Custody of A.C.*, 165 Wn.2d 568, 579-580.

In the trial court's July 6, 2010 oral ruling, the court made no finding regarding the mother's fitness or whether placement with the mother would result in actual detriment. RP 176-187. In the November 2, 2010 Findings of Fact and Conclusions of Law, the trial court found that the mother was indeed a fit parent. CP 124:2 of 4. The court made no finding that placement with the mother would result in actual detriment to the child. CP 124:2 of 4. However, the mother was deprived of her child.

**B. THE TRIAL COURT'S USE OF "THE BEST INTERESTS OF THE CHILD" STANDARD AND PLACEMENT OF THE EVIDENTARY BURDEN ON THE MOTHER IS ERRONEOUS IN THE CUSTODY DISPUTE BETWEEN THE MOTHER AND A NONPARENT.**

In determining whether the trial court properly interpreted Chapter 26.10. RCW, the standard of review on appeal is de novo. *Shields*, 157 Wn.2d at 140, *C.C.M.*, 149 Wash. App. at 198.

Washington has a long history of protecting the welfare of children and the rights of their parents. Use of "the best interests of the child"

standard to determine a custody dispute between a parent and a nonparent is erroneous, as it does not comply with “the constitutional mandate of deference to parents.” *Shields*, 157 Wn.2d at 142. The correct standard is clear and convincing evidence that a parent is unfit or actual detriment to the child if placed with the parent. *C.C.M.*, 149 Wash. App. at 191.

An award of custody to a nonparent over a parent cannot be treated similar to the placement of a child with one parent rather the other in a dissolution proceeding. 149 Wash. App. at 204. In a dissolution proceeding, the less stringent “best interests of the child” standard is proper. This standard focuses on the “totality of circumstances” analysis where the court weighs seven factors contained in RCW 26.09.187 to determine the best interests of the child in making a parenting plan. 149 Wash. App. at 204. This is because Chapter 26.09 RCW is designed to facilitate the placement choice between equals, the parents, in a custody dispute. *Id.* Under Chapter 26.09 RCW, regardless of the final placement, the child will indeed be placed with a parent.

The interests addressed in nonparental custody actions are similar to those at issue in termination and dependency proceedings. *Id.* at 205. The Court of Appeals, Division I, recognizing this held that in a nonparental custody action, the nonparent must establish a parent’s

unfitness or actual detriment to the child's growth and development by nothing less than "clear and convincing evidence." *Id.* at 191.

Because of the severe consequences of an erroneous deprivation of a parent's custody rights, courts must apply the heightened standard of proof rather than "preponderance of the evidence." *Id.* at 204-205.

Hence, a nonparent's capacity to provide a superior home environment to that which a parent can offer is not enough to outweigh the deference that is constitutionally owed to a natural, fit parent. *Id.* at 204, (citing *Shields*, 157 Wn.2d at 144).

C. A FIT PARENT SHOULD NOT BE DEPRIVED OF HER CHILD UNDER WASHINGTON STATE LAW BECAUSE OF POVERTY.

Ms. Simonsen failed to establish by clear and convincing evidence that actual detriment to the child's growth and development will occur in the mother's home. "[T]here is a presumption that fit parents act in the best interest of their children." *Troxel*, 530 U.S. at 68, 120 S.Ct. at 2054. Under Washington case law, when a parent is fit, only in extraordinary circumstances can a child be removed from that parent and placed in the care of a nonparent. *Shields*, 157 Wn.2d at 145.

The fact that a child returned to her parent will lose opportunities available in the nonparent's home is not sufficient to show actual detriment to the child. 157 Wn.2d at 145 (citing *In re Custody of*

*Anderson*, 77 Wash. App. 261, 265-266, 890 P.2d 525 (1995)). The fact “that [a child] might be better educated, and better clothed, and have a more pleasant home with some one else other than the parent can have no weight with the court as against the natural rights of parent.” *C.C.M.*, 149 Wash. App. at 204 (citing *In re Neff*, 20 Wash. 652, 655, 56 P. 383 (1899)).

It is a well-established principle of justice that a court should not remove a child from a parent’s care on the sole basis of poverty. *In re Warren*, 40 Wash.2d 342, 345, 243 P.2d 632 (1952); *see also In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007). Pursuant to Washington statutory law, “[p]overty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.” RCW 26.44.020(13).

The state should prevent the removal of a child from a parent’s care only if the potential harm to the child is created by poverty or homelessness. The rationale for this policy is clear: poverty and homelessness, just like being a victim of domestic violence, are situational, not permanent conditions. An individual’s ability to parent and attend to the needs of her children is completely independent of her

economic circumstances. It is the parent's circumstances that need to be addressed, rather than any parenting deficiency.

DSHS is tasked with trying to preserve the family unit due to the constitutional interests of a parent to care for her child. Providing housing assistance is within DSHS' duties to provide reasonable efforts to prevent the need for a child to be removed from a parent's home. *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 924, 949 P.2d 1291 (1997). The Washington State Supreme Court held that a court can order the DSHS to assist a parent in securing adequate housing in those cases where lack of safe and adequate housing is the primary reason for the children being in foster care. 133 Wn.2d at 919.

DSHS also preserves the family unit by providing needy families with Temporary Assistance for Needy Families ("TANF"), which is a monthly cash grant. WAC 388-400-0005. DSHS also assists families by providing subsidized childcare and even family medical insurance. WAC 170-290-0001, WAC 170-290-0015, and WAC 388-505-0220. It is against public policy to remove a child from her parents on the basis of poverty or homelessness.

There was no finding of actual detriment made by the trial court and the evidence Ms. Simonsen presented at trial fails to support any

finding of actual detriment. Actual detriment is “something greater than the comparative and balancing analyses of the ‘best interests of the children’ test.” *Shields*, 157 Wn.2d at 143. Only 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.” *Id.*

At the time of trial the mother was not unable to provide financially for the child. RP 148:19-23, RP 148:5-7, RP 148:8-12, RP 162:16-25, RP 163:1-3, and RP 163:4-7. The mother displayed knowledge of how to obtain financial assistance when faced with little to no income. The mother testified that she received DSHS food assistance monthly. RP 163:4-7. If the mother had her child in her care she would have been qualified for additional DSHS services, such as TANF, subsidized childcare, and state medical for herself and the child. Although the mother had no driver’s license and no vehicle, she testified that her family is able to provide her transportation assistance and that she could use public transportation. RP 148:8-12.

At the time of trial the mother was not homeless. The mother had a home. RP 147:9-17. The child even had her own room at the mother’s residence, regardless of where the mother and the other adults slept. RP

147:9-17. The residence where the mother lived was not an apartment, but a house with a large fenced back yard. RP 147:16-19.

### CONCLUSION

Only a heightened standard that affords deference to parents can justify the state's intrusion into the mother's constitutional interests in having custody of her child. In nonparental actions, a parent can only be deprived of their child if, by clear and convincing evidence, the parent is unfit or placement with the parent would result in actual detriment to child.

Because the trial court found the mother fit, it erred in using the "best interest of the child" standard and placing the child with the nonparent. The court failed to find actual detriment to the child if placed with the mother. This is because actual detriment is met only in circumstances that are extraordinary. The mother's poverty is not an extraordinary circumstance.

Respectfully submitted this 18<sup>th</sup> day of February 2011.

### NORTHWEST JUSTICE PROJECT

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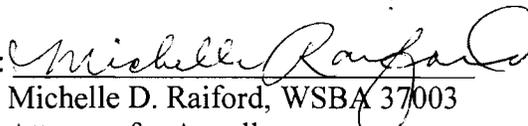
## REQUEST FOR REASONABLE ATTORNEY FEES

Counsel for Ms. Gillio, pursuant to RAP 18.1, respectfully requests an award for reasonable attorney fees and appellate costs. Ms. Gillio qualified for services by the Northwest Justice Project (“NJP”), a statewide legal aid office that represents low income clients in civil matters. NJP is a recipient of federal funds from the Legal Services Corporation (“LSC”). Effective March 15, 2010 LSC repealed its regulatory prohibition on the collection of attorney fees pursuant to State law permitting the award of such fees. 45 C.F.R. §1609, 1610, and 1642.

RCW 26.09.140 states, “Upon 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 fees in addition to statutory costs.” NJP has incurred statutory costs, transcript costs, and attorney costs in this action which are very significant for a legal services program. Thus a request for costs is respectfully submitted to this court.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of February 2011.

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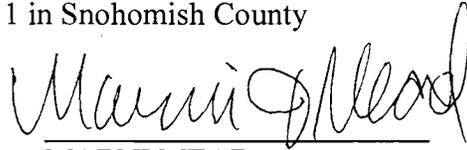


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Dated this 18<sup>th</sup>, day of February, 2011 in Snohomish County  
Washington.

  
MARNI MEAD

SUBSCRIBED AND SWORN TO before this 18<sup>th</sup>, day of February,  
2011.



ANN VINING  
NOTARY PUBLIC in and  
for the State of Washington  
Residing at Everett  
Washington.

My commission expires: 9-1-14

