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NO. 66321-6

**IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I**

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

APPELLANT'S REPLY BRIEF

Michelle Raiford, WSBA No. 37003
NORTHWEST JUSTICE PROJECT
Attorney for Appellant
2731 Wetmore Avenue, Suite 410
Everett, WA 98201
(425) 252-8515

66321-6
APPELLANT'S REPLY BRIEF
KIMBERLY R. RAIFORD
10/19/09

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INTRODUCTION

Since birth, the child has always resided with her mother, Kristine Gillio (“the mother”) until February 2009. RP 137:24-25 and RP 138:1-17. Fleeing domestic violence, in February 2009, the Mother left the house they shared with the alleged father, Christopher Simonsen, and his mother, Karen Simonsen. RP 137:10-22 and RP 138:10-22. The mother tried to take the child with her and then tried to have visits, but she was prevented. RP 140:24-25, RP 141:3-23, RP 145:19-25, and RP 146:1-7.

During the trial court’s oral ruling, it never made a finding that the mother was unfit or that actual harm would result to the child in the mother’s care. RP 176-187. The court also found no RCW 26.10.160 limitations against the mother. RP 176-187. However, proposed orders were entered that failed to reflect the oral ruling without findings and a decree. CP 112, CP 120, and RP 176-187. After the oral ruling, a hearing on the presentation of final orders was held on August 25, 2010. CP 123.

Final orders were entered on November 2, 2010. In the findings, the trial court found that the mother was a fit parent, but concluded it was in the child’s best interest to be placed with Ms. Simonsen due to the mother’s inability to financially provide for the child. CP124:2 of 4. The mother requests the appellate court to reverse the trial court’s error of law, vacate the nonparental custody decree, and award the mother custody.

REPLY ARGUMENT

- A. THE TRIAL COURT'S ERROR OF LAW REQUIRES ITS DECISION TO BE REVERSED BECAUSE THE TRIAL COURT DID NOT FIND THAT PLACEMENT WITH THE MOTHER WOULD BE DETERIMENTAL, NOR DOES THE RECORD SUPPORT SUCH A FINDING.

The State's interest in interfering with a parent's fundamental right is justified only if there is clear and convincing evidence to prove (1) a parent is unfit or (2) placement with that parent would result in actual detriment to the child. *In re Custody of C.C.M.*, 149 Wn. App. 184, 203-205, 202 P.3d 971 (2009). In the absence of a finding on a factual issue there is the presumption that the party with the burden of proof failed to sustain their burden on such issue. *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

Remand to the trial court is not appropriate unless "findings are so incomplete as to deprive appellant of an opportunity to challenge them and where consideration of the legal questions involves speculation as to the legal theories the trial court pursued." *Mayes v. Emery*, 3 Wn. App. 315, 321, 475 P.2d 124 (1970). In the present case, the findings entered by the trial court were not so incomplete nor too uncertain to allow a determination on what theory the court pursued. The November 2, 2010 final orders were signed by all the parties and the Honorable Judge Gerald

Knight. CP 124, CP 125, CP 126, and CP 127. In the 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 trial court's findings are silent on the issue of whether placement of the child with the mother would result in actual detriment and the record does not support such a finding. CP 124:1-4, RP 3-187, and Ex. 3-5.

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. *In re the Custody of Shields*, 157 Wn.2d 126, 144-145, 136 P.3d 117 (2006). Extraordinary circumstances that justify nonparental custody are rare. *In re Custody of A.C.*, 165 Wn.2d 568, 580, 200 P.3d 689 (2009). Usually it is found when a child has special needs that the parent is not able to address, and therefore there would be actual detriment to the child if placed in the parent's care. 165 Wn.2d at 580. There is no evidence that the child has extraordinary needs that the mother is unable to meet. RP 3-187 and Ex. 3-5.

Nevertheless, the court made the written finding that although the mother is a fit parent, she is unable to financially provide for the child. CP 124:2 of 4. The trial court emphasized this fact in its oral ruling pointing out that the mother at the time of trial had no job, no car, no driver's license, no independent housing, and lived with family members in

crowded quarters. RP 179-181. These circumstances are what deprived the mother of custody of her child.

B. THE TRIAL COURT'S ERROR OF LAW SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S USE OF THE BEST INTEREST OF THE CHILD STANDARD FOR DETERMINING NONPARENTAL CUSTODY IS ERRONEOUS.

In custody disputes between a parent and a nonparent, deference to a parent's fundamental right to custody requires a more rigorous standard to be applied than that of the "best interest of the child." *Shields*, 157 Wn.2d at 142. The correct standard requires a nonparent to establish a parent's unfitness or actual detriment to the child's growth and development by nothing less than "clear and convincing evidence." *C.C.M.*, 149 Wash. App. at 203-205.

In the instant case, the trial court concluded that custody of the child with the nonparent was in the best interest of the child. CP 124:2 of 4. This is an error of law. It ignores the constitutional mandate of deference to parents. *Shields*, 157 Wn.2d at 144.

"When the heightened standard is properly applied the showing required by the nonparent is "substantial." *Id.* at 145. Only in "extraordinary circumstances" will a nonparent generally be able to meet this test. *Id.* 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. *C.C.M.*, 149 Wash. App. at 204, (citing *Shields*, 157 Wn.2d at 144).

C. THE TRIAL COURT'S ERROR OF LAW SHOULD BE REVERSED BECAUSE THE RECORD SUPPORTS THE CONTENTION THAT THE COURT'S SOLE BASIS FOR DENYING A FIT MOTHER HER CHILD WAS BECAUSE SHE HAD NO JOB, NO INCOME, AND LIVED WITH EXTENDED FAMILY.

There was no finding of actual detriment made by the trial court and Ms. Simonsen failed to prove 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 v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054 (2000). However, the trial court in error failed to apply this presumption. RP 180:9-21, RP 180:22-25, and RP 181:1-4.

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. Respondent's argument comparing Respondent's ability to provide for the child based on her income to that of the mother advocates for use of the wrong standard.

The court's oral decision provides no justification for removing a child from a fit mother. Only in "extraordinary circumstances," where

placing the child with an otherwise fit parent would be detrimental to the child, is a parent's right to custody outweighed by the State's interest in the child's welfare." *Id.*

The record reflects that the mother had no criminal convictions or charges. RP 38:15-17, RP 178:15-17, and Ex. 5. There was significant evidence that the mother was not using drugs. RP 7:2-16 and Ex. 5. The Guardian Ad Litem ("GAL") testified that the child did not have any fears or reservations about the mother. RP 18:5-9. The GAL could not provide evidence that the mother failed to assist the child with homework. RP 37:21-25. The GAL only went to the mother's residence once. Ex. 3, 4, 5, and RP 10:9-23.

The trial court's focus during its oral decision was on the mother not having any income, not having a car, not having a driver's license, and living in crowded quarters with extended family. RP 176-187. The court's emphasis on the mother's poverty and living situation is seen in the language of the November 2, 2010 Final Parenting Plan and the Findings of Fact and Conclusions of Law. CP 126:1-7 and CP 124:1-4.

The parenting plan entered on July 6, 2010 was simply a temporary order. This plan even has the caption "proposed parenting plan." CP 112. If the plan was a final parenting plan it could not be easily changed pursuant to RCW 26.09.260. Also, a final parenting plan must be

supported by findings of fact and conclusions of law. CR 52(2). On July 6, 2010, no Findings of Fact and Conclusions of Law or Nonparental Custody Decree was filed. RP 186 and CP 120. After the trial court's oral ruling, Respondent's counsel did not have final orders prepared pursuant to the court's decision. RP 186. A presentation date was obtained. RP 186:12-13. The court entered the proposed parenting plan on July 6, 2010 in addition to a child support order. RP 186. Both the proposed parenting plan and the child support order contained numerous errors. CP 120.

These errors along with the parties' proposed language for the findings and decree were resolved at the August 25, 2010 presentation hearing before Honorable Judge Gerald L. Knight. CP 123. At the conclusion of the August 25, 2010 presentation hearing, Judge Knight allowed the final orders to be submitted to him for his signature without setting another hearing. CP 123. The November 2, 2010 final orders are signed by all the parties and the Honorable Judge Gerald Knight. CP 124, CP 125, CP 126, and CP 127.

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. The trial court erred in using the "best interest of the child" standard and placing the child with the nonparent.

In nonparental actions, a parent can only be deprived of their child if, by clear and convincing evidence, the parent is either unfit or placement with the parent would result in actual detriment to child. The mother was found a fit parent. The Respondent failed to satisfy her high burden of proof.

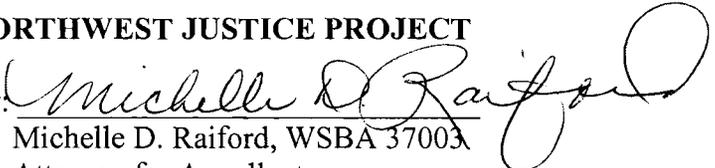
The court failed to find actual detriment to the child if placed with the mother. Actual detriment is met only in circumstances that are extraordinary. Those circumstances are not found here. The mother's poverty, crowded residence with family, possible criminal charges in the future does not constitute an extraordinary circumstance individually or together.

The only appropriate recourse is for the trial court's decision to be reversed and the nonparental custody decree vacated. The child should be returned to her mother immediately. Remand to the trial court is not appropriate in this case. The trial court's findings are not so incomplete or uncertain as to prevent this court from determining what theory the court based its decision.

Respectfully submitted this 17th day of May 2011.

NORTHWEST JUSTICE PROJECT

By:


Michelle D. Raiford

Michelle D. Raiford, WSBA 37003

Attorney for Appellant

2731 Wetmore Avenue, Suite 410

Everett, WA 98201

(425) 252-8515, ext. 31

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

In re the Custody of:

KATLYN LEIGH SIMONSEN,
Child,

KAREN LEIGH SIMONSEN,
(Petitioner)
Respondent,

And

CHRISTOPHER ROBERT SIMONSEN,
Alleged Father,

KRISTINE RAYE GILLIO,
(Respondent)
Appellant.

No. 66321-6

CERTIFICATE OF SERVICE

MICHELLE D. RAIFORD, being first duly sworn upon oath, deposes and
says:

I am the attorney of record for the Respondent in this action. On the 18th
day of May, 2011, I delivered using ABC Legal Messenger a copy of *Reply*
Brief of Appellant, Designation of Clerk's Papers, and Certificate of
Service to the following:

CERTIFICATE OF SERVICE - 1 of 2

Northwest Justice Project
2731 Wetmore Avenue Suite 410
Everett, WA 98201
TEL: (425) 252-8515; FAX (425) 252-5945

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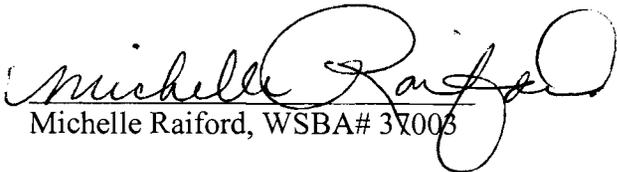
J. Michael Gallagher
300 Vine Street, Suite 4
Seattle, WA 98121

Breck Marsh
Snohomish County Prosecutor's Office
6th Floor Admin East, M/S 504
3000 Rockefeller Ave
Everett, WA 98201-4046

Deborah G. Riehl
1906 Pacific Avenue
Everett, WA 98201

Christopher Robert Simonsen
1318 McDougall St.
Everett, WA 98201

Dated this 18th day of May, 2011 in Everett, Washington.


Michelle Raiford, WSBA# 37003