

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

In the Matter of the Custody of	)	No. 66321-6-I
	)	
K.L.S., minor child	)	
	)	
KAREN LEIGH SIMONSEN,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
KRISTINE RAYE GILLIO,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
CHRISTOPHER ROBERT SIMONSEN,	)	UNPUBLISHED OPINION
	)	
Alleged Father.	)	FILED: August 29, 2011
	)	

Ellington, J. — Kristine Ray Gillio appeals a ruling granting custody of her child, K.L.S., to K.L.S.’s paternal grandmother. We reverse and remand with direction to the court to make a determination based upon the correct standard for a petition for nonparental custody.

BACKGROUND

K.L.S. was born in February 2001 to Kristine Gillio. K.L.S. spent her first five years living with Gillio and her father, Christopher Simonsen (Chris).<sup>1</sup> They lived with Karen Simonsen (Simonsen) in her home in Marysville. Then for two years, K.L.S.

lived with her parents in an apartment in Everett. In April 2008, they again moved in with Simonsen, who had moved to Granite Falls.

In February 2009, Gillio and Chris separated. Gillio lived with her uncle for about a month, then reconciled with Chris and lived with him at the home of his grandfather, Walter Ingalls. K.L.S. remained with Simonsen, but spent weekends during the school year and much of the summer with Gillio and Chris.

In the fall, Ingalls evicted Gillio and Chris because he suspected they had stolen from him.<sup>2</sup> Gillio moved in with cousins in Everett. When she attempted to have K.L.S. join her there, Simonsen filed a nonparental custody action<sup>3</sup> and obtained a temporary order placing K.L.S in her custody.

The court appointed a guardian ad litem (GAL). At trial in July 2010, the GAL testified that in her opinion, Gillio was not an unfit parent, but that it would be detrimental to K.L.S. to be in Gillio's custody and was in K.L.S.'s best interest to remain with Simonsen.<sup>4</sup>

The court found that Gillio was a fit parent but was "unable to financially provide for the child."<sup>5</sup> In its oral ruling, the court discussed Gillio's lack of income,

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<sup>1</sup> At the time of trial, Chris had not cooperated with the State's attempt to establish his paternity. The parties do not dispute he is K.L.S.'s biological father.

<sup>2</sup> The Snohomish County Prosecuting Attorney's Office indicated its intent to file charges against Gillio and Chris, but had not done so as of the hearing in this matter.

<sup>3</sup> See RCW 26.10.030.

<sup>4</sup> We do not further discuss the evidence because the pertinent issue is not sufficiency of the evidence but whether the court applied the correct legal standard.

<sup>5</sup> Clerk's Papers at 133.

lack of car and driver's license, possible theft charges, and living situation. The court found, "It is in the best interest of the child to be placed in the custody of the petitioner and at this time . . . the mother is fit but unable to financially provide for the child."<sup>6</sup>

### DISCUSSION

When a child has a fit parent, custody may be awarded to a nonparent over the fit parent's objection only if the nonparent shows by clear, cogent and convincing evidence that placement with the parent would result in actual detriment to the child's growth and development.<sup>7</sup> Actual detriment is "something greater than the comparative and balancing analyses of the 'best interests of the children' test" typically used upon dissolution of marriage.<sup>8</sup> When properly applied, this burden will be met only in extraordinary circumstances.<sup>9</sup> A nonparent's capacity to provide a home environment superior to that which the parent can offer does not, by itself, outweigh the deference constitutionally owed to a fit parent.<sup>10</sup>

Here, the court found Gillio fit, but made no finding that actual detriment to K.L.S. would result from placement with Gillio. The judgment therefore cannot be sustained.

We reverse and remand for determination of custody under the correct legal standard and for entry of findings under that standard.

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<sup>6</sup> Id.

<sup>7</sup> RCW 26.10.030(1); In re Custody of Shields, 157 Wn.2d 126, 143, 136 P.3d 117 (2006); In re Custody of C.C.M., 149 Wn. App. 184, 202-05, 202 P.3d 971 (2009).

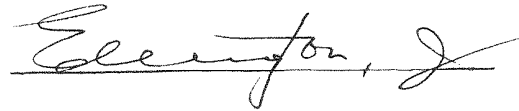
<sup>8</sup> See Shields, 157 Wn.2d at 142-43, 146-47.

<sup>9</sup> Id. at 145.

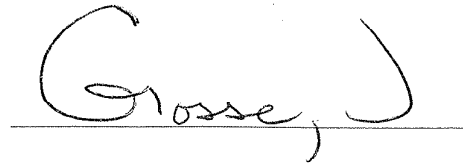
<sup>10</sup> Id. at 144.

Gillio's requests reasonable appellate costs and attorney fees.<sup>11</sup> Under RCW 26.10.080, this court may order a party to pay costs and attorney fees to the other party. Gillio is a low income client of a statewide legal aid service, and the court found she struggles financially. Simonsen makes no argument to the contrary. We therefore award Gillio her fees on appeal, to be determined by the trial court. Appropriate affidavits satisfying RAP 18.1 shall be filed with the trial court.

Reversed and remanded.

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WE CONCUR:

Handwritten signature of Becker, J. in cursive script, written over a horizontal line.Handwritten signature of Grosse, J. in cursive script, written over a horizontal line.

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<sup>11</sup> See RAP 18.1.