894168-6

Court of Appeal No. 31574-6

Supreme Court No. 87064-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL BARRETT, SR.

Appellant,

v.

DANIEL BARRETT, JR., CARRIE BARRETT and CARMELITA BARRETT

Respondents,

APPEAL FROM THE SUPERIOR COURT OF KITTITAS COUNTY

KITTITAS COUNTY CAUSE NO. 05-3-00148-4

MOTION FOR ADDITIONAL TIME TO FILE RESPONDENT'S OPENING BRIEF/MOTION ON THE MERITS

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WASHINGTON STATE SUPREME COURT

DAN BARRETT, SR., *Appellant,* vs. DAN BARRETT, JR., CARRIE BARRETT, and CARMELITA BARRETT Respondents.	No. 87064-1 RESPONDENT'S MOTION FOR ADDITIONAL TIME TO FILE RESPONDENT'S BRIEF

COMES NOW the Respondent by and through his attorney *RICHARD* T. COLE, and hereby move the Court for an extension until December 7, 2012 to file Respondent's Brief, in the alternative, respondents' request the Court's consideration of a Motion on the Merits.

Appellant has filed now two unsuccessful appeals to the Court of Appeals, No. 25303-1-III and No. 29045-0-III all focusing on the Kittitas County Superior Court Cause No. 05-3-00148-4. A copy of the Decision of the Court of Appeals No. 25303-1-III (the first appeal) and a denial by this Supreme Court of review of that decision are attached hereto and marked **Exhibit A.**

Following the First Appeal, Appellant Daniel Barrett, Sr. then appealed the Decision of the Superior Court as mandated in the first

Barrett Appeal and in that Brief, for the first time, raised the jurisdictional issue in Court of Appeals No. 29045-0-III. On page 11 of Appellant's Opening Brief, under Conclusions, Appellant Daniel Barrett, Sr. admitted as follows:

> "In what can only be described as bad lawyering, Appellant's former counsel failed to argue the jurisdictional issue to this Court, thus allowing the entire proceedings to have the appearance of validity and wasting everyone's time."

Appellant admitted that no challenge was raised in the first appeal, No. 25303-1-III regarding the issue of the Kittitas County Superior Court's jurisdiction.

On May 25, 2011 Respondents Daniel Barrett, Jr. and Carrie Barrett by and through the undersigned attorney filed in Cause No. 29045-0-III a Motion on the Merits requesting the Court to dismiss Appeal No. 29045-0-III on the basis that the issue of jurisdiction, having not been raised in the first appeal when it could and should have been raised, could not be considered on a subsequent appeal in the same case, i.e. the Law of the Case Doctrine. On September 19, 2011 the Court of Appeals Division III, Commissioner Joyce J. McCown issued a Commissioner's Ruling granting Respondent's Motion on the Merits affirming the Trial Court Decision and dismissing Appellant's appeal. A copy of the Commissioner's Ruling in Cause No. 29045-0-III is attached hereto and marked **Exhibit B.**

Respondent respectfully requests that the Court recognize that the Appellant is now requesting a third bite at the apple in that the

jurisdictional issue now again raised by Appellant, was not raised in the first Appeal, No. 25303-1-III and then was ruled as the Law of the Case and dismissed in Appeal No. 29045-0-III.

The second issue raised by the Appellant deals solely with the discretionary award of attorney's fees. The Court should decline jurisdiction in regard to that issue, but if the Court wishes that issue to proceed, which is not subject to the Law of the Case Doctrine, Respondents would file a short Brief in regards to that issue alone.

Respondents request an award of fees on Appeal pursuant to R.A.P. 18.1. The Appellant has abused the Appellant process and knew full well the jurisdictional issue has been previously addressed. This process is effectively punishing Respondents and is unjustified; they should be awarded reasonable fees for their attorney's time in responding.

Respectfully submitted,

DATED this 20th day of November, 2012.

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Page 1

146 Wn.App. 1 (Wash.App. Div. 3 2008)

189 P.3d 800

In re the CUSTODY OF BJB and BNB.

Daniel Barrett, Jr., and Carrie Barrett, Respondents,

v.

Daniel Barrett, Sr., Appellant,

Carmelita Barrett, Respondent.

No. 25303-1-III.

Court of Appeals of Washington, Division 3.

April 29, 2008

Reconsideration Denied Aug. 7, 2008.

Publication Ordered Aug. 7, 2008.

[189 P.3d 801] [Copyrighted Material Omitted]

[189 P.3d 802] Keely Rae Chapman, Robert R. Cossey, Robert Cossey & Associates PS, Spokane, WA, Daniel J. Barrett, pro se, South Prairie, WA, for Appellant.

Richard Tyler Cole, Attorney at Law, Carmelita Maria Barrett, pro se, Ellensburg, WA, for Respondent.

OPINION

STEPHENS, J.[*]

Page 6

¶ 1 Dan Jr. and Carrie Barrett filed a petition for nonparental custody of BJB and BNB, Dan Jr.'s siblings. Dan Barrett Sr. opposed the petition. The court entered a finding of adequate cause and set the matter for hearing. After a hearing, the court granted the petition and limited Dan. Sr.'s visitation until specified conditions were met. The court also imposed a child support obligation and attorney fees. Claiming the court erred in all these matters, Dan Sr. appeals. We affirm custody and visitation. We reverse the court's fee award and remand for a redetermination of child support, federal tax exemptions and attorney fees.

EXHIBIT A

FACTS

¶ 2 Dan Sr. and Carmelita Barrett were married in 1979. They had seven children. Two of their children who are still

Page 7

minors at this time, BJB and BNB, are the subject of this third-party custody action.

¶ 3 In 1997, Dan Sr. and Carmelita filed for dissolution of their marriage. Initially, Carmelita was the custodial parent. That action was filed in Pierce County.

¶ 4 In 2001, Dan Sr. filed a motion to modify the parenting plan. Carmelita was late to the hearing and a default order awarding Dan Sr. custody of the couple's then minor children was entered. BJB and BNB were at the courthouse with Dan Sr. at the time the order was entered. He left the courthouse and Carmelita next saw him at her residence where he went to take custody of their other three minor children.

¶ 5 Carmelita had called her home to tell the children what had happened. She and her boyfriend then proceeded to the residence. When her boyfriend approached Dan Sr., there was an altercation and Dan Sr. shot the boyfriend. Dan Sr. was arrested. This was the last time he had any contact with BJB and BNB.

¶ 6 After the shooting, the children lived with a family friend and then their mother. In May of 2003, they moved in with their brother Dan Jr., and his wife, Carrie.

¶ 7 Dan Sr. was eventually acquitted of any crime arising from the shooting. However, a permanent restraining order was entered prohibiting him from contact with Carmelita or any of their minor children.

¶ 8 In September 2005, Dan Jr. and Carrie filed a petition for third-party nonparental custody. The petition alleged the children were not in the physical custody of either parent and would be detrimentally affected if they were to return to the custody of their parents. Carmelita did not oppose the petition, but Dan Sr. did. Dan Jr. and Carrie also requested that Dan Sr.'s visitation be limited.

[189 P.3d 803] ¶ 9 The court found there was adequate cause supporting the petition and appointed a Guardian ad Litem (GAL). This matter proceeded to trial in April 2006. Dan Sr. represented himself. After hearing testimony from several witnesses,

Page 8

the court entered findings of fact and conclusions of law awarding Dan Jr. and Carrie nonparental custody. The court also limited Dan Sr.'s visitation: he was not to have any contact with BJB and BNB until he completed a domestic violence perpetrator treatment program and sought the advice of counselors. The court also entered a child support order and awarded Dan Jr. and Carrie $2,000 in attorney fees. Dan Sr. appeals.

ANALYSIS

¶ 10RCW 26.10.030(1) permits a nonparent to petition for custody of a child. *In re Custody of Shields*, 157 Wash.2d 126, 137, 136 P.3d 117 (2006). However, a nonparent is only permitted to make such a petition in two situations: (1) if the child is not in the physical custody of one of its parents, or (2) if neither parent is a suitable custodian. RCW 26.10.030(1). RCW 26.10.032(1) sets forth the procedure for a nonparent to seek custody. That statute provides:

> A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

RCW 26.10.032(1). The court must deny the motion unless it finds adequate cause exists from the affidavits submitted to require a hearing. RCW 26.10.032(2). If the court finds adequate cause, then the motion is set as an order to show cause why the requested order should not be granted. *Id.*

¶ 11 Dan Sr. claims the court erred by determining adequate cause existed. First he asserts there was no basis for the ruling finding adequate cause. He relies on cases interpreting RCW 26.09.260 to argue the affidavits lacked the requisite support. However, RCW 26.09.260 relates to modifications of parenting plans between parents. The courts have stated in such cases that there is a presumption

Page 9

favoring custodial continuity and against modification. *In re Marriage of Roorda*, 25 Wash.App. 849, 851, 611 P.2d 794 (1980), *overruled on other grounds by In re Parentage of Jannot*, 149 Wash.2d 123, 125-27, 65 P.3d 664 (2003). The purpose of these statutes is to impose a heavy burden on the noncustodial parent so that he or she will not file this type of motion to harass the custodial parent. *Id.* Adequate cause in these cases thus requires something more than prima facie allegations. *Id.* at 852, 65 P.3d 664.

¶ 12 Adequate cause here is governed by RCW 26.10.032. This statute does not contain the same requirements or test that the nonparental custody petition statutes require. We rely on the tools of statutory construction to determine what RCW 26.10.032 requires.

¶ 13 The purpose of statutory construction is to discern and give effect to legislative intent. *In re Custody of Smith*, 137 Wash.2d 1, 8, 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). Intent is derived primarily from the language itself. *Id.* We presume the legislature means what it says. *Id.* Adequate cause under RCW 26.10.032 exists if the affidavits supporting the motion show the child is not in the custody of either parent or that one or both parents is not a suitable custodian. The use of the term " or" suggests the phrases separated by the " or" are alternatives. *In re Marriage of Caven*, 136 Wash.2d 800, 807, 966 P.2d 1247 (1998). The term " or" is a coordinating particle which signifies an alternative. *Id.* Thus, the court can enter a finding of adequate cause if the affidavits establish either alternative.

¶ 14 The petition indicated that the children were not in the physical custody of either parent. It also alleged placement with Dan Sr. would be detrimental to the children. Dan Sr.'s response to the petition admitted the children were not in his custody. However, he denied he was detrimental to their [189 P.3d 804] growth and development. The fact that the parties agreed the children were not in the custody of either parent gave rise to an undisputed basis to find adequate cause under the statute.

Page 10

¶ 15 Dan Sr. argues that if adequate cause is based upon the fact the children were not in his physical custody, this prevents him from asserting his fitness or suitableness as a parent at the full hearing. This argument has no merit. Under RCW 26.10.032(2), once adequate cause has been established, a show cause hearing is held to determine if the motion should be granted. It is then that the nonparent must show the parent is unfit, or that placement with an otherwise fit parent would detrimentally affect the child's growth and development. *See Shields*, 157 Wash.2d at 142-43, 136 P.3d 117. Once adequate cause is established, then the court must use this heightened standard to determine if awarding custody to a nonparent is proper.

¶ 16 The court properly determined there was adequate cause to proceed to the show cause hearing. There was no error.

¶ 17RCW 26.10.030(1) permits a nonparent to file a petition for custody. The court may grant such a petition. This court reviews custody decisions for an abuse of discretion. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993).

¶ 18 A custody dispute between a parent and a nonparent requires this court " to apply a heightened legal standard; more than the ' best interests of the child' standard is required." *See Shields*, 157 Wash.2d at 140, 136 P.3d 117. A parent's rights may be outweighed in two situations: (1) if the parent is unfit or (2) " when actual detriment to the child's growth and development would result from placement with an otherwise fit parent." *Shields*, 157 Wash.2d at 142-43, 136 P.3d 117.

¶ 19 Here, the court set forth several facts to support its findings that BJB's and BNB's growth and development would be detrimentally affected by placement with Dan Sr. Among other facts, the court noted the father's significant history of physical and emotional abuse against his children. It found Dan Sr. dragged BJB to her room by her hair when she was a small child because she had not vacuumed properly. The father also controlled these two children by fear.

Page 11

¶ 20 These facts support the finding that it would be detrimental to the growth and development of BJB and BNB to be placed with their father.

¶ 21 Dan Sr. does not attack the factual basis for the court's findings; rather he claims that because these events occurred in the past, they cannot form the basis for the present finding of detriment. The test for custody should be the present condition of the parent, he asserts, not any future or past conduct. *In re Marriage of Nordby,* 41 Wash.App. 531, 534, 705 P.2d 277 (1985).

¶ 22 However, Dan Sr. had had no contact with his children for five years at the time of the hearing. The court noted he appeared emotionless when the children were upset while testifying. The GAL reported the children were still very fearful of their father. BNB reported to the GAL that he does not feel safe with his dad. The GAL noted the children had not had any contact with their dad since 2001. They were currently living in a stable, happy and nurturing environment. The GAL noted Dan Sr.'s parenting style in general was detrimental to the children.

¶ 23 Given the facts present in this case, the court did not abuse its discretion in granting custody to Dan Jr. and Carrie. The facts established that returning BJB and BNB to Dan Sr. would have a detrimental affect on their growth and development.

¶ 24 Dan Sr. also claims the court should not have been permitted to consider any past pattern of abuse because it was not alleged in the petition. This is not so. The petition clearly states placement with Dan Sr. would detrimentally affect the children because of his violent nature.

¶ 25 He further argues it was error for the court to enter a continuing restraining order when no limitations under RCW 26.10.160(2)(a) were pleaded. This is not so. The petition requested visitation be limited based upon the permanent restraining order [189 P.3d 805] entered in Pierce County. Furthermore, the restraining order entered in this case is redundant because the Pierce County restraining order is

Page 12

still in effect and prohibits Dan Sr. from contacting his children.

¶ 26 The court properly found placing BJB and BNB with Dan Sr. would be detrimental to their growth and development. The court thus properly granted Dan Jr. and Carrie's petition for nonparental custody.

¶ 27 Dan Sr. complains the court applied the wrong standard. The best interests of the child standard is the appropriate standard when deciding custody between parents. *Shields,* 157 Wash.2d at 142, 136 P.3d 117. It is also the proper standard when determining custody between nonparents. But between a nonparent and a parent, a more stringent balancing test is required. *Id.* This test requires a finding of parental unfitness, or that placement with an otherwise fit parent would be detrimental to the growth and development of the child. *Id.* at 142-43, 136 P.3d 117. Here the court referenced the best interests of the children, but the findings and conclusions clearly indicate the court applied the more stringent test required. This is not a basis for reversal.

¶ 28 Dan Sr. next argues the court erred by not providing a manner by which he could seek visitation. A parent that is not granted custody is entitled to reasonable visitation. RCW 26.10.160(1). However the court may limit visitation if it finds the parent engaged in the following conduct:

> (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iv) the parent had been convicted as an adult of a sex offense.

RCW 26.10.160(2)(a)(i-iv). The court limited Dan Sr.'s visits based upon the second and third types of conduct.

¶ 29 Dan Sr. first argues the court did not make appropriate findings as required to limit his visitation. RCW 26.10.160(2)(m) does require the court to enter findings

Page 13

setting forth the reasons why visits are limited. The court did so here. The court also set forth what Dan Sr. could do to obtain visitation. The court indicated that visitation could begin after input from counselors and after Dan Sr. completed a domestic violence perpetrator treatment program. The court is permitted to make such requirements as a condition for visitation. *In re Interest of Mahaney,* 146 Wash.2d 878, 887, 51 P.3d 776 (2002). An avenue for visitation exists.

¶ 30 Dan Sr. further claims the court erred because despite the fact the court imposed conditions in the findings, the nonparent custody decree prohibited him from having any contact with the children. The decree does state he is not to have any contact with the children. The conditions imposed that once satisfied could permit visitation are not contained in the decree.

¶ 31 The decree indicates it is based upon the findings. We read the documents together, and will not engage in artificial parsing of the language. Reading the findings in conjunction with the decree, there is an avenue through which Dan Sr. can obtain visitation.

¶ 32 Moreover, to the extent there is an actual conflict, the decree can be amended nunc pro tunc so that it reflects what actually was ordered at trial. *See In re Marriage of Hardt,* 39 Wash.App. 493, 498–99, 693 P.2d 1386 (1985).

¶ 33 On May 1, 2006, the parties appeared to present the findings and conclusions and the nonparent custody decree. At this hearing, Dan Jr. and Carrie also presented a child support worksheet, and an order of child support. The documents listed Dan Sr.'s gross income as $3,520 a month. Counsel indicated the child support worksheet was based upon income as verified by Dan Sr.'s exhibits at trial. The mother had income of $800 a month imputed to her because she was voluntarily unemployed.

¶ 34 At this hearing, Dan Sr. asked for financial documents from the mother. The mother was present at the

Page 14

hearing and told the court she was currently unemployed.

[189 P.3d 806] She was placed under oath and questioned by the court. She said she had not worked for two and one-half years, and suffered from Post Traumatic Stress Disorder (PTSD). Despite this condition, she was willing to have income of $800 a month imputed to her. The court did not order her to provide any documentation. The court further stated there was no information available to give to Dan Sr. The court entered the child support orders based upon these figures. Dan Sr. claims the court erred in the manner in which it imputed income to the mother. He also takes issue with the amount imputed to her.

¶ 35 In a nonparental custody action, the court makes child support provisions. RCW 26.10.040(1)(a). The determination of child support is based upon the schedule and standards set forth in chapter 26.19 RCW. RCW 26.10.045 (also see Reviser's note to this statute). A child support award is reviewed for abuse of discretion. *In re Marriage of Peterson,* 80 Wash.App. 148, 152–53, 906 P.2d 1009 (1995), *review denied,* 129 Wash.2d 1014, 917 P.2d 575 (1996).

¶ 36 Dan Sr. first claims the court erred in its child support order because it failed to require the mother to provide income verification. " All income and resources of each parent's household shall be disclosed and considered by the court" for the basis of determining each parent's child support obligation. RCW 26.19.071(1). Current pay stubs and tax returns for the previous two years are to be provided to verify income. RCW 26.19.071(2). Income and deductions that do not appear on tax returns or pay stubs shall be proved by " other sufficient verification." *Id.*

¶ 37 Dan Sr. takes issue with the manner in which the court imputed income for the mother. The court is required to impute income to a voluntarily underemployed parent. RCW 26.19.071(6); *In re Marriage of Schumacher,* 100 Wash.App. 208, 213, 997 P.2d 399 (2000). Whether a parent is voluntarily underemployed for purposes of the statute is determined based on work history, education, health, age, and other relevant factors. *Peterson,* 80 Wash.App. at 153, 906 P.2d 1009. " In

Page 15

the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round, full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census." RCW 26.19.071(6).

¶ 38 The court based its imputation of income for the mother solely upon her testimony. There was nothing verifying her income. The record shows the court accepted her testimony that she suffered from PTSD and imputed $800 of monthly income to her without any documentation; however, the court did not follow the statutory mandate for setting child support and imputing income. Remand is therefore appropriate. *In re Marriage of Sievers*, 78 Wash.App. 287, 306, 897 P.2d 388 (1995) (remand appropriate where trial court failed to include child support worksheet as required by statute).

¶ 39 RCW 26.10.040(1)(b) requires the court to make an allocation of the children for purposes of the federal tax exemption. It did not do so. The court must also consider this issue on remand.

¶ 40 Finally, Dan Sr. appeals the court's order requiring him to pay $2,000 in attorney fees. RCW 26.10.080 grants the court power to award fees at the trial level based on the financial resources of the parties. *Smith*, 137 Wash.2d at 21, 969 P.2d 21; *In re Custody of S.H.B.*, 118 Wash.App. 71, 91-92, 74 P.3d 674 (2003), *aff'd*, 153 Wash.2d 646, 105 P.3d 991 (2005). In deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *Smith*, 137 Wash.2d at 22, 969 P.2d 21.

¶ 41 There is nothing in the record regarding the financial situation of Dan Jr. and Carrie. Thus, the court could not have considered their need in making this award. Consequently, we reverse the court's fee award. On remand, the court retains discretion to award fees if it makes the requisite findings under RCW 26.10.080.

¶ 42 Both parties have requested fees on appeal. An appellate court may, in its discretion, order a party to

pay for the [189 P.3d 807] cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. *Smith*, 137 Wash.2d at 21, 969 P.2d 21 (citing RCW 26.10.080). Again, in deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *Id.* at 22, 969 P.2d 21.

¶ 43 Pursuant to RAP 18.1(c), both parties must file an affidavit of financial need with this court in support of their respective requests for an award of fees and costs on appeal. Based on the affidavits filed, we award fees to Dan Jr. and Carrie Barrett, in an amount to be determined by a commissioner of this court.

CONCLUSION

¶ 44 We affirm the trial court's determination of custody and visitation. We reverse the court's fee award and remand for a redetermination of child support, federal tax exemptions and attorney fees. We award Dan Jr. and Carrie Barrett fees on appeal.

WE CONCUR: SCHULTHEIS, C.J., and SWEENEY, J.

Notes:

[*] Justice Debra L. Stephens was a member of the Court of Appeals at the time oral argument was heard on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

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165 Wn.2d 1037 (Wash. 2009)
205 P.3d 131
In re Custody of Blake Barrett, Brittany Barret, Daniel Barrett, Jr., Carrie Barrett, Daniel Barrett, Sr., Carmelita Barrett
No. 82158-5
Supreme Court of Washington
March 31, 2009
Editorial Note:

This decision has been designated as "Supreme Court of Washington Table of Petitions for Review" table in the Pacific Reporter.

Appeal From: 25303-1-III, 146 Wash.App. 1, 189 P.3d 800

Petition For Review: Denied.

The Court of Appeals
of the
State of Washington
Division III

FILED

SEP 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

In re the Custody of:	)	COMMISSIONER'S RULING
	)	NO. 29045-0-III
BJB and BNB.	)	

Daniel Barrett Sr. appeals a Kittitas County Superior Court decision denying his motion to vacate all prior orders by that court regarding the custody of BJB and BNB. He contends that the Kittitas Court lacked jurisdiction to enter those orders. Daniel Barrett, Jr.'s motion on the merits is granted.

On January 27, 2005, the Puyallup Tribal Court granted Daniel Barrett Jr. guardianship of BJB and BNB. One month later, Daniel Barrett Sr., the appellant here and father of BJB and BNB, received by default proceedings in a Pierce County dissolution action a parenting plan over BJB and BNB.

Daniel Barrett Jr.'s motion to intervene in the Pierce County action was granted and he petitioned for non-parental custody. However, shortly thereafter, he abandoned

EXHIBIT B

this Non-Parental Custody Petition. Daniel Barrett Jr. declared that he did not fill out a summons, and did not serve Daniel Barrett Sr. with this Non-Parental Custody Petition.[1] Rather, on September 26, 2005 Daniel Barrett Jr. filed another Non-Parental Custody Petition in Kittitas County where the children resided with him.

On October 24, 2005, an adequate cause hearing was held in Kittitas County on the matter. During this hearing, Daniel Barrett Sr. challenged the jurisdiction of the Kittitas County Superior Court, but the challenge was denied.

After trial in Kittitas County, Daniel Barrett Jr. was granted non-parental custody of BJB and BNB. Daniel Barrett Sr. appealed this decision. (Court of Appeals Case No. 25303-1-III). On appeal, Daniel Barrett Sr. did not assign error to the Kittitas Court's decision on jurisdiction or venue. This Court affirmed the trial court's determination of custody and mandated the case.

On March 5, 2010, Daniel Barrett Sr. moved to vacate. The Kittitas County Superior Court denied the motion stating that it was frivolous because:

> RCW 26.10.030 requires that non-parental custody actions be brought in the Superior Court where the child(ren) are permanently resided or where they are found. At the time of the filing of the non-parental custody Petition in Kittitas County, the children were residents of Kittitas County. In addition, Respondent challenged venue of the Kittitas County Superior Court at the initial Hearings held In regards to the Adequate Cause hearing held on October 24, 2005.

CP 57-58.

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[1] On April 1, 2008, Daniel Barrett Jr. voluntarily dismissed his Pierce County Superior Court Non-Parental Custody Petition.

Daniel Barrett Sr. appeals the trial court's refusal to vacate all prior orders, contending that the court erred in holding that the change of county courts was a mere venue issue rather than a jurisdictional issue. He asserts that under the priority action rule, the proper result is vacation and dismissal of the case. Daniel Barrett Jr. responds that Mr. Daniel Barrett Sr. waived his right to challenge the Kittitas County Superior Court's decision because he failed to raise the venue/jurisdiction issue in his first appeal to this Court.

"Venue and jurisdiction are distinct concepts." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn. 2d 310, 315, 76 P.3d 1183 (2003). "Jurisdiction 'is the power and authority of the court to act.'" *Id.* In making a determination on whether a court has subject matter jurisdiction, the focus is the type of controversy involved. *Marley v. Dep't of Labor & Indus.*, 125 Wn. 2d 533, 539, 886 P.2d 189 (1994). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Marley,* 125 Wn. 2d at 539, 886 P.2d 189 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse,* 1988 BYU L.Rev. 1, 28).

In contrast, "[v]enue has to do with the place of a proceeding." *Dougherty*, 150 Wn. 2d at 316. "Venue is distinguished from jurisdiction in that jurisdiction connotes the power to decide a case on its merits while venue connotes locality." *Id.* "While location determines venue, the "location of a transaction or a controversy usually does *not* determine subject matter jurisdiction." *Id.*

RCW 26.10.030 pertains to commencement of non-parental custody cases. RCW 26.10.030(1) provides:

> Except as authorized for proceedings brought under chapter 13.34 RCW, or chapter 26.50 RCW in district or municipal courts, a child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.

Here, both the Pierce and Kittitas County Superior Courts have subject matter jurisdiction over non-parental causes of actions. Daniel Barrett Sr.'s challenge, that the matter should have been decided in Pierce rather that Kittitas County, is a venue rather than jurisdictional issue.

While a jurisdictional challenge may be raised at any point in a proceeding, a venue challenge is deemed waived if not timely objected to. *See* CR 82. The law of the case doctrine states that "[i]ssues decided in prior appeals, or not raised that could have been decided in prior appeals, will not be considered on a subsequent appeal in the same case." *Seattle v. McCready*, 131 Wn. 2d 266, 271, 931 P.2d 156 (1997) (citing *Greene v. Rothschild,* 68 Wn. 2d 1, 414 P.2d 1013 (1966)). The law of the case doctrine has been codified in RAP 2.5(c), which provides:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

While RAP 2.5(c) appears permissive, since the adoption of the rule courts have held that an appellate court may reconsider only those decisions that were clearly erroneous

and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside. *See State v. Worl*, 129 Wn 2d 416, 425, 918 P.2d 905 (1996); *see also Folsom v. County of Spokane*, 111 Wn. 2d 256, 263-64, 759 P.2d 1196 (1988).

In relation to child custody cases, the parties have an obligation to expedite the resolution of the custody issues in order limit the period during which children face an uncertain future. *See In re Dependency of A.W.*, 53 Wn. App. 22, 26, 765 P.2d 307 (1988). "It is therefore of paramount importance that the trial court be apprised of alleged errors so that it can make corrections, if necessary, and thereby avoid an appeal and consequent new proceeding." *Id.*

In this case, under RCW 26.10.030(1), Kittitas County Superior Court properly had venue of the matter because at the time of the proceedings BJB and BNB resided in Kittitas County with Daniel Barrett Jr. and his wife.

Also, Daniel Barrett Sr. failed to raise the jurisdiction/venue issue in his first appeal, even though he had raised the issue in the trial court. Therefore it is deemed waived. Public policy supports this decision in the interest of the children's future.

The Kittitas County Superior Court had both jurisdiction and venue in this matter. The motion on the merits is granted and the decision of the trial court is affirmed.

September 19, 2011.

Joyce J. McCown
COMMISSIONER

Supreme Court No. 87064-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL BARRETT, SR.

Appellant,

v.

DANIEL BARRETT, JR., CARRIE BARRETT and CARMELITA BARRETT

Respondents,

APPEAL FROM THE SUPERIOR COURT OF KITTITAS COUNTY

KITTITAS COUNTY CAUSE NO. 05-3-00148-4

DECLARATION OF RICHARD T. COLE IN SUPPORT OF MOTION FOR ADDITIONAL TIME TO FILE RESPONDENT'S OPENING BRIEF/MOTION ON THE MERITS

Richard T. Cole, WSBA #5072
Law Offices of Richard T. Cole
Attorney for Respondents
Daniel Barrett, Jr., Carrie Barrett and Carmelita Barrett
P.O. Box 638
1206 North Dolarway Road, Suite 108
Ellensburg, WA 98926
(509) 925-1900

STATE OF WASHINGTON SUPREME COURT

DAN BARRETT, SR.,

Appellant,

vs.

DAN BARRETT, JR., CARRIE BARRETT and CARMELITA BARRETT

Respondents.

Supreme Court No.: 87064-1

DECLARATION OF RICHARD T. COLE IN SUPPORT OF MOTION FOR ADDITIONAL TIME TO FILE RESPONDENT'S OPENING BRIEF/MOTION ON THE MERITS

Richard T. Cole being first duly sworn on oath deposes and says:

1. That I am the attorney for the Respondents in the above entitled matter, am over the age of eighteen and competent to testify to the facts stated herein.

2. Respondents request additional time to file Respondent's Brief in the above entitled matter. The Brief of the Appellant was received, hand Delivered by the Appellant on October 19, 2012. Due to scheduling problems and trials I was unable to contact the Court on November 19, 2012, yesterday, to request an extension of time due to a busy schedule and conflicts which have necessitated a request for

additional time to file Respondent's Opening Brief and/or a Motion on the Merits pursuant to RAP 18.4.

3. Respondents wish the following relief, extension of the deadline to file Responding Brief in regards to the issues raised by Appellant until December 7, 2012; in the alternative if the Supreme Court recognizes that the issue on Appeal regarding jurisdiction is the Law of the Case and has been waived, has already been subject to review by the Appellant Court system. This Supreme Court should take action thereby either dismissing the entire Appeal, if the Court feels that the remaining issue does not justify this Supreme Court's time and energy or remove from this matter the issue of jurisdiction which is final and is not subject to appeal and leave as the only and solely remaining issue the issue addressed by Appellant in his Brief dealing with the discretionary award of attorney's fees.

Respectfully submitted,

DATED this 20 day of November, 2012

Richard T. Cole, WSBA #5072
Attorney for Respondents
Daniel Barrett, Jr. and Carrie Barrett
P.O. Box 638
1206 N Dolarway Rd., Suite 108
Ellensburg, WA 98926
(509) 925-1900

NO. 87064-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL BARRETT, SR.

Appellant,

v.

DANIEL BARRETT, JR., CARRIE BARRETT and CARMELITA BARRETT

Respondents,

CERTIFICATE OF SERVICE

Richard T. Cole, WSBA #5072
Law Offices of Richard T. Cole
Attorney for Respondents
Daniel Barrett, Jr. and Carrie Barrett
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Holly Gremel hereby certifies that on the 20 day of November, 2012, she mailed a copy each via USPS of the Motion for Additional Time to File Respondent's Opening Brief/Motion on the Merits; and Declaration of Richard T. Cole in Support of Motion for Additional Time to File Respondent's Opening Brief/Motion on the Merits and Certificate of Service to the following:

Mr. Daniel Barrett, Sr.
P.O. Box 361
South Prairie, WA 98385

Daniel and Carrie Barrett, Jr.
5321 Edgewood Dr. E
Edgewood, WA 98372

Ms. Carmelita Barrett
2210 Colockum Rd
Ellensburg, WA 98926

and emailed copies of the above to the Washington State Supreme Court:

supreme@courts.wa.gov

and sent the original copies via USPS to

Supreme Court, State of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. RCW 9A 72.085.

SIGNED in Ellensburg, Washington on this 20 day of November, 2012

Holly Gremel/Legal Assistant to Richard T. Cole

OFFICE RECEPTIONIST, CLERK

To: Lisa Hentges
Subject: RE: Barrett v. Barrett

Rec. 11-20-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lisa Hentges [mailto:lisa@colelaw.net]
Sent: Tuesday, November 20, 2012 4:18 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Barrett v. Barrett

Court Clerk:

attached are our Motion for Additional Time to File Respondents' Opening Brief/Motion on teh Merits; Declaration of richard T. Cole in Support of Motion fo Additional Time to File Respondent's Opening Brief/Motion on the Merits; and the Certificate of Service. I will mail the original documents to you today.
Thank you, Holly Gremel, Legal Assistant to Richard T. Cole