

ORIGINAL

NO. 34873-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

J.L.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 05-7-00354-5

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BRIEF OF RESPONDENT

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## I. COUNTERSTATEMENT OF THE ISSUE

**Is suspending detention upon Compliance with school attendance an appropriate purge condition under the three part test of *M.B.*, because it is directed at obtaining future compliance, is within the power of the child to fulfill, and is reasonably related to the cause of the contempt?**

## II. STATEMENT OF THE CASE

### The Order To Attend School

In May of 2005, J.L. had unexcused absences that resulted in a Petition for an Order to Compel School Attendance being filed against her. CP 1-7; RP (10/21) 3-4. J.L. was later ordered to appear before the Kitsap County Juvenile Court to show cause why she should not be ordered to attend school. CP 8, 9.

On October 21, 2005, J.L. came before the Court and admitted that she had been truant as alleged in the Petition to Compel, as well as a number of days leading up to the hearing. RP (10/21) 4. The Court thereupon ordered J.L. to attend school with no skips, unexcused absences, suspension or expulsions for the remaining school year (2005-2006). CP 10; RP (10/21) 4.

The Order Requiring Student To Attend School (hereinafter "Order") was executed and signed by J.L. CP 10. The Order warns that violation could result in a finding of contempt and imposition of up to 7 days of

detention for each violation. Id.

### **The First Contempt**

In November of 2005, J.L. missed school for a number of days, which resulted in a Petition and Declaration for Order of Contempt (hereinafter “First Contempt”) being filed against her. CP 11-13; RP (12/16) 3. J.L. was ordered to appear before the Court again, this time to show cause why she should not be found in contempt of the Order to attend school. CP 14, 15.

On December 16, 2005, J.L. appeared and admitted she had been truant as alleged in the First Contempt. RP (12/16) 3. The Court thereupon ordered, that 4 days of secure detention be imposed but suspended upon the explicit condition that J.L. comply with the Order. CP 16; RP (12/16) 4. The Court also ordered J.L. to perform 16 hours of community service by February 17, 2006, and to complete a tour of detention by January 7, 2006. Id.

Issuing its oral ruling, the Court specifically told J.L. the 4 days of secure detention was suspended provided she follows the Order here on out by attending school. RP (12/16) 4.

Furthermore, if J.L. succeeded in complying with the Order by

attending school, then the days of secure detention would “fade away”.<sup>1</sup> Id. J.L. acknowledged her understanding that these days would be purged upon successful completion of the Order. RP (12/16) 5.

### **The Second Contempt**

In January 2006, J.L. again missed school for a number of days, resulting in a second Petition and Declaration for Order of Contempt (hereinafter “Second Contempt”) being filed against her. CP 17-19; RP (03/03) 3-4. J.L. was once again ordered to appear before the Court to show cause why she should not be found in contempt of Order for a second time. CP 20, 21.

On March 3, 2006, J.L. again appeared and admitted she had been truant as alleged in the Second Contempt. RP (03/03) 3. As for the community service ordered under the First Contempt, J.L. claimed she had done the hours and just needed to provide proof of them. RP (03/03) 4-5.

The tour of detention previously ordered had not been completed. RP (03/03) 4.

Because J.L. had failed to comply with the original purge condition to attend school, the Juvenile Court ordered 2 of the 4 suspended days of secure

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<sup>1</sup> Implicit in the Court’s ruling is that 16 hours of community service would also be required to purge the suspended detention, though that is not specifically stated. Later rulings by the Court imposing detention in lieu of the 16 hours not completed make it clear community

detention imposed under the First Contempt to be served, however the Court allowed J.L. to serve them out of custody on the alternatives to detention work crew<sup>2</sup>. CP 22; RP (03/03) 5.

The 16 hours of community service J.L. failed to complete was converted to the 2 remaining days of secure detention suspended from the First Contempt. Id. J.L. was also allowed to serve these days out of custody on work crew. In addition, those 2 days could still be purged if J.L. provided proof of the 16 hours community service previously ordered. Id.

The Court again asked that the tour of detention previously ordered be completed, this time by March 4, 2006. Id.

To sanction the Second Contempt, the Court imposed 4 more days of secure detention, but once again suspended those days on condition that the J.L. comply in the future with the Order. Id.

### **The Third Contempt**

In March 2006, J.L. again missed several days of school, resulting in a third Petition and Declaration for Order of Contempt (hereinafter “Third Contempt”) being filed against her. CP 23-26; RP (05/19) 3-4. For the third

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service was an additional purge condition.

<sup>2</sup> “Work crew” is an alternative to secure detention, which allows a day of detention to be served out of custody through 8 hours of community service work under the supervision of Kitsap County Juvenile Detention Staff. The work is completed outside of secure detention.

time the Court ordered J.L. to appear and show cause why she should not be found in contempt of the Order. CP 27, 28.

On May 19, 2006, J.L. appeared and admitted she had been truant as alleged in the Third Contempt. RP (05/19) 3-4.

By May 19, 2006, J.L. had failed to complete the 4 days of detention work crew she had been ordered to complete for her failure to purge the First Contempt by attending school, including her failure to show proof of completing 16 hours of community service that would have purged 2 of those 4 days. RP (05/19) 7.

In addition, J.L. had failed to attend school after March 3, 2006, and, therefore failed to purge an additional 4 days of suspended detention imposed during the Second Contempt hearing. Id. For seven months, the only order J.L. followed was to take a tour of detention. Id.

The Court noted J.L. had failed to comply with the previous orders “to a great degree”. RP (05/19) 10. The Court imposed only 2 secure detention days of the 4 detention work crew days she failed to purge from the First Contempt by attending school and completing community service. CP 29; RP (05/19) 9.

The Court did not impose any of the 4 days of suspended detention from the Second Contempt that could have been imposed for failing to purge

by not attending school thereafter. RP (05/19) 7.<sup>3</sup>

In the end, J.L. actually served 2 days of secure detention out of 8 days, which could have been imposed for seven months of non-compliance with court orders. Id.

On May 24, 2006, J.L. filed a Notice Of Appeal to Division II of the Court of Appeals.

### III. ARGUMENT

**SUSPENDING DETENTION UPON COMPLIANCE WITH SCHOOL ATTENDANCE IS AN APPROPRIATE PURGE CONDITION UNDER THE THREE PART TEST OF *M.B.*, BECAUSE IT IS DIRECTED AT OBTAINING FUTURE COMPLIANCE, IS WITHIN THE POWER OF THE CHILD TO FULFILL, AND IS REASONABLY RELATED TO THE CAUSE OF THE CONTEMPT.**

The State of Washington mandates school attendance.<sup>4</sup> Children who fail to attend school as required can be court ordered to attend school. RCW 28A.225.090(1).

Failure to attend after a court order has been entered requiring school attendance can result in court-imposed sanctions, including up to seven days of detention. RCW 28A.225.090(2); 7.21.030(2)(e). These detention

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<sup>3</sup> The Court was mis-advised that there were “eight days suspended outstanding from the first two orders” [RP (05/19) 7; line 15]. Actually, only 4 of the 8 days remained suspended, since during the Second Contempt the Court ordered 4 of the suspended days to be served on work crew. Thus only 4 days actually remained suspended from the first two orders.

<sup>4</sup> The mandatory attendance provisions are set forth in RCW Chapter 28A.225.

sanctions are specifically deemed in the statute to be remedial in nature; not punitive. RCW 7.21.030(2)(e). However, despite its label as remedial, the nature of the sanction, not the statutory label, determines whether it is truly remedial or punitive. *Hicks v. Feiock*, 485 U.S. 624, 631, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988).

**A. COURT'S ARE NOT LIMITED TO ACCEPTING A MERE PROMISE THAT A STUDENT WILL ATTEND SCHOOL IN THE FUTURE, RATHER, THE COURT CAN CONDITION THE PROMISE TO VERIFY ITS RELIABILITY**

Remedial sanctions coerce future performance of an act still within the person's power to perform; while punitive sanctions determinatively punish a person for their failure to perform that act in the first instance. RCW 7.21.010(2) and (3); *Hicks* at 633.

The conditional nature of a sanction will generally render it remedial, while unconditional or determinate sentences will render it punitive. *Id.* However a determinate sentence may still be remedial so long as it contains a "purge clause" allowing the contemnor to end the contempt upon his or her willingness to comply with the order by performing the delinquent act. *Id.* at 634; *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999).

Traditional examples of purge compliance include providing court

testimony,<sup>5</sup> or producing documents,<sup>6</sup> which the contemnor had previously refused in violation of court order. These traditional examples in case law normally presume the contemnor has the ability to complete what was previously incomplete.

But compliance with the delinquent act is often impossible in the context of juvenile truancy because the truant is not able to make up missed days at school. All a student can do is promise to attend in the future. Does that mean truancy sanctions will always be punitive?

In *In Re M.B.*, 101 Wn. App. 425, 446, 3 P.3d 780 (2000), Division One of the Court of Appeals dealt with traditional notions of remedial sanctions in the specific context of juvenile truancy under RCW 28A.225.090(2) and RCW 7.21.030(2)(e).

The appellant in *M.B.*, argued detention sanctions under the truancy statutes were inherently punitive because the truant could never fully comply with the order to attend school by “going to school yesterday.” *M.B.*, at 448. So any action not otherwise required by the original order would thus be punitive. *M.B.* at 447.<sup>7</sup> In the end, the truancy court could only require a

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<sup>5</sup> *Hicks v. Feiock*, 485 U.S. at 634, citing, *Shillitani v. United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966).

<sup>6</sup> *Hicks* at 633, citing, *Penfield Co. V. SEC*, 330 U.S. 585, 67 S. Ct. 918, 91 L. Ed. 1117 (1947).

<sup>7</sup> The Appellant in *M.B.* cited *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996),

juvenile's promise to attend school. *Id* at 447-48.

But the Court in *M.B.* rejected that argument, holding a truancy court's powers should not be so limited:

We believe the court's powers are not as limited as appellants suppose. A contemnor's promise of compliance is the first step. ***But where that promise is demonstrably unreliable, the court can insist on more than mere words of promise as a means of purging contempt. To conclude otherwise would render the statutes unenforceable and reduce the court to the level of beggar.*** *Id* at 448 (emphasis added).

The Court in *M.B.*, noted that the truancy court must be entitled to fashion an appropriate condition that will ensure future compliance with the order and still remain remedial. *Id* at 448-49.

The Court in *M.B.* recognized that in many instances a child's promise to attend school would be demonstrably unreliable, even on the first contempt. *Id* at 450. Because promises to attend school can often be unreliable, a truancy court is entitled to disregard the bare promise to attend school as unpersuasive and to require further action on the part of a truant to demonstrate a willingness to comply with the order by attending school in the future. *Id.*

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for the proposition that anything other than the conditions of the original order would be punitive.

**B. ANY PURGE CONDITION IS REMEDIAL IF IT SERVES REMEDIAL AIMS, IS WITHIN THE CHILD’S POWER TO COMPLETE, AND IS REASONABLY RELATED TO THE CONTEMPT.**

The Court in M.B. adopted a three part test developed from In re Marriage of Larsen<sup>8</sup> to determine whether a purge condition remains remedial: (1) The condition must be designed to serve remedial aims, i.e. future compliance; (2) The condition must be within the power of the child to fulfill; and, (3) The condition must be reasonably related to the cause or nature of the child's contempt. M.B. 101 Wn. App. at 450.

The Court in M.B. recognized that, along with a promise to attend school, written plans to comply with the order to attend would suffice as a remedial purge condition as such assignment complies with the three-part test. Id at 450-51, citing, In Re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997).

However, the Court in M.B. made clear its intention that purge conditions not be limited to just writing papers or submitting written plans. M.B. 101 Wn. App. at 451. Rather, any condition that would otherwise satisfy the court of the child’s future compliance is permitted so long as it satisfies the three-part test enunciated by the Court in M.B..<sup>9</sup>

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<sup>8</sup> In Re Marriage of Larsen, 165 Wis.2d 679, 478 N.W.2d 18 (1992)

<sup>9</sup> “Like the court in Farr, we see nothing inappropriate in a purge condition requiring a

**C. SUSPENDING DETENTION UPON ACTUAL SCHOOL ATTENDANCE IS AN APPROPRIATE PURGE CONDITION BECAUSE IT SATISFIES THE THREE PART TEST OF *M.B.***

Requiring a juvenile to actually attend school with no further unexcused absences for the remainder of the school year is an appropriate purge condition because it meets the remedial elements of the test in *M.B.*

First, the condition is meant to serve remedial needs, in this case coercing future school attendance, by giving the juvenile the opportunity to comply with the order and thereby, purge suspended detention days at the end of the school year. The days of suspended detention become the coercive element that serves the remedial aim. Thus the first element of the three-part test in *M.B.* is met.

Second, the condition is within the power of the juvenile to complete. The juvenile is required to attend school and ordered to do so anyway. There isn't anything else for the juvenile to complete. The condition requires nothing more than actual compliance with something the juvenile promises to do in the first place: Go to school. At the end of the school year, full compliance with the order to attend will purge the suspended days. It is

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written explanation to the court as to how the contemnor intends to comply in the future with the portion(s) of the original order that he or she violated in the past. And as in *Farr*, **we do not mean to foreclose other possible purge conditions that will satisfy the court of the child's future compliance.**" *In Re Interest of M.B.*, 101 Wn. App.at 451(emphasis added).

within the juvenile's power and control to complete. Thus the second element of the three-part test in M.B. is met.

Finally, the condition is related to the cause of the child's contempt: Failure to attend school. Nothing could be more direct than to order the juvenile to actually attend school and do what they promise. Thus, the final element of the three part test in M.B. is met.

J.L. argues imposing suspended time is punitive since it imposes a determinate term of detention without the ability to later purge once the detention is ordered to be served.<sup>10</sup> However, this is not a proper characterization of the sanction in this case because detention is only served as a result of a decision the juvenile makes. In reality, the juvenile is given the choice as to whether or not they wish to comply with the order or serve the detention time.

J.L. holds the keys to detention in her own pocket. Hicks, 485 U.S. at 633.<sup>11</sup> She can decide to not go into detention by going to school and

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<sup>10</sup> Brief of Appellant, page 7.

<sup>11</sup> "A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. "One who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.'" Hicks at 633, quoting, Penfield Co. v. SEC, 330 U.S. 585, 590, 67 S.Ct. 918, 91 L.Ed. 1117 (1947), quoting, In re Nevitt, 117 F. 448, 461 (CA8 1902).

completing her community service. If she decides to not go to school, it is clear that she has decided she would rather go to detention and serve the sanction instead of purging her contempt. If she decides not to complete community service, or work crew, she has chosen to place herself into detention. *Id.*

The situation is no different than if J.L. had been placed into detention immediately for 4 days and decided she would not purge the contempt but instead just do 4 days in detention. Satisfaction of the condition is within her power to complete and to avoid detention..

**D. J.L. FAILED TO COMPLY WITH COURT ORDERS AND THEREBY  
CHOSE NOT TO PURGE HER CONTEMPT**

In the present case, J.L. clearly failed to comply with nearly every requirement the Court placed upon her in order to get her to go to school.<sup>12</sup>

The Court gave her several options to purge her contempt. First, she was ordered to serve 4 days of detention, but was released upon the condition that she attends school with no further problem and complete 16 hours of community service. CP 16; RP (12/16) 4. Upon completing the conditions, the 4 days would “fade away”. RP (12/16) 4. Though the condition was intended to serve the remedial aim of getting her to attend school, she failed

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<sup>12</sup> Appellant eventually completed a tour of detention as ordered.

to comply, and thus, failed to purge. CP 17-19; RP (03/03) 3-4.

Next the court imposed the 4 days of detention but allowed her to remain out of custody on the work crew. CP 22; RP (03/03) 5. Further, she could purge 2 of those days by showing proof of completing 16 hours of community service as ordered previously. *Id.* Though she had every opportunity to purge the contempt by serving work crew and community service, she again failed to comply. RP (05/19) 7. In addition, she failed to attend school, for which 4 additional days were imposed but suspended on condition of further compliance. CP 22; RP (03/03) 5. For the third time, she failed to abide by her promise to attend school. RP (05/19) 7.

In the end, she only spent 2 days in detention out of the 8 possible days ordered. *Id.* She wouldn't even explain why she didn't want to attend school. RP (05/19) 8.

By her own actions, J.L. chose to spend the 2 days in detention rather than comply with court orders. Though the court gave her the chance to purge and avoid detention, J.L. chose not to purge.

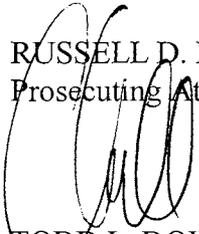
Removing the Court's ability to impose suspended sanctions against J.L. would have reduced it to the level of a beggar. *M.B.*, 101 Wn. App. at 448.

#### IV. CONCLUSION

For the foregoing reasons, the imposition of suspended sanctions should be affirmed. The State believes there is a continuing and substantial interest in this case, as such, the issue is not moot and should be reviewed.

DATED November 22, 2006.

Respectfully submitted,

  
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Prosecuting Attorney

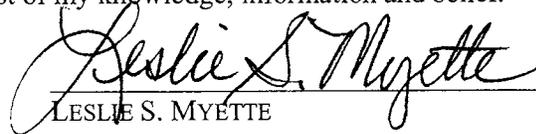
  
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: November 22, 2006  
PLACE: Port Orchard, WA

  
\_\_\_\_\_  
LESLIE S. MYETTE

Prosecutor's File Number-05-172569-1

CERTIFICATION OF SERVICE; Page 2 of 2



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