

NO. 45123-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KELSEY BREITUNG,

Appellant,

v.

STATE OF WASHINGTON; and COMMUNITY COUNSELING
INSTITUTE, a Washington non-profit corporation,

Respondents.

**BRIEF OF RESPONDENT STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

This case arises from an inappropriate sexual relationship between 17½ year old Appellant Kelsey Breitung and her former substance abuse counselor Andrew Phillips, with whom she was placed pursuant to orders issued by the juvenile court in her dependency action.

Kelsey intentionally made false statements to the juvenile court so that she could continue to live with Andrew Phillips and his wife, Betsy Phillips. When she made her false statements to the court Kelsey had already begun a sexual relationship with Andrew.¹ Kelsey's brazen determination to remain in the Phillips home was striking. As the trial court observed, Kelsey "stood there in front of that court and perjured herself. There's no other way to put it. She flat out lied to that court . . ." RP 53.

Based on her false statements, the Juvenile Court Commissioner ordered Kelsey's placement with Phillips to continue. Unbeknownst to the Commissioner, Betsy Phillips and DSHS, Kelsey's intentionally false statements also allowed her sexual relationship with Andrew to continue. Although Kelsey now attributes most, if not all, of her claimed injuries and damages to her inappropriate sexual relationship with Andrew, she chose not to name him as a defendant in this lawsuit. Instead, Kelsey seeks to hold Respondent State of Washington Department of Social and Health Services

¹ Kelsey Breitung and her mother, April Breitung are referred to by their first names for clarity. Similarly, Andrew Phillips and his wife Betsy Phillips are referred to by their first names. No disrespect is intended by this practice.

(DSHS) liable for complying with the juvenile court's placement decision that she and her attorney specifically advocated for and Kelsey lied to secure. Kelsey's claims against DSHS arising from her placement with the Phillips lack merit and were properly dismissed by the trial court as a matter of law. CP 1124. That order should now be affirmed.

First, DSHS is statutorily immune for the placement recommendations it made to the juvenile court, and for the actions it took to comply with the juvenile court's placement orders. RCW 4.24.595(2). For this reason alone, the Court should affirm the trial court order.

Second, the equitable doctrine of judicial estoppel precludes Kelsey from financially benefiting in this lawsuit from the intentionally false representations she made to the court in her dependency proceedings. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009) (“Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.”).

Third, as the trial court ruled, except for the information that Kelsey alone knew and intentionally withheld, the juvenile court had all material information in its possession when it ordered her placement with the Phillips. RP 52-53. Thus, even if DSHS were not already immune under RCW 4.24.595(2), the juvenile court's placement decisions operate as superseding intervening acts that sever any remaining liability of DSHS for the injuries caused by her placement with the Phillips. *Petcu v. DSHS*,

121 Wn. App. 36, 56, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004).

For each of the above reasons, this Court should affirm the trial court order that dismissed all claims and damages related to Kelsey's placement in the Phillips' home.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly rule that DSHS is statutorily immune under RCW 4.24.595(2) for the placement recommendations it made to the juvenile court and the actions it took to comply with the juvenile court's placement decisions?

2. Did the trial court correctly rule that Kelsey is judicially estopped from recovering damages in this lawsuit for injuries that resulted from a placement decision Kelsey and her attorney specifically requested, and continued to advocate for in court even after she began her sexual relationship with Phillips?

3. Did the trial court correctly rule that the juvenile court's placement decisions operated as superseding, intervening acts that broke the chain of causation and severed any liability of DSHS?

III. COUNTERSTATEMENT OF THE CASE

A. Kelsey's Dependency Action And Placement History

The material facts are not in dispute. Indeed, the unchallenged facts the trial court relied upon to reach its placement decisions were primarily taken from Kelsey's own admissions, the juvenile court pleadings and

orders, and from the transcripts of Kelsey's dependency proceedings. The undisputed facts that follow provide context for the recommendations made by the DSHS social workers and the placement decisions ordered by the Juvenile Court Commissioner. On July 27, 2009, DSHS received a referral from Andrew Phillips that 17 year old Kelsey had run away from home after she was physically abused by her mother, April Breitung. Andrew also reported that Kelsey was living at the home of a "family friend." The referral was assigned to Jessica Chaney, an experienced Child Protective Services (CPS) worker employed by DSHS. CP 457.

That same day Ms. Chaney went to the Breitung home to meet with April. No one answered the door, so Ms. Chaney left her business card with a note asking April to call. Ms. Chaney also attempted to contact Kelsey at the number of the "family friend" where she was allegedly staying, but no one answered. Ms. Chaney left a voicemail message asking Kelsey to contact her. CP 457.

On August 10, 2009, DSHS received another referral, this time from Betsy Phillips, the wife of Andrew Phillips. Betsy reported that Kelsey had been going from "home to home" living with various individuals. At that specific point in time Kelsey was staying with a couple who had taken Kelsey to a party. According to Betsy, Kelsey "got drunk and had sex with a 19-year-old military man (no name available)." Betsy also reported that Kelsey had intentionally cut on herself in an act of self-mutilation.

CP 457-58. No address or phone number was provided for the place where Kelsey was staying. The following day Ms. Chaney called and left a voicemail message for Betsy. That message was returned the same day by Andrew Phillips.

Andrew explained that Betsy was his wife, and her referral to DSHS was based on information that was obtained from him. Andrew reported that Kelsey moved in with Rose Sialana a week earlier. Andrew's only concern was that Ms. Sialana had alcohol in her home, which Kelsey had already accessed. CP 458.

Still trying to locate Kelsey, Ms. Chaney contacted Rose Sialana. Ms. Sialana reported that Kelsey had lived in her house for approximately two weeks. Explaining the incident reported by Betsy, Ms. Sialana said the events followed a barbeque that Kelsey attended with Ms. Sialana and her boyfriend the previous weekend. There was no drinking at the barbeque, and she and her boyfriend did not permit Kelsey to drink alcohol at their house. They brought Kelsey home after the party, and one of their military friends came over. After Ms. Sialana and her boyfriend went to bed, Kelsey found a fifth of alcohol, drank it all, and engaged in sex with their 19-year-old military friend. According to Ms. Sialana, Kelsey knew her poor decisions were going to land her in trouble, so Kelsey cut on herself. Ms. Sialana made an appointment for Kelsey to be seen at Good Samaritan Hospital on August 20, 2009. CP 459.

On August 13, 2009, Ms. Chaney separately interviewed Kelsey, who confirmed each of Ms. Sialana's earlier statements. Kelsey also provided a history of where she had lived, and described the physical abuse that caused her to run away from her mother's home. Kelsey did not know the whereabouts of her mother. Kelsey also relayed that Ms. Sialana had threatened to prohibit her from receiving drug/alcohol treatment from Andrew Phillips. CP 459-60.

Ms. Chaney then met with Ms. Sialana and her boyfriend. Ms. Chaney shared her concern about pulling Kelsey out of drug/alcohol treatment with Andrew. Kelsey had voluntarily placed herself in treatment with Andrew. Equally important, Kelsey, who was almost 18 years old, threatened to quit substance abuse treatment altogether if she was not allowed to continue treating with Andrew. At the conclusion of their meeting, Ms. Sialana said she would decide whether to allow Kelsey to continue treating with Andrew after she met with Andrew's supervisor at Respondent Community Counseling Institute (CCI) later that day. CP 460-61.

That very evening, Ms. Sialana decided that she no longer wanted Kelsey in her home. At approximately 11:00 p.m., Kelsey was placed into protective custody by the Tacoma Police Department. CP 461. Kelsey was taken to South King County Youth Shelter (SKYS), a licensed group home. CP 461. On August 18, 2009, DSHS filed a dependency petition pursuant to

RCW 13.34. CP 462.

On August 19, 2009, a shelter care hearing was held.² At that hearing attorney Matt McCoy was appointed to represent Kelsey at all future dependency hearings. A continued shelter care hearing was held on September 16, 2009. At that hearing the juvenile court asked Kelsey where she wanted to be placed:

THE COURT: Okay. Has there been any discussion with you about placement with any individuals as opposed –

KELSEY BREITUNG: Yes. Betsy and Andrew are a good stable couple and they have offered to take me and I feel -- to live with them.

THE COURT: Where do they live?

KELSEY BREITUNG: In Tacoma. Close to the -- they both work close to Stadium so . . .

THE COURT: And how do you know them?

KELSEY BREITUNG: Well, first Andrew was my counselor for a brief period of time, and then we started going to church together and that's where I met his wife. And so we go to church every Friday together and hopefully every Sunday soon . . .

CP 431-32.

² An initial shelter care hearing must be held within 72 hours of the date the child is taken into custody. RCW 13.34.065(1)(a). The primary purpose of a shelter care hearing is to determine whether the “child can be immediately and safely returned home while the adjudication of the dependency is pending.” *Id.* Thereafter, a child can only remain in shelter care for longer than 30 days if specifically approved by court order. RCW 13.34.065(7)(a).

Following that hearing the Commissioner entered an order that allowed Kelsey to be placed with an “other suitable person.”³ DSHS assigned Social Worker Gabrielle Rosenthal to handle Kelsey's ongoing case. CP 357.

The SKYS group home only provides short term placement. So, Ms. Rosenthal began looking for a more permanent placement for Kelsey. CP 357. Kelsey again asked to live with Andrew and Betsy Phillips. CP 358-59.

Kelsey had already established a good relationship with both Andrew and Betsy Phillips: Andrew was Kelsey's former drug/alcohol counselor; Kelsey attended church with Andrew and Betsy each week; and Andrew and Betsy introduced Kelsey to “Celebrate Recovery,” a faith based 12-step substance abuse program that was held at their church. Kelsey also reported that Andrew and Betsy were supportive and caring, and wanted to serve as a placement resource for her. CP 358-59.

Ms. Rosenthal also took into account that Kelsey was almost 18 years old, had demonstrated a willingness to run away from placements she did not like and “couch surf” at the houses of people she met. CP 358. Ms. Rosenthal was understandably concerned that, if placed with someone this independent 17 ½ year old teenager found objectionable, Kelsey might

³ An “other suitable person” is a separate statutory placement category. RCW 13.34.130(1)(b)(ii). The other statutory placement categories available to the juvenile court included placement of the child in the parent’s home, with a relative, or in foster care. *Id.* It is undisputed that the Phillips were the only “other suitable persons” ever considered or approved by the juvenile court.