

FILED
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Division II
State of Washington
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Court of Appeals NO. 50159-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Angela K. Scoutten/Schreiner

Appellant,

v.

Michael J. Scoutten

Respondent.

Brief regarding whether Mr. Scoutten can grant legal custody through power of attorney

On Appeal from the Superior Court of Pierce County

No. 11-3-03452-5

Angela Schreiner

5105 Grand Loop Way #602

Tacoma, WA 98407

1. Federal Law

The UNIFORM POWER OF ATTORNEY ACT, Chapter 11.125.500(2) (b) RCW states: “A person is not required to accept an acknowledged power of attorney if: (b) Engaging in a transaction with the **agent** in the same circumstances would be **inconsistent with federal law**,”(RCW 11.125.500(2)(b). The “special” power of attorney Mr. Scoutten drafted is inconsistent with federal laws concerning a parent’s fundamental constitutional right to the care, custody and control of his or her child. Additionally, Mr. Scoutten’s power of attorney is inconsistent with Washington State Supreme Court precedent regarding third party custody rights over the objection of a fit parent.

Under the Fourteenth Amendment of the United States Constitution, a parent has a fundamental right to the care and custody of his or her child. T.L., 165 Wn.App. at 280–81; Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion), “ ‘It is cardinal with us that the custody, care and nurture of the child **reside first in the parents**, whose primary function and freedom include preparation for obligations the [S]tate can neither supply nor hinder.’ “ T.L., 165 Wn.App. at 280 (quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). Therefore, “State interference with the parent's right to rear her or his children is subject to **strict scrutiny**, ‘justified only if the [S]tate can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.’ “ T.L., 165 Wn.App. at 280 (quoting In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), aff’d sub nom. Troxel, 530 U.S. 57). Consequently, “[p]rotecting a parent's right to rear her or his child has sometimes required Washington and federal courts to read special protections into custody and visitation statutes **when a parent's interest conflicts with that of a nonparent.**” Id.

The contempt order issued against Ms. Schreiner clearly violated the constitution by denying Ms. Schreiner's fundamental parental rights to her child over a third-party. Commissioner Keisel ruled Ms. Schreiner violated the residential aspects of a parenting plan for not returning the child to a third-party, who held no residential rights to the child and held no delegation of Mr. Scouttens residential rights. Just as in Troxel, the Scouttens did not allege, and no court has found, that Ms. Schreiner was an unfit parent. There is a presumption that fit parents act in their children's best interests, Parham v. J. R., 442 U.S. 584, 602. The care, custody and control of the child therefore remained with Ms. Schreiner over any third-parties. Additionally, RCW 26.10.030(1) protects the fundamental rights of parents by permitting petitions only when 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." RCW 26.10.030(1). A third-party did not commence an action to modify the parent's rights and responsibilities in this case, and the child was in the physical custody of Ms. Schreiner. It was never alleged neither parent was a suitable custodian for the child.

1. Mr. Scouttens failed to delegate his residential rights to Monica Scouttens

It is undisputed that Mr. Scouttens failed to expressly delegate **any residential rights** for the child to his agent by Power of Attorney or by utilizing RCW 26.09.260(12). If anything, Mr. Scouttens was the one in contempt of the 2015 court ordered parenting plan by not exercising his residential time with his child. Mr. Miller argues that Mr. Scouttens only tried to allocate health care and educational decision-making rights to his agent. Therefore, he cannot allege that Ms. Schreiner violated the residential provisions of the court-ordered parenting plan regarding residential time. Mr. Scouttens never delegated any residential rights to Monica Scouttens, and she held no individual rights to residential custody of the child. The Supreme Court concluded that

"There is no statutory right to third-party visitation under our laws, and we decline to exercise our equitable powers to create such a right."(In re Custody of M.W.). A party has standing to pursue an action when she is within the zone of interests protected by a statute and has suffered an injury in fact. *Branson v. Port of Seattle*, 152 Wash.2d 862, 875–76, 101 P.3d 67 (2004). In cases of third party standing, Washington courts apply the three factors used by the United States Supreme Court: The litigant must have suffered an “injury in fact,” thus giving him or her a “sufficiently concrete interest” in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (internal citations omitted); see *T.S. v. Boy Scouts of Am.*, 157 Wash.2d 416, 424 n. 6, 138 P.3d 1053 (2006) (citing *Mearns v. Scharbach*, 103 Wash.App. 498, 512, 12 P.3d 1048 (2000)); *State v. Burch*, 65 Wash.App. 828, 837, 830 P.2d 357 (1992). Monica Scoutten had no interests to protect. Monica had no legal right to residential time with the child. She cannot then pursue a contempt motion on behalf of Mr. Scoutten, when Mr. Scoutten failed to delegate residential time to Monica Scoutten. Accordingly, Ms. Schreiner did not violate the court-ordered parenting plan regarding decision-making, because Ms. Schreiner had decision-making rights for the child while the child was in her care. Ms. Schreiner’s decision-making rights are outlined in the “Other Provisions” section of the 2015 court ordered parenting plan. The power of attorney Mr. Scoutten drafted attempts to terminate Ms. Schreiner’s rights and give them to his new wife. The parenting plan requires that all major decisions be discussed with Ms. Schreiner, so delegating Mr. Scoutten’s legal decision-making rights to Monica and not including the fact that Mr. Scoutten had to discuss all major decisions with Ms. Schreiner renders his power of attorney invalid and void. Mr. Scoutten further attempts to terminate Ms.

Schreiner's parental rights to her child through his power of attorney, by including the language that Ms. Schreiner was only the "biological mother" and that she be "prohibited from making any decisions" rendered his power of attorney void, invalid, and in contempt of the 2015 court-ordered parenting plan. Mr. Scoutten's power of attorney states "I hereby state for clarity purposes, that I was previously married to Angela Schreiner who is the biological mother of Memphis Scoutten." Ms. Schreiner is not only the biological mother of Memphis Scoutten, she is also the legal parent of Memphis Scoutten, has a legal interest in the care, custody and control of her child, and maintains her parental rights to her child. Ms. Schreiner's parental rights have not been terminated by any court of record, nor have they been voluntarily revoked by her, and she has not been deemed to be "unfit" to care for her child. Ms. Schreiner has residential time allocated to her, as well as decision-making rights that are included in the 2015 parenting plan. According to the 2015 parenting plan, Mr. Scoutten was required to "discuss all major decisions together" with Ms. Schreiner. He misleads anyone who reads his invalid power of attorney concerning the parental rights of Ms. Schreiner. He goes on to incorrectly state in his power of attorney that "Pursuant to a trial in Pierce County Superior Court and the resulting court orders, I was granted full custody and sole decision making authority with regard to Memphis Scoutten." This entire statement is inherently void, as the 2015 parenting plan did not grant Mr. Scoutten "full custody", it granted Mr. Scoutten "primary" custody of their minor child. The 2015 parenting plan also did not grant Mr. Scoutten "sole" decision-making authority. It granted Mr. Scoutten certain decision-making authority for the child, but still maintained the parents "discuss together the major decisions which have to be made about or for the child" (line 16 of the 2015 Court ordered parenting plan). Additionally, Ms. Schreiner had authority to not only day-to-day decisions for her child, but the 2015 parenting plan also gave Ms. Schreiner authority to obtain

emergency dental and health care without notifying Mr. Scoutten, and stated that “each parent shall have authority to give parental consent or permissions as may be required concerning school, daycare or other programs for the child while the child is in his or her care”(line 18-19 of the 2015 Court-ordered parenting plan). Mr. Scoutten’s power of attorney reads: “It is my intention this special power of attorney allow my wife Monica Scoutten to act in my stead with regard to all decisions set forth in paragraph 4.2 of the parenting plan **and that Angela Schreiner be prohibited from making any decisions** pursuant to the restrictions set forth in paragraph 4.3 of the parenting plan.” The 2015 parenting plan did not “prohibit her from making any decisions” pursuant to any restrictions. In fact, the “Other provisions” section gave Ms. Schreiner authority to give permissions for school, daycare and other programs while the child was in her care. And since Mr. Scoutten failed to delegate his residential time to anyone while he was deployed/incapacitated, he left the child in Ms. Schreiner’s care. Mr. Scoutten holds no authority to write his own interpretation of court-orders by power of attorney that directly conflict with the court-ordered parenting plan in this case. **Mr. Scoutten’s power of attorney is in contempt of the court-ordered parenting plan.** Lastly, legal custody cannot be transferred through power of attorney unless one parent is deceased and the surviving parent becomes incapacitated and nominates a guardian through a durable power of attorney, then a court may appoint a guardian under 11.88. Those aren’t the circumstances of this case. Ms. Schreiner is well and alive and retains parental rights to her child through a court-ordered parenting plan and maintains her fundamental and constitutional parental rights.

2. **Mr. Scoutten’s power of attorney is invalid, void, and not compliant with RCW’s pursuant to the Uniform Power of Attorney Act.**
The UNIFORM POWER OF ATTORNEY ACT, Chapter 11.125.

a. RCW 11.125.040 Power of attorney—Termination.

The authority conferred under a power of attorney created prior to January 1, 2017, and also for a power of attorney created on or after January 1, 2017, **terminates upon the incapacity of the principal unless the writing contains the words "This power of attorney shall not be affected by disability of the principal,"** or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity.

[2016 c 209 § 104.] Mr. Scoutten's power of attorney does not contain the language required to be considered a "durable" power of attorney pursuant to RCW 11.125.040. A minor child is not considered or defined as personal property pursuant to RCW 11.125.020 and cannot be gifted to a third-party through a "special" power of attorney. RCW 11.125.350 refers to maintaining financial contributions to family members, and RCW 11.125.410 refers to health care decisions, "to be effective if the child has no other parent or legal representative readily available and authorized to give such consent." Ms. Schreiner is a fit parent and was readily available and authorized to give such consent over any third-parties while the child was in her care during Mr. Scoutten's incapacitation.

b. Mr. Scoutten was incapacitated during his times of deployment, pursuant to RCW 11.125.020(5). RCW 11.125.020(5) defines: "Incapacity means inability of an individual to manage property, business, personal, or health care affairs because the individual: (a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (b) Is:

(ii) OUTSIDE OF THE UNITED STATES AND UNABLE TO RETURN (RCW 11.125.010).

c. Ms. Schreiner never accepted Mr. Scoutten's "special" Power of Attorney. Mr. Scoutten failed to present Ms. Schreiner with his power of attorney for acceptance in compliance with RCW 11.125.200(1)(a), which states "A person shall either accept an acknowledged power of attorney or request a certification or a translation no later than seven business days after presentation of the power of attorney for acceptance." (RCW 11.125.200(1) (a)). Since Mr. Scoutten failed to present Ms. Schreiner with a power of attorney, she lacked actual knowledge to comply with Mr. Scoutten's Power of Attorney.

d. Mr. Scoutten's Power of attorney violate several statutory requirements outlined by RCW 11.125.200(2) (a-f) that state:

- (2) A person is not required to accept an acknowledged power of attorney if:
 - (a) The person is not otherwise required to engage in a transaction with the principal in the same circumstances;
 - (b) Engaging in a transaction with the **agent** in the same circumstances would be **inconsistent with federal law**;
 - (c) The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
 - (d) A request for a certification or a translation is refused;
 - (e) **The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested**, whether or not a certification or a translation has been requested or provided; or
 - (f) **The person makes, or has actual knowledge that another person has made, a report to the department of social and health services stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.**

Ms. Schreiner was not required to accept Mr. Scoutten's power of attorney for the following reasons:

1. "Engaging with the agent in the same circumstances would be inconsistent with Federal Law" in violation of RCW 11.125.200(2) (b).

2. Mr. Scoutten's power of attorney is in conflict with the 2015 court-ordered parenting plan signed by Judge Arend and conflicting law pursuant to RCW 11.125.220.

Conflicting laws.

This chapter does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this chapter.

[2016 c 209 § 122.]

Ms. Schreiner had decision-making rights for her child, but the power of attorney Mr. Scoutten drafted stated that Ms. Schreiner had "NO DECISION MAKING RIGHTS" and that all decision making rights be granted "to Monica Scoutten", rendering it invalid and in conflict with laws inconsistent with the court-ordered parenting plan.

3. Ms. Schreiner did not believe that the power was valid in accordance with RCW 11.125.200 (2) (e). A third-party cannot have rights that supersede Ms. Schreiner's parental rights.

4. Ms. Schreiner believed the agent does not have the authority to perform the act requested pursuant to RCW 11.125.200(2) (e). Ms. Schreiner does not believe that Monica Scoutten had the authority to perform acts pursuant to legal or residential custody for the child.

5. Ms. Schreiner had actual knowledge that a report had been made by a social worker at Mary Bridge Children's Hospital to DSHS stating a good faith belief by a hospital social worker that the principal's child may be subject to abuse, neglect, or abandonment by the agent pursuant to RCW 11.125.200(2) (f).

6. Because Mr. Scoutten's power of attorney was not durable, it terminated upon his incapacitation pursuant to RCW 11.125.040 and RCW 11.125.100(1) (b) which states "A power of attorney terminates when: b) The principal becomes incapacitated.

3. Judge Tollefson's order regarding parenting functions

Whether the Appellate Court agrees or disagrees with Mr. Miller's argument that his client was able to perform his primary parenting functions from overseas, the conclusion is the same. Ms. Schreiner was not in contempt of the court-ordered parenting plan. It was not her failure to comply with the residential provisions in the parenting plan, it was Mr. Scoutten's failure to complete his parenting functions that was in contempt of the parenting plan, and Mr. Scoutten's power of attorney was in contempt of the court-ordered parenting plan. The statutory language determining who performs parenting functions is unambiguous. It's the parent. RCW 26.09.004(2) defines "parenting functions", "parenting functions means those aspects of the

parent-child relationship in which **the parent** makes decisions and **performs functions** necessary for the care and growth of the child."(RCW 26.09.004(2) (b) Attending to the daily needs of the child, such as feeding, clothing, **physical care** and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family.(RCW 26.09.004). Monica Scoutten does not have a legal parent-child relationship with Ms. Schreiner's daughter, only Mr. Scoutten and Ms. Schreiner have a legal parent-child relationship with the child. Therefore, Mr. Scoutten was not able to personally complete his parenting functions and provide physical care of the child while out of the country, and after he left the child in Washington with Ms. Schreiner.

Compelling State Interest

Washington courts have long held that a nonparent seeking custody from a parent must also prove (1) "that the parent is unfit," or (2) "that placement of the child with the otherwise fit parent will result in actual detriment to the child's growth and development." T.L., 165 Wn.App. at 275 (citing *In re Custody of Stell*, 56 Wn.App. 356, 365, 783 P.2d 615 (1989); *In re Custody of Shields*, 157 Wn.2d 126, 144, 136 P.3d 117 (2006); *In re Parentage of M.F.*, 168 Wn.2d 528, 533, 228 P.3d 1270 (2010)). In T.L., Court of Appeals of Washington, Division 3, held that where a nonparent has never proved the heightened standard required by the constitution to obtain custody from a parent, then, in the event a parent moves to dismiss or modify the custody decree, the nonparent can successfully resist the motion only by proving the constitutional requisites. If an unevaluated third party was able to obtain legal custody of a child through power of attorney, then all third-party custody actions would be obsolete in the State of Washington. Parents, whether custodial or noncustodial, could simply grant their parental rights and

responsibilities to third-parties without proving the parents unfit in violation of federal and state laws regarding parental rights over third-parties. This would also undermine the authority of court ordered parenting plans from maintaining authority over parenting functions. Moreover, this would put all children in the State of Washington in danger, and without the safeguards to prevent unevaluated and unfit third-parties from obtaining parental rights without going through a court of record.

Conclusion

Mr. Miller cites no applicable Case Law that supports his argument, and failed to provide even one statutory provision that supports that his client has the authority to transfer legal custody of a child through power of attorney. He also admitted that his client failed to delegate residential custody of the child to a third-party while he was out of the country and unable to return. If anyone was in contempt of the court-ordered parenting plan in this case, it was Mr. Scoutten himself. He failed to establish a court-order that delegated his residential time to a third-party while incapacitated. Although not obligated to do so, Ms. Schreiner still allowed Mr. Scoutten's wife visitation with the child, despite the fact that a court-order delegating Mr. Scoutten's residential rights to a third-party did not exist. Ms. Schreiner did not have the ability to return the child to Mr. Scoutten's physical custody when he was deployed out of the country and unable to return/incapacitated, but this was not in Ms. Schreiner's power to perform. It was however, in Mr. Scoutten's power to delegate his residential rights to a third party utilizing RCW 26.09.260(12), yet he failed to do so. Further, Mr. Miller is now arguing that his client performed his parenting functions from overseas. How can Mr. Miller argue that the noncustodial parent was in contempt for performing Mr. Scoutten's parenting functions, if he's now claiming Mr. Scoutten himself performed his parenting functions while deployed? This contradictory

argument only supports Ms. Schreiner's claim that she was not in contempt of the court-ordered parenting plan. Mr. Scoutten was not able to perform his parenting functions, but the fault lies at the feet of Mr. Scoutten, not Ms. Schreiner. Mr. Scoutten was in contempt of the parenting plan by not exercising his residential time with the child, and by drafting an invalid and void power of attorney that contradicted the 2015 court ordered parenting plan in this case. Mr. Scouttens "special" power of attorney lacked the mandatory language to be considered "durable", and terminated upon his incapacitation. "A power of attorney terminates when: (a) the principal dies (b) The principal becomes incapacitated, if the power of attorney is not durable."(RCW 11.125.100(b). Further, a power of attorney authorizing an agent to make health care decisions for their child is effective only "if the child has no other parent or legal representative readily available and authorized to give such consent" (RCW 11.125.410). Ms. Schreiner was readily available and authorized to give such consent, as Mr. Scoutten left the child in her care while Mr. Scoutten was incapacitated. Moreover, Ms. Schreiner was never presented with Mr. Scoutten's power of attorney for her to accept, required by RCW 11.125.200(1) (a). And Ms. Schreiner is not required to accept a power of attorney if it does not comply with the requirements outlined in RCW 11.125.200(2) (a)-(f).

Mr. Scouttens power of attorney fails to comply with Federal Law, State Law, and the Uniform Power of Attorney Act. Because Commissioner Keisel's contempt order violated Federal Law, and violated Washington State Supreme court precedent regarding a fit parent's rights to the care, custody and control over their children over third parties, a reversal of the contempt order is required.

ANGELA SCHREINER - FILING PRO SE

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