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AUG 27 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

No. 313735

Spokane County Superior Court Case No. 09-3-02721-6
The Honorable
Superior Court Judge Annette Plese
&
Superior Court Commissioner Royce Moe

In Re the Custody of SR

CATHERINE LYLE AND KEVIN JAMES, RESPONDENTS

V.

ALICIA MCDONALD, now CROSTON, APPELLANT
JACK ROSMAN, RESPONDENT
JAMES AND DEENA MCDONALD, RESPONDENTS

OPENING BRIEF

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Washington Appeals Courts Cases

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RCW 26.10.200 – pp. 4-6, 9

I. Statement of Facts

In 2008, a Third Party Custody Petition was filed by the maternal grandparents, the McDonalds, against the Appellant, and a eventual Decree was entered removing her as primary custodian of her daughter and replacing her with the grandparents, as the child's new primary custodian. [1-29-10 RP 4]. With the entry of this 2008 Third Party Custody Decree the Appellant then became a non-custodian of the subject child where her fitness as a primary parent was irrelevant to future proceedings, unless the child was returned to her in a modification order. Id; CP 64-70; and see also RCW 26.10 et. seq.

On the date of October 23, 2009 Catherine Lyle and her fiancé Kevin James (herein after referred to as Ms. Lyle) came into the subject child's life by watching her about 1 day every week, and receiving an alleged agreement that they should now be the new custodians of the subject child. [1-29-10 RP 6] Based on these allegations they filed a Petition for Third Party custody to now place the subject child in their care. [CP 1-15] They also filed motion for temporary orders without a RCW 26.20.200 request for Adequate Cause. [CP 46-48]

At the hearing for Temporary Orders and in a somewhat strange representational twist, Ms. Lyle did not have an attorney, instead she allowed the "unfit" natural father's counsel to argue their case at the temporary hearing in this matter. [1-29-10 RP generally/see p.5 specifically] Ms. Lyle's new Petition for Custody set out a number of old litigated facts about the natural father and Appellant, however, did not focus on the fitness of the current custodial parents, rather it stated that they had been having the subject child in their care a day a week, stating that they would now be a new proper custodian, as their basis for temporary orders. [CP 8 & 46-48 & 1-29-10 RP 6] Ms. Lyle's recitation for the new basis for changing custody clearly did not follow any of the requirements of the Third Party Custody Adequate Cause statute, nor address the fitness of the current custodians.¹ Id.

¹ See Law and Argument section herein

At the hearing on temporary orders, the natural father's counsel admitted that her client did not file the pro se Petition seeking the custody of the subject child, but rather Ms Lyle filed it and the McDonald's allegedly joined the Petition. [1-29-10 RP 4-9] The father's attorney indicated at one point in the hearing that "They all agreed" to this change in custody; however, the Appellant, for one, did not agree with this, and basically took the position that if the McDonalds were not going to have her child, she should be in her care. [1-29-10 RP 7 & CP 28-36] The father's counsel argued the case for Ms. Lyle saying that the parties agreed that the McDonald's wanted Ms. Lyle to have their granddaughter, even though they were not unfit. [1-29-10 RP 4-9] To show that Ms. Lyle did not feel that the McDonalds were unfit in anyway, later on the father's counsel suggested that they all still wanted the McDonald's to supervise the Appellant's visits. [1-29-10 RP 7-8] The Commissioner ruled that the subject child be in the temporary care of Ms. Lyle. [1-29-10 RP generally] The father's attorney put together a hand written order allowing the child to be in Ms. Lyle's home. [CP 53-54] This temporary care order seemed primarily based on the McDonald's in court statements that they "supported" Ms. Lyle and her fiance's position in this case; along with their joinder of the Petition. [See [1-29-10 RP 10-11 & 13]

Within a short time of this hearing, the McDonald's, who were pro se, apparently felt that there was a misunderstanding about their joinder and they filed a motion to set aside their agreement and joinder. [CP 64-70] As a result of Ms. Lyle's failure to identify and outline the unfitness issues against the McDonalds, they also filed a Motion to Dismiss the Petition because there seemed to no longer be any basis for the change in custody. Id. They also obtained new counsel to help them in this case. [CP76-95 Stan Kempner, Esq.]

The hearing on the motion to dismiss was held September 30th, 2010 and the commissioner denied the same without explanation. [CP 73-74] The record of that proceeding indicates that both the McDonalds and Appellant argued that what Ms. Lyle told the court on January 29th, 2010 was inaccurate about the McDonald complete support for a permanent change of custody.

[CP 89 & transcript generally] Again, Adequate Cause was not addressed or found at this time either. Id.

The initial issues in this appeal come from the Commissioner's September 30th, 2010 order regarding the dismissal motion and the McDonald's stricken joinder; at that hearing the Commissioner allowed the McDonalds to recant their joinder and file a negative response to the Petition. [CP 73-74 & 1-29-10 RP 76-95] The McDonalds argued that because the court found that they could retract their joinder and support for Ms. Lyle, that this case should have been dismissed. Id. This is especially true since Ms. Lyle only had been having the child in their home one day a week and there was no fitness issue. [See CP 89 in particular] Again, more orders were entered without a finding of Adequate Cause. [CP 73-74] Nevertheless, the motion to dismiss was denied summarily, without a reason why. Id.

As an ancillary thought in this case and to show that Adequate Cause was never ever found before it both went to trial and a temporary order was entered, it should be noted that the Trial Judge clearly spoke to the issue of Adequate Cause not being found in this matter some year and one-half later, even with a Final Parenting Plan being entered. The record indicates that on the date of June 9, 2011 Judge Plese stated that . . . : "we haven't had a full blown hearing and adequate cause hasn't been found at this point, . . ." [6-6-11 RP 5-22] and later on there were many discussions about needing adequate cause in the record showing that everyone even knew Adequate Cause was never found. [6-6-11 RP 20, 39 & 40] It was obvious to everyone in this case that Adequate Cause had not been found but they kept litigating the case in what seemed a clear violation of the statutes and laws. Id.

The Appellant, the natural mother of the subject child has appealed the failure to grant the motion to dismiss, based on the clear facts that when the Commissioner ordered the joinder stricken, that there was no longer any agreement by the custodians (McDonalds) to justify going further, along with a complete failure to follow the statutes regarding such cases.

II. List of Errors by Court

The Court erred in the following ways:

- By allowing the Petition for Third Party custody to go forward after allowing the McDonald's to retract their joinder and support for the Petition, and they were not allegedly unfit to parent;
- By allowing this case to go forward even though the Petitioner's claimed the wrong "best interests" standard as the basis for their case;
- By failing to dismiss the Petition after striking the custodial parent's joinder, and even though there was no longer any basis for the case;
- By entering a temporary order in violation of RCW 26.10.200 before Adequate Cause was found;
- By allowing this case to go forward without the wrong legal basis and standard for such cases;
- By entering final papers awarding custody to Ms. Lyle and Mr. James without a finding of Adequate cause;
- By granting Ms. Lyle and Mr. James' Petition for Third Party Custody when the Petition used the wrong standard and did not indicate that the McDonalds were unfit, with their joinder being stricken by court order.

III. Law and Argument

- A. RCW 26.10.032 & .200 requires the court to find Adequate Cause before a temporary order is entered or the matter is sent to trial, and since this law was not followed in this case, the matter should have been dismissed summarily.

A review of the court file in this matter shows that the case was set for trial early on by a formal trial setting schedule without a finding of Adequate Cause as is required by RCW 26.10.032 and .200. [CP 96] Before the trial setting there were also temporary orders

entered allowing Ms. Lyle to have temporary custody, and were the last and only orders before the trial setting occurred on January 24, 2011. [CP 1-95]

Recently the Supreme Court has discussed proceeding to trial in a third party custody case without a proper adequate cause basis, regardless of having a hearing, going to a complete trial, or even the concluding the case. In the case of *In re Custody of S.C.D-L.*, 243 P.3d 918, 170 Wn.2d 513 (Wash. 2010), the Supreme Court completely vacated a custody decree out of Spokane County Superior Court where there was obviously no basis for the case to go forward, stating:

A nonparent may petition for custody of a child if the child is not in the physical custody of a parent or if the petitioner alleges that neither parent is a suitable custodian. RCW 26.10.030(1). The trial court must deny a hearing on the petition unless the nonparent submits an affidavit (1) declaring that the child is not in the physical custody of one of the child's parents or that neither parent is a suitable custodian and (2) setting forth facts supporting the requested custody order. *In re Custody of E.A.T.W.*, 168 Wash.2d 335, 348, 227 P.3d 1284 (2010). S.C.D-L. was in Mr. Littell's physical custody at the time Ms. Littell filed her petition, and the petition does not allege that he is an unfit parent. Instead, the petition implies it would be in the child's best interest to reside with Ms. Littell, but the " 'best interests of the child' " standard does not apply to nonparent custody actions. *In re Custody of Shields*, 157 Wash.2d 126, 150, 136 P.3d 117 (2006). Further, the petition avers no facts that would support the required allegation that Mr. Littell is an unsuitable custodian. *Id.* At 516.

The vacated order required the return of the child to the natural parent immediately, down in California from Spokane and her grandmother. *Id.* They said that litigation for a child, especially over their custody is disruptive and traumatic, therefore, these cases should be tested immediately and carefully by the Adequate Cause process, or be dismissed. *Id.* The *SCD-L* case was a tragedy for the little girl in that case; she was basically robbed of valuable time with her siblings and father for little or no reason since not only was the wrong standard used (the Best Interest standard), there was no real claim that the father was unfit currently. *Id.*

In this case, since the true "custodians" were the McDonalds and the court withdrew their joinder/agreement by order, there were no longer any facts that formed the basis for

Adequate Cause or the Petition to go forward. In addition, just like the *SCD-L* case, Ms. Lyle and fiancé pled that it was simply in the child's "Best Interests" to live with them. [CD 1-15] On that basis alone the case should have been dismissed.

- B. Even though Ms. Lyle's Petition was not immediately dismissed, no temporary order should have ever been entered without first finding Adequate Cause.

RCW 26.10.200 states,

A party seeking a temporary custody order or modification of a custody decree shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

As can be seen, before any Temporary Orders can be entered in a RCW 26.10 case, the court must find Adequate Cause first to proceed, and if they do not find this standard is met, they must dismiss the case. *See also SCD-L, supra.* Now, Ms. Lyle may try and say that Commissioner Moe must have found Adequate Cause since he entered a temporary order. However, as can be seen from the *SCD-L* case, this is not an ipso-facto process. *Id.* You cannot reach back and say "just because" and that satisfies Adequate Cause. Instead, Adequate Cause is much more in a Third Party Custody case than just saying "just because", it is a look at the Petition, the basis for such cases, and what is plead to get the case to the court, and whether it is plead in such a manner that it appears that there would be a modicum of success winning the Petition. It is not a form over substance issue, especially in a RCW 26.10 case where Adequate Cause must be a consideration of the legal standard as well. *See e.g. In re Custody of E.A.T.W., 227 P.3d 1284, 168 Wn.2d 335 (Wash. 2010) & In re; the Custody of Shields 84 P.3d 905, 120 Wash.App.108 (2004).* If the Petition and declarations do not fit the standards set out by these cases for unfitness or the other basis', they should be

dismissed. *SCD-L, supra*. For example, citing just the “Best Interests” as a basis for Adequate Cause must not be found and the Petition should be dismissed. *Id.* &

This case should have been dismissed from the date that the court struck the joinder in the Petition by the McDonald. There was no proper basis for the Petition and which seemed to cause some confusion for the trial court, because this case went forward without reconciling the issue of Adequate Cause and first.

- C. The concept of “invited error” does not apply when there are required statutory threshold issues to be found before the case moves on to a change in custody, from a child’s current custodian to a third party.

Ms. Lyle may say that the concept of “invited error” applies in this case because the McDonald’s first joined the Petition and then reneged on that choice, after the Temporary Orders were entered. However, this would not apply for two reasons, first, the Appellant did not invite this alleged error; she has dissented from the beginning of the hearings. And second, when there is a statutory requirement to follow, the concept of “invited error” does not apply.

First the doctrine of “invited error” is primarily used in criminal cases. See *e.g. City of Seattle v. Patu*, 58 P.3d 273, 147 Wn.2d 717 (Wash. 2002). And second, this doctrine does not apply to “subject matter jurisdiction” issues. See *Angelo Property Co., LP v. Hafiz*, 274 P.3d 1075, 167 Wn.App. 789 (Wash.App. Div. 2 2012). Subject matter jurisdiction is for the judge to determine. *Id.* Adequate Cause is a primary subject jurisdiction issue that cannot be bypassed. See *In re Marriage of Shryock*, 76 Wn.App. 848, 888 P.2d 750 (1995).

- D. Although the McDonald’s are not the “natural parents”, they were the child’s “custodian”, therefore, they replace the natural parents as the current custodians, who must be found unfit under the law.

Ms. Lyle may try and plead the unusual nature of this case as a reason to say that the law under *SCD-L* and *Shields (supra)* do not apply. However, this would be a “form over

substance” argument, or a “technicality” to avoid the obvious, because the Supreme Court already made it clear that the term “custodian” can be used interchangeably in RCW 26.10 matters for the term “natural parent”, if the non-natural parents are the current custodians. *See SCD-L supra*. To reiterate, the Supreme Court stated,

A nonparent may petition for custody of a child if the child is not in the physical custody of a parent or if the petitioner alleges that neither parent is a suitable custodian. RCW 26.10.030(1). The trial court must deny a hearing on the petition unless the nonparent submits an affidavit (1) declaring that the child is not in the physical custody of one of the child's parents or that neither parent is a suitable custodian and (2) setting forth facts supporting the requested custody order. *In re Custody of E.A.T.W.*, 168 Wash.2d 335, 348, 227 P.3d 1284 (2010). S.C.D-L. was in Mr. Littell's physical custody at the time Ms. Littell filed her petition, and the petition does not allege that he is an unfit parent. Instead, the petition implies it would be in the child's best interest to reside with Ms. Littell, but the “ ‘ best interests of the child’ ” standard does not apply to nonparent custody actions. *In re Custody of Shields*, 157 Wash.2d 126, 150, 136 P.3d 117 (2006). Further, the petition avers no facts that would support the required allegation that Mr. Littell is an *unsuitable custodian*. *Id.* At 516 (Emphasis added).

The McDonalds were the current “custodians” of the subject child and the Supreme Court would not have used the terms unsuitable custodian if they did not feel that the real issue is who is the current custodian, natural parent or not; therefore, it was Ms. Lyle’s burden of proof to show that the grandparents were unsuitable, after their joinder had been stricken. Again, since they did not, the Petition should be dismissed.

- E. The natural mother’s fitness should never have been at issue since the 2008 decree awarding custody to the McDonalds made them the target of any fitness concerns, and since Ms. Lyle had no concerns about their fitness, their Petition should have been dismissed.

Ms. Lyle’s Petition was appropriately filed, but focused on the wrong people as the child’s custodial parents, since the fitness of the Appellant was not a primary issue in this RCW 26.10 case. [CP 1-15] Although Ms. Lyle said that the McDonalds and the natural parents were the Respondent’s, there was nothing in their Petition that said the McDonalds were unfit, just older and may not be able to care for the child as much as before. *Id.* With the issue of an joinder/agreement no longer viable, Ms. Lyle could only say that they visited the child every week for a day or so, while they cared for her. Again, as said in argument

below, there was no other basis for this Petition than the joinder, and now that that was gone, the Petition was no longer was viable.

Ms. Lyle may say that the joinder was sufficient to allow this to go forward, however, the problem with that is that the term “go forward”, which speaks to the issue of Adequate Cause, since by law a Third Party Custody case cannot “go forward” without first having a finding of Adequate Cause under RCW 26.10.032/.200. Since that had not happened before the McDonald’s joinder was stricken any request for Adequate Cause could not go forward without the new fact showing that the McDonald’s did not agree to have Ms. Lyle and her fiancé be custodians.

Secondly, Ms. Lyle may try and say that regardless of what Commissioner Moe did, in striking the joinder and reasons for their Petition, the case should still go forward; however, that analysis must then be tested by an Adequate Cause hearing since there now was no longer a basis for this Petition other than the natural parents being unfit. Ms Lyle cannot and should not second guess Commissioner Moe in letting the McDonalds withdraw their joinder. See e.g. *Worthington v. Worthington*, 73 Wn.2d 759, 762, 440 P.2d 478 (1968). This was a discretionary decision and he was best suited to make that decision, which was final long ago. Again, without a close look at the reason for the Petition, the case should not have gone forward. *SCD.L supra*.

- F. The entry of the parties Decree did not negate the fact that there was not a basis for this case to proceed and that it should have been dismissed summarily in September 2010.

Ms. Lyle might say that this is all moot since there was an agreement by some of the parties to the current plan and decree. However, the problem with that position is found in the Findings of Fact & Conclusions of Law where virtually all of the issues were “reserved” for future determination, and Adequate Cause was completely skipped as if it was not important. [CP 102 sec. 2.8] Then, the Decree itself and the child support order were contested, along with the parenting plan. [CP 199] Had the Petition itself been tested in a full

Adequate Cause hearing there is little doubt that the case would likely have not proceeded. This, more than anything, is reason enough to take a close look at the denial of the motion to dismiss.

As indicated, on the date of 09/30/10 a Superior Court Commissioner entered a hand written order denying the McDonald's motion to dismiss in this case. Between that date and December 4, 2012 when the decree was entered no final decree was entered actually granting the Petition in this matter. The parenting plans that were entered do say the words "final" but they are simply that, parenting plans and not a decree granting the relief requested in the Summons and Petition. In addition, the Appellant was there for the entry of the final Parenting Plan, but refused to even sign the same as a pro se litigant, obviously meaning she objected to its entry. [CP 193]

- G. Even though there were two "final" Parenting Plans entered in this case, that does not excuse a lack of finding of Adequate Cause, nor a failure to find the custodians unfit under the law.

In this case there were two parenting plans entered, one in January 2011, and another November 2012. [CP 107-117 & 184-193] Both plans state that they are final, yet in the case of the first one, an actual trial date was reset to "finalize the case"; which was obviously not necessary if there was a "final order". [see 6-6-11 RP 8, 10, 39-40] And in the case of the 2012 Plan no final Decree was entered ratifying the plan until a few months later (even then Adequate Cause was never visited).

Since this case is somewhat unusual it might be beneficial to first see if there is a case that dealt with the entry of a parenting plan, and then later a revision of that plan on review, to eliminate any questions of whether such orders can be entered and if that has any affect on the jurisdiction issues in this case. In the case of *In re Marriage of Possinger*, 105 Wn.App. 326, 19 P.3d 1109 (Wash.App. Div. 1 2001) the court was faced with a similar problem as we see in this case, and that is whether the court can enter an interim parenting

plan without completing the case, leaving the “final” disposition of the matter until a later date, and whether Adequate Cause was necessary for the second plan’s entry. The *Possinger* court upheld the trial court’s right to piece-meal a parenting plan until later disposition, i.e. entry of one “final” parenting plan, then a review to enter another later. The *Possinger* court shows that Judge Plese was within her right to enter the plans as she did; however, this does not really answer the question as to the finality of this matter, but does help with the finality issues of the interim parenting plans. The *Possinger* case does not, however, excuse the lack of a finding of Adequate Cause in this case. This is because the *Possinger* orders sprang from an original dissolution Petition, and the first Parenting Plan reserved the issue of a changed plan until after school was out. Therefore, that case cannot excuse a lack of finding of Adequate Cause under a new RCW 26.10 filing.

IV. Conclusion

This case was a new RCW 26.10 case, filed by Ms. Lyle and Mr. James. They pled the wrong standard for such cases, that the custodians were not unfit, and any joinder by the custodians was stricken before any Adequate Cause hearing was held. The case went on to finality and was appealed. The court’s failure to find Adequate Cause to go forward before it set the matter for trial and entered Temporary Orders changing custody to Ms. Lyle et al, was fatal to their Petition. That was a clear failure by the court to follow jurisdictional requirements, and the case should have been dismissed at the case’s second hearing. The Appellant asks that this court vacate the decree and parenting plan in this matter and reinstate the McDonalds as the subject child’s custodian.

Respectfully submitted this 27th day of August 2013


Gary R Stenzel, WSBA # 16974

I, Gary R Stenzel, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on August 27, 2013 affiant enclosed in an envelope a copy of the Appellant's Opening Brief and Motion for Short Extension to File addressed to:

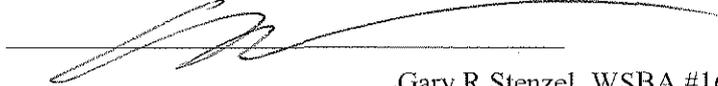
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Said addresses being the last known addresses of the above-named individuals, and on said date deposited the same so addressed by regular mail with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington.



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*It should be noted that Mr. Landis said he does not represent Mr. Rosman in this matter; however, this is the last address we have for Mr. Rosman.