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NO. 318133-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NIKKI N. WATTLES,
APPELLANT/PETITIONER,
vs.
TRISTA C. WORRELL,
APPELLEE/RESPONDENT.

BRIEF OF APPELLANT NIKKI N. WATTLES

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. By way of entry of the "Order On Motion For Revision", [CP 626-627], the Superior Court of Spokane County, (hereafter revision Court) erred in denying Nikki Wattles' motion for revision of that certain order of Commissioner Anderson, [CP 566-567], as the revision Court and the commissioner lacked jurisdiction and authority over the subject matter by failure to name the minor child as a party and by failure to appoint a guardian ad litem to protect the child's interests prior to adjudication of de facto parentage.

2. By way of the "Order On Motion For Revision", [CP 626-627], the revision Court also erred in ordering "the commissioner's ruling will remain in full force and effect without amendment and/or modification by this court" as the revision Court and the commissioner lacked jurisdiction and authority over the subject matter by failure to name the minor child as a party and by failure to appoint a guardian ad litem to protect the child's interests prior to adjudication of de facto parentage.

3. By way of the "Order on Motion For Revision", [CP 626-627], and "Order Re: Establishment of De Facto Parent Status", [CP 566-

567], the revision Court and commissioner also erred by finding “the respondent has satisfied all four of the factors set forth in In Re: Parentage of L.B.”

4. By way of an “Order On Motion For Revision”, [CP 626-627], and “Order Re: Establishment of De Facto Parent Status”, [CP 566-567], the revision Court and commissioner also erred by finding that “it would be detrimental to the child to sever the parent like relationship with the child.” [CP 566]

5. By way of an “Order On Motion For Revision”, [CP 626-627], and “Order Re: Establishment of De Facto Parent Status”, [CP 566-567], the revision Court and commissioner further erred by finding “the Respondent is the de facto parent.” [CP 566-567]

6. By way of an “Order On Motion For Revision”, [CP 626-627], and “Order Re: Establishment of De Facto Parent Status”, [CP 566-567], the revision Court and commissioner further erred by finding “the respondent is a de facto parent to the child and shall have residential time with the child . . .”. [CP 566]

7. By way of an “Order On Motion For Revision, [CP 626-627], and “Order Re: Establishment of De Facto Parent Status”, [CP 566-567], the revision Court and commissioner also erred by failure to find Ms. Worrell was an adult who had fully and completely undertaken a permanent, unequivocal, committed, and reasonable parental role in the child’s life as required by In Re: Parentage of L.B., 155 Wn. 2d 679, 708, 122 P. 3d 161 (2005), certiorari denied, 546 U.S. 1143, 126 S. Ct. 2021, 164 L. Ed 2d 806 (2006).

8. By way of an “Order On Motion For Revision”, [CP 626-627], and “Order Re: Establishment of De Facto Parent Status”, [CP 566-567], the commissioner and the revision Court further erred in the incorporated findings, [CP 566-567; 584-613], including, but not limited to the findings that: (1) the natural or legal parent consented to and fostered the parent-child relationship, [CP 604]; (2) that both women were in a committed long term relationship, [CP 605]; (3) that in the child’s mind he has two moms, [CP 605]; (4) that there is nothing in the case law that says how long they needed to reside in the same household, [CP 606]; (5) that the “petitioner” (sic) [Ms. Worrell] assumed obligations of parenthood without the expectation of financial compensation, [CP 606]; (6) that Ms. Worrell has been

a parent, [CP 607]; (7) that Ms. Worrell spent significant time with the child over the course of the last two and three and a half years, [CP 608]; (8) that a person not a parent would be unlikely to kiss a child not their own, [CP 608]; (9) that the "petitioner" (sic) [Ms. Worrell] has been in a parental role for a length of time sufficient to establish with the child a bonded, dependent relationship, parental in nature, [CP 609]; (10) that the child identifies with Ms. Worrell as momma Trista and has done so since he was born supported by relationships with other family members who used that moniker and by the pictures, [CP 609]; (11) that there is kind of a judicial judgment call that if there's a parent in this child's life and if [the court] cuts that parent out there will be a substantial psychological impact on [the] child, [CP 609]; (12) that there is no need to show actual harm or establish harm, or show harm actual harm to the child before that prong is met, [CP 610]; (13) that Trista Worrell is de facto parent to Alayden, [CP 610].

9. With respect to the "Order On Motion For Revision", [CP 626-627], and the "Order Re: Establishment of De Facto Parent Status", [CP 566-567], the revision Court and commissioner also erred by failure to name Alayden as a party to the proceedings and by failure

to appoint a guardian ad litem for Alayden before entertaining any motions regarding the determination of de facto parent status.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether The Commissioner And Revision Court Had Subject Matter Jurisdiction And/Or Authority To Determine The Status Of De Facto Parentage Without First Naming The Minor Child As A Party And Appointing A Guardian Ad Litem For The Minor Child? [Assignments of Error 1 through 9]
2. Whether The "Order On Motion For Revision" And The "Order Re: Establishment Of De Facto Parent Status" Are Void Ab Initio For The Failure To Name The Minor Child As A Party And Appoint A Guardian Ad Litem Before Any Decision? [Assignments of Error 1 through 9]
3. Whether The "Order On Motion For Revision" And The "Order Re: Establishment Of De Facto Parent Status" Are Based Upon Substantial Evidence? [Assignments of Error 2, 3, 4, 5, 6, 7, 8]
4. Whether The Revision Court And Commissioner Abused Discretion By Entry Of The "Order On Motion For Revision" And The "Order Re: Establishment Of De Facto Parenting Status"? [Assignments of Error 1 through 9].

II. STATEMENT OF THE CASE

This matter commenced with dual petitions to dissolve a registered domestic partnership, identified as 13-3-00737-0, [CP 1-14], and 13-3-00746-9, [CP 26-32]. The domestic partnership was registered 06/08/09. [CP 164-165] Both petitions address a minor child named Alayden.[CP4; 28-29]

Ms. Wattles' petition alleges she is Alayden's legal parent, [CP 4], and Ms. Worrell is neither the legal parent, [CP 4], nor a de facto parent. [CP 5]. Contrarily, Ms. Worrell's petition alleges she is Alayden's de facto parent, [CP 29], but agrees she is not Alayden's legal parent, [CP 28]. (Emphasis added)

Ms. Worrell asked the Court find she was Alayden's de facto parent, [CP 32], and the actions were subsequently consolidated. [CP 397-400]. At the time the actions were commenced, Alayden was 3 years old. He was born 07/04/09. [CP 4; 29; 543-545]

When the actions were commenced, and at all times prior to entry of the orders subject to this appeal, Alayden was not named a party in either action. [CP1-627]. Moreover, when both actions commenced, and at all times prior to entry of the orders subject to this appeal, a guardian ad litem was never requested, or appointed, to independently investigate or protect Alayden's best interests. [CP 1-627].

On 05/07/13, over Ms. Wattle's objection [CP 359; 595-602] the commissioner adjudicated Ms. Worrell's request to be named Alayden's de facto parent, [CP 170-172; 187; 566-567]. Although Alayden was not a party, nor were Alayden's interests represented

by counsel, nor had a guardian ad litem been appointed to protect Alayden's interest in the consolidated actions, the commissioner proceeded with adjudication based upon incomplete and disputed declarations, affidavits, records, pictures, [CP 556-558], and argument of counsel, [CP 604-610; CP 584-613]. The commissioner found, based upon those incomplete and disputed facts, Ms. Worrell was Alayden's de facto parent, [CP 566-567], and the commissioner entered an order to such effect. [CP 566-567]. However, Alayden was not a party to the consolidated action, and as Alayden's interests were not protected by appointment of a guardian ad litem, no independent investigation of the factors necessary to establish a de facto parent was conducted prior to adjudication.

As part of the commissioner's decision, the commissioner remarked "we do have some case law that provides guidance in this area and that is In Re The Matter of L.B., and I did print that out. I reviewed it again before I came out here." [CP 604] Similarly, the revision Court also subsequently remarked in the "Order On Motion For Revision", denying revision, the revision Court had "studied In Re: The Parentage of L.B. in significant detail." [CP

626]. The full citation to the referenced authority is In Re: The Parentage of L.B., 121 Wn. App. 460, 89 P. 3d 271 (2004), affirmed in part, reversed in part on other grounds, and remanded, In Re: Parentage of L.B., 155 Wn. 2d 679, 122 P. 3d 161 (2005), certiorari denied, 546 U.S. 1143, 126 S. Ct. 2021, 164 L. Ed. 2d 806 (2006).(i.e., L.B. One and L.B. Two)

As argued by former counsel below on behalf of Ms. Wattles, “this isn’t a family law case so much as it is a constitutional rights” [CP 597] case. “The partner needs to establish some overwhelming burden in order to intervene into a parent child relationship which we hold sacred.” [CP 597]

As Ms. Wattles’ former counsel below also noted, Ms. Worrell’s declarations were deficient and simply “value laden”, [CP 597], without discussing “the criteria”, [CP 598], and noting further, “we have sort of diametric issues and I would make at least one point this goes to the procedural issues and that is if you’ve got conflicting declarations, which we do, she has not met her burden of proof.” [CP 598]

Indeed, the commissioner herself acknowledged the fact the declarations were contradictory. In this regard, the commissioner

noted, "I've read through countless declarations from family members and friends and I know that there are discrepancies." [CP 605]. See, summary of counsel, [CP 559-565] declaration of Heidi Henrick, [CP 432-433]; declaration of Thomas Kynett, [CP 430-431]; declaration of Nina Wattles, [CP 428-429]; declaration of petitioner, [CP 422-427]; affidavit of petitioner, [CP 366-393]; declaration of Mary Wattles, [CP 362-365]; Ms. Wattles' verified petition, [CP 3-13] and Ms. Wattles' response to Ms. Worrell's petition. [CP 358-360].

Yet, as will be evident below, the first necessity in In Re: The Parentage of L.B., enunciated for the court to address, before addressing the factors to determine de facto parentage status, is the necessity of naming Alayden as a party and appointing a guardian ad litem to conduct an independent investigation and to protect his interests. Yet, this was not done.

Moving forward, further addressing conflicting evidence, the commissioner next found "the petitioner" (sic), (Ms. Worrell) [CP 606], and the child (Alayden) lived together in the same household, [CP 606], yet noted there was "nothing in the case law that says how long they needed to reside in the same household." [CP 606],

Yet, it was also noted conflicting testimony indicated “Ms. Wattles’ estimation was the residency was as short as 4 months.” [CP 606].

Next, on conflicting evidence, the commissioner, rather than drawing on the facts, “drew on likenesses”, [CP 607], and stated, “[s]o I don’t think you necessarily have to live in the same household”, [CP 607], even though, as the commissioner observed, the declarations also established Ms. Wattles and Ms. Worrell “both admit that they were no longer in a relationship after about 2010.” [CP 608].

Moreover, given the conflicting declarations, as to the fourth requisite element enunciated in L.B., supra., the commissioner clearly stated the evidence to be “a little bit more, I think, mushy.” [CP 609]. Yet, despite the “mushy” “evidence”, the commissioner found “petitioner” [sic] [Ms. Worrell] had been in a parental role for a length of time sufficient to establish with the child a bonded dependent relationship parental in nature”, [CP 609], even though this statement is also juxtaposed to the statement, “I don’t think that the length of time has to be for, you know, living together for 4 years in the same household.” [CP 609].

Moving forward, the commissioner next stated, “[a]nd while

there maybe hasn't been a showing of what that detriment could be for Aladen (sic) if Ms. Worrell isn't included in his life as a parent from here forward," [CP 609] (Emphasis added), the commissioner speculated, "I think it's just kind of a judicial judgment call that there's a parent in this child's life and if I cut that parent out that there will be a substantial psychological impact on this child. I don't think you have to show actual harm, [CP 609], . . . I would hate to think that we would have to actually have to establish harm, show harm, actual harm, to the child before that prong was met." [CP 610].

And, finally, judicial speculation aside, the commissioner's order [CP 566-567] and the commissioner's oral decision, [CP 584-613], failed to determine, as In Re: L.B. supra. requires, that Ms. Worrell was an adult who has "fully and completely undertaken a permanent, unequivocal, committed and responsible role in [Alayden's] life." In Re: L.B., 155 Wn. 2d at 708 (Emphasis added) (Bracketed identification added).

Thereafter, on 05/14/13, a motion for revision was filed. [CP 577-581]. The motion for revision noted the conflict regarding the declarations and records before the commissioner, [CP 579], as

well as the commissioner's legal errors, [CP 579], and the failure to rule on all factors. [CP 579-580].

Continuing, on revision, Ms. Wattles' former counsel below, once again pointed out the evidentiary problems, [RP 2], stating, "I would note and I do think that there are some evidentiary problems in that in order for [Ms. Worrell] . . . , her evidence has to be more than simply self serving . . . where it's controverted. So she makes allegations through it that I've done this or I've done that, and they are refuted. And more importantly they are refuted by multiple witnesses and parties," [RP 3], despite the lack of a guardian ad litem to protect Alayden's interests. Indeed, as further noted by Ms. Wattles' former counsel below, "the testimony was [also] controverted in terms of credibility." [RP 5] Moreover, the commissioner's speculation aside, [CP 609], as former counsel noted, "there's zero evidence of detriment. No evidence whatsoever was presented", [RP 7], (Emphasis added).

In fact, as pointed out in the declarations of Michael Wattles and Nina Wattles, Ms. Worrell's witnesses were "flat out lying" without "personal knowledge" and Michael's and Nina's own testimony contradicted Ms. Worrell's own "self serving", "value

laden”, allegations. [CP 428-429].

III. STANDARDS OF REVIEW

The issues raised herein are governed by the following standards of review. First, a Court’s oral decision, if included in the record, may be considered on appeal. Banuelos v. TSA Washington Inc., 134 Wn. App. 603, 616, 140 P. 3d 652 (2006). The oral decision is before this Court. [CP 584-612].

Second, if a case involves mixed questions of law and fact, such review is treated as a question of law, to be viewed in the light of the facts and evidence presented. State v. Horrace, 144 Wn. 2d 386, 392, 28 P. 3d 753 (2001). Here, mixed questions of law and fact exist concerning the adjudication of de facto parent status.

Third, pure legal errors, including the proper interpretation and application of a statute, court rule, or prior case law, are reviewed de novo. State v. Horace, supra. In this vein, whether a Court has subject matter jurisdiction or authority to rule, poses a question of law, and reviewed de novo. In Re: Marriage of Tostado, 137 Wn. App. 136, 144, 151 P. 3d 1060 (2007), In Re: Marriage of Thurston, 92 Wn. App. 494, 497, 963 P. 2d 947 (1998), review denied, 137 Wn. 2d 1023 (1999), In Re: Kastanas, 78 Wn. App.

193, 197, 896 P. 2d 726 (1995). On this point, whether all of the factors set forth in L.B., supra., were properly interpreted, applied, or ignored is also at issue.

Fourth, with respect to issues addressing the exercise of discretion, the standard of review is “abuse of discretion.” In this regard, a Court’s discretion is abused if discretion is based on untenable grounds or for untenable reasons, or otherwise fails to abide by the governing law. Deyoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P. 3d 587 (2000), review denied, 146 Wn. 2d 1016 (2002). Here, it is submitted, the decisions of the commissioner and the revision Court are based upon untenable grounds and untenable reasons and fail to abide by governing law.

Fifth, as this Division has remarked, a commissioner’s actions are subject to revision by a Superior Court judge, In Re: Marriage of Dodd, 120 Wn. App. 638, 643, 86 P.3d 801, 804 (2004), and “[i]n cases such as this, where evidence before the commissioner lacks live testimony, the revision Court’s review of the record is de novo. Id., citing, In Re: Marriage of Moody, 137 Wn. 2d 979, 993, 976 P. 2d 1240 (1999). On this point, if a party challenges the commissioner’s findings of facts and conclusions of

law, the revision Court reviews the findings for substantial evidence and the conclusions of law de novo, but the revision Court's scope is not limited to whether substantial evidence supports the commissioner's findings. Rather, the revision Court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner. *Id.* Moreover, "the [S]uperior [C]ourt's revision order supersedes the commissioner's ruling." *Id.* And, as this Division has instructed, when the revision Court does not enter written findings of fact and conclusions of law, a revision denial constitutes an adoption of the commissioner's decision and "[t]he commissioner's oral findings adopted by the revision [C]ourt are sufficient for review" as the Court's order adopts the commissioner's findings as its own. In Re: Marriage of Williams, 156 Wn. App. 22, 27-28, 232 P. 3d 573 (2010); In Re: Dependency of B.S.S., 56 Wn. App. 169, 782 P. 2d1100 (1989).

Lastly, as stated in In re Marriage of Major, 71 Wn. App. 531, 859 P. 2d 1262 (1993) a challenge to subject matter jurisdiction can be brought at any time. See also, Inland Foundry Co. Inc. v. Spokane County Air Pollution Control Authority, 98 Wn. App. 121,

989 P. 2d 102 (1999), review denied, 141 Wn. 2d 1008 (2000); see also, CR 12(h)(3); RAP 2.5(a)(1). This includes prior orders of a commissioner not designated in the appeal of the final judgment. Hwang v. McMahon, 103 Wn. App. 945, 15 P. 3d 172 (2000), review denied, 144 Wn. 2d 1001 (2001). See also, RAP 2.4. And, a litigant cannot use post filing facts to create subject matter jurisdiction/authority when it did not first exist. In re Marriage of Iernonimakis, 66 Wn. App. 83, 831 P. 2d 172 (1992), review denied, 120 Wn. 2d 1006, 838 P. 2d 1142 (1992).

IV. SUMMARY OF ARGUMENT

Pursuant to In Re: Parentage of L.B., 121 Wash. App. 460, 89 P. 3d 271 (2004), affirmed in part, reversed in part on other grounds, and remanded, In Re: Parentage of L.B., 155 Wn. 2d 679, 122 P. 3d 161 (2005), certiorari denied, 546 U.S. 1143, 126 S. Ct. 2021, 164 L. Ed 2d 806 (2006), the commissioner lacked jurisdiction and/or authority to determine de facto parentage without first naming Alayden as a party and appointing a guardian ad litem to protect Alayden's interests and separately address, on Alayden's behalf, all of the criteria for a de facto parenting adjudication as enunciated In Re: Parentage of L.B., 155 Wn. 2d 679, 708 (2005). The failure to name

Alayden as a party and appoint a guardian ad litem to protect Alayden's interests, prior to determining de facto parenting status was untenable, thus, an abuse of discretion. Further, the commissioner failed to address all criteria enunciated in In Re: L.B., supra., thus the commissioner's decision was, for this additional reason, untenable, and an abuse of discretion.

The revision Court's refusal to revise the commissioner's "Order Re: Establishment of De Facto Parent Status" was similarly infected with the same errors and, sadly, also untenable and an abuse of discretion. As such, the commissioner's "Order Re: Establishment Of De Facto Parent Status", [CP 566-567], and the Revision Court's "Order On Motion For Revision", [CP 626-627], denying revision, should be reversed and the matter remanded for further proceedings.

V. ARGUMENT

1. As A Matter Of Common Law, The Commissioner and Revision Court Lacked Jurisdiction/Authority To Adjudicate De Facto Parentage As Alayden Was Not A Party To The Litigation Nor Represented By A Guardian Ad Litem. [Issue Nos. 1-4]

The commissioner and revision Court lacked jurisdictional authority to make an adjudication of parentage under the common law as Alayden was not a named party to the action and a guardian

ad litem was not appointed to protect his interests in the adjudication Trista Worrell was his parent. See In Re: Parentage of L.B., 121 Wash. App. 460, 491, 89 P. 3d 271, 287 (2004), affirmed in part, reversed in part on other grounds, and remanded, In Re: Parentage of L.B., 155 Wn. 2d 679, 712 n. 29, 122 P. 3d 161, 179 (2005). As therein clearly stated by the Court of Appeals, and not disturbed by the Supreme Court,

...[w]e do point out, . . . the child . . . is a necessary party to the common law parentage action. . . our Supreme Court in State v. Santos, 104 Wn. 2d 142, 146-147, 702 P. 2d 1179 held that constitutional considerations require that children be parties to actions determining their parentage, and that the child must not be a party in name only. Accordingly, following our remand, we direct that the court promptly appoint a guardian ad litem . . . that the guardian be served with [the] petition, and that the guardian answer the petition on behalf of the child....
In Re: L.B. (I) at 491

In other words, L.B.(I) requires, before the commissioner could proceed with the adjudication of de facto parentage, Alayden had to be a named party, a guardian ad litem had to be appointed for Alayden, and service of a copy of Ms. Worrell's petition had to be effectuated upon Alayden's guardian ad litem. Because of these serial constitutional failures, revision should have been granted by the revision Court and the commissioner's order voided until proper representation of Alayden's interests.

Indeed, the Supreme Court in L.B. (II), upon which this case was based, and analyzed, [CP 604, 606], not only affirmed this direction from the Court of Appeals to the trial court, the Supreme Court made crystal clear, at page 687 n. 4, and page 712, n. 29, the child L.B. was, in fact, in those proceedings, represented by a Guardian ad litem in further proceedings before the trial court and the Supreme Court before any adjudication of de facto parentage, as previously directed by the Court of Appeals. And, as the Supreme Court further remarked, “[w]e strongly urge trial courts in this and similar cases to consider the interests of children . . . and where appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice. . . .”, L.B.(II) at 713 n. 29, (Emphasis added), such should be considered.

Suffice it to say, the commissioner’s failure to appoint a guardian ad litem for Alayden, and to do so prior to the adjudication of parentage, as mandated by L.B. and State v. Santos, supra., under the common law, was untenable and the commissioner lacked the jurisdictional authority to adjudicate Ms. Worell’s parentage as Alayden’s de facto parent. The revision Court’s denial

of revision was equally in error and both orders should be reversed.

Indeed, Alayden had an absolute right to participate in the parentage proceedings---from the beginning and on revision. For, as observed in State v. Santos, 105 Wn. 2d 142, 147, 702 P. 2d 1179, (1985),

...no individual should be bound by a judgment affecting his interests where he has not been made a party to the action. A child must not be a party in name only. It is fundamental that parties whose interests are at stake must have an opportunity to be heard at a meaningful time and in meaningful manner....

In sum, the failure of both the commissioner and the revision Court to make Alaydan a party and the failure to appoint a guardian ad litem divested the commissioner and revision Court of jurisdictional authority to adjudicate the issue of de facto parenting status, and renders the decisions below void. Hayward v. Hansen, 97 Wn. 2d 214, 647 P. 2d 1142 (1992); Miller v. Sybouts, 97 Wn. 2d 445, 645 P. 2d 1082 (1982); McDaniels v Carlson, 108 Wn. 2d 299, 312, 738 P. 2d 254 (1987). For, as this Division stated in Gonzales v. Cowen 76 Wn. App. 277, 282, 884 P. 2d 19 (1994), in similar analysis, “the requirement that a child be made a party to a paternity adjudication is jurisdictional.” Or, as reflected in In Re:

Burley, 33 Wn. App. 629, 658 P.2d 8 (1983):

. . . [i]n State v. Douty, supra., the court noted that where an action is brought under RCW 26.26 the absence of the child, an indispensable party, deprives the trial court of jurisdiction to enter a judgment. . . . The minor child must be made a party plaintiff and it is not sufficient for a mother to bring such an action on the child's behalf. Miller v. Sybouts, 97 Wn. 2d 445, 450, 645 P. 2d 1082 (1982). Moreover, the failure of a minor child to be represented by a guardian ad litem in a paternity suit under RCW 26.26. brings into question the jurisdiction of the trial court to resolve the issues before it. Miller v. Sybouts, supra., . . . Here, the minor child is an indispensable party to any action under RCW 26.26. and was required to be joined, represented by a guardian ad litem, . . . he was not represented by a guardian ad litem. Consequently the trial court was without jurisdiction to enter a judgment...

2. The Issue Of Subject Matter Jurisdiction Can Be Raised At Any Time. [Issue Nos. 1-4]

Subject matter jurisdiction is an elementary pre-requisite to the exercise of judicial authority. In re Leland, 115 Wn. App. 517, 526, 61 P. 3d 357 (2003), overruled on other grounds, In re PRP of Higgins, 152 Wn.2d 155, 95 P. 3d 330 (2004). Where a Court lacks subject matter jurisdictional authority, the proceeding is void. Id. A Court or a party may raise subject matter jurisdiction at any time in a legal proceeding. Id. CR 12(h)(3) See also this Division's opinions in First Union Management v. Slack, 36 Wn. App. 849, 855 n. 4,

679 P. 2d 936 (1984); In Re: Parentage of Ruff, 168 Wn. App. 109, 115-117, 275 P. 3d 1175 (2012). See also, RAP 2.5(a)(1).

Again, the lack of jurisdictional authority renders the challenged orders [CP 566-567]; [626-627] void from issuance (i.e., ab initio). As stated in State v. Brennan, 76 Wn. App. 347, 350, 884 P. 2d 1343 (1994), "it is well established that a party may challenge a court's subject matter jurisdiction at any time . . . (citations omitted) . . . Moreover a judgment rendered by a court lacking jurisdiction is void ab initio and is legally no judgment at all." (Emphasis added) Nor can a party consent to subject matter jurisdiction. Rust v. Western Washington State College, 11 Wn. App. 410, 419, 524 P. 2d 204 (1974).

Here, the commissioner's failure, and the failure of the revision Court, to name Alayden as a party, and appoint a guardian ad litem to protect Alayden's interests prior to adjudicating de facto parenting status, violated the requirements of the common law and well known, long standing, and recently re-emphasized, case law, that such action was a necessary jurisdictional criteria before entertaining a request to adjudicate de facto parentage. The commissioner, having reviewed In Re: L.B., [CP 604], should have

been aware of this jurisdictional requirement, as well as the revision Court. [CP 606]. The commissioner's failure and revision Court's failure to adhere to the instruction in L.B. and State v. Santos, supra., to name Alayden as a party and appoint a guardian ad litem to protect his interests before any adjudication of his status vis a vis parentage, renders both decisions untenable and thus, an abuse of discretion.

Indeed, analogously, although neither party below plead or argued either adult was a presumed parent, (Ms. Worrell specifically denied she was a presumed parent), [CP 4; 28], under such circumstances, RCW 26.26.530(1), like former RCW 26.26.090, requires a child be named a party if, like Alayden, the child is over the age of two at the time the action is commenced. And, although in this case, any presumption of paternity in a domestic partnership was explicitly denied, analogously, such a "presumption" is thereafter rebutted by the common law analysis established in L.B. On this point analogously, as stated at RCW 26.26.555 (2), "[i]f a minor . . . child is a party . . . the court shall appoint a guardian ad litem to represent the child, subject to RCW 74.20.130." Indeed, as our Supreme Court held in State v. Santos,

104 Wn.2d 146-147, 702 P. 2d 1179, constitutional considerations require children be parties to actions determining their parentage.

For, Santos states:

...procedural due process already requires that a child must be a party to a paternity action in recognition of the principle no individual should be bound by a judgment affecting his or her interests where he has not been made a party to the action. . . . procedural due process is not all that due process requires of a paternity hearing....

On this point, as also noted in Santos at 149, and as should be similar here, Alayden has "a compelling interest in the accuracy of such a determination." (i.e., determination of de facto parentage).

3. As A Matter Of Law, The Lack Of Subject Matter Jurisdiction Renders The Proceedings Of The Superior Court Void. [Issue Nos. 1-4]

As previously remarked, it is well established a judgment or other decision rendered by a Court lacking subject matter jurisdictional authority is "void ab initio" and is legally no judgment or decision at all. Wesley v. Schneckloth, 55 Wn. 2d 90, 93-94, 346 P. 2d 658 (1959); State v. Brennan, 76 Wn. App. 347, 349 n.4, 884 P. 2d 1343 (1994); Rust v. Western Wash. State College, 11 Wn. App. 410, 418, 523 P. 2d 204 (1987). Thus, the decisions on review, rendered by the commissioner and wrongfully affirmed by the

revision Court, are void and should be of no effect. Id.

4. As A Matter Of Law, The Superior Court Could Not Find De Facto Parentage As Ms. Worrell Failed To Prove All Required Factors. [Issues No 3 and 4]

As observed in In Re: Parentage of J.A.B., 146 Wn. App. 417, 423, 426, 191 P. 3d 71 (2008) establishment of de facto parentage requires analysis of “stringent criteria” and the “stringent criteria” are described as a “rigorous test”. Id. Absent the establishment of any necessary factor, the de facto parent test is not met. L.B. supra. And, one of those factors is “(4) the petitioner has been in a parental role for a length of time sufficient to have established with [Alayden] a bonded, dependent relationship parental in nature. See In re Parentage of L.B., 121 Wn. App. at 487”, Parentage of L.B., 155 Wn. 2d 679, 708. Equally, it is necessary to establish the “petitioner” is an adult who has “fully and completely undertaken a permanent, unequivocal, committed and responsible role in [Alayden’s] life.” C.E.W., 845 A. 2d at 1152.” Parentage of L.B., 155 Wn. 2d at 708. (Emphasis added)(Bracketed identification added).

As the commissioner's comments in the transcript make clear, all of the factors required by In Re: Parentage of L.B., 155 Wn. 2d

679, 122 P.3d 161 (2005) were not established. For as cannot be denied, the “finding” Ms. Worrell established a parental role, for a length of time sufficient to establish with Alayden a bonded, dependent relationship, parental in nature” [CP 609] was simply not supported, by even a generous reading. Contrary to the rigorous test required by In Re: Parentage of J.A.B., 146 Wn. App. 417, 423, 426, 191 P. 3d 71 (2008), the commissioner clearly admitted the evidence was “mushy”. [CP 609] Equally, nowhere in the commissioner’s order, [CP 566-567] or incorporated findings [CP 584-612], is there any discussion or finding regarding the C.E.W. requirement adopted by L.B. that “the de facto parent is an adult who has “fully and completely undertaken a permanent, unequivocal, committed and responsible role in the child’s life.” L.B., 155 Wn. 2d at 708.

Again, this latter required factor is not even mentioned in the commissioner’s order [CP 566-567] or in the commissioner’s oral ruling. [CP 604-610]. Yet, as this Court well knows, when a lower court makes no express finding regarding a material fact, it is considered the finding is adverse to the party in whose favor the finding would have been made, City of Spokane v. Department of

Labor and Industries, 34 Wn. App. 581, 589, 663 P. 2d 843 (1983), (i.e., Ms. Worrell). And, these ignored necessary factors are no less “mushy” and are equally absent in the revision Court’s “Order On Motion For Revision,” [CP 626-627], upholding the commissioner’s defective order.

In short, to the extent naming Alayden as a party, and appointing a guardian ad litem to investigate and protect his interests, prior to adjudicating “mushy” findings, yet imposing upon him a parental-like relationship without prior investigation of Alayden’s interests, much less protection of those interests, is a foundational error made clear by L.B., and should not be condoned. Indeed, had Alayden been named as a party and had a guardian ad litem been appointed to investigate and protect his interests, the adjudication below would not have been “mushy”. Rather, all required factors absent in both decisions, including the C.E.W. factor set forth at In Re: Parentage of L.B., 155 Wn. 2d 679, 708, would have been addressed in rigorously protecting Alayden’s interests.

Suffice it to say, tenable decisions are not based on “judicial judgment calls” [CP 609] in the absence of facts, nor are tenable

decisions founded upon “mushy” evidence. [CP 609]. “Mushy” evidence and “judicial judgment calls” are not substantial evidence, i.e., evidence of a sufficient quantity in the record to persuade a fair minded, rational person of the truth of the finding, State v. Hill, 123 Wn. 2d 641, 644, 870 P. 2d 313 (1994), nor are they the result of the rigorous tests stated in J.A.B., Id. And further, “judicial judgment calls” do not serve in place of required factual evidence. See, e.g., Hojem v. Kelly, 93 Wn. 2d 143, 145, 606 P. 2d 275 (1980),(a decision cannot be founded upon mere theory or speculation). The failure to even address, let alone consider, the C.E.W. factor announced in In Re: Parentage of L.B., 155 Wn. 2d at 708 is fatal, even to a “mushy” decision or an adjudication simply based upon a “judgment call” and as such, each of these failures constitutes an abuse of discretion.

VI. CONCLUSION

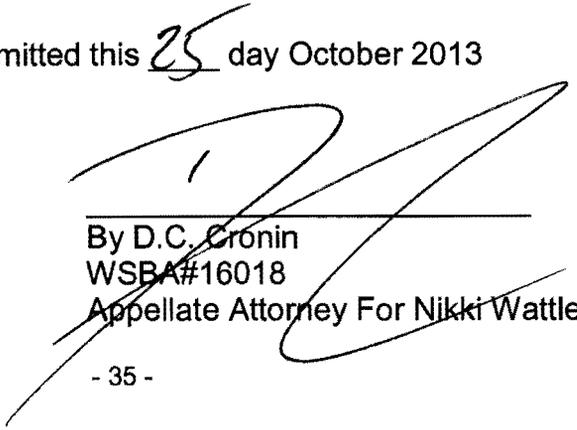
“Like the L.B. court, [this Court should] recognize that although this type of litigation tends to focus on the interests, rights, and responsibilities of the litigant adults, ‘the best interests of the child pervades our judicial consciousness in this field.’ 155 Wn. 2d at 694 n. 10. This standard requires Courts to ‘remain centrally

focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless.’ 155 Wn. 2d at 712 n. 29.”

Thus, the value to Alayden of two parents, rather than one, is an issue the trial Court may consider on remand, In Re: B.M.H., 165 Wn. App. 361, n.15, 267 P. 3d 499 (2011), recognizing, a child does not always need two parents, State v. D.R.M., 109 Wn. App. 182, 189, 34 P. 3d 887 (2001). But if such a question is to be properly adjudicated, Alayden must be a named party, represented by a guardian ad litem to protect his interests, L.B., supra., and Santos, supra., rather than the unrepresented and voiceless recipient of an adjudication based upon “mushy” evidence and “judgment calls” by others which fails to address all of the required factors set forth in L.B.

Ms. Wattles respectfully requests, for all of the reasons above, the challenged decisions of the Superior Court be reversed.

Respectfully submitted this 25 day October 2013


By D.C. Cronin
WSBA#16018
Appellate Attorney For Nikki Wattles

Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on this date declarant personally filed the original and one copy of the document entitled: BRIEF OF APPELLANT NIKKI WATTLES at:

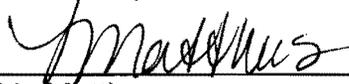
Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND

that on this date declarant delivered to GT Investigations a true and correct copy of: BRIEF OF APPELLANT NIKKI WATTLES and Report of Proceedings for personal/abode service upon Pro Se Respondent,

Trista Worrell
2820 N. Cherry, Apt. D-101
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DATED this 25th day of October, 2013



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