

**FILED**

**MAY 16 2017**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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No. 34589-1-III

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

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Melissa Jade Peterson, Appellant

v.

Sheila Kay Peterson, Respondent

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**Brief of Respondent**

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Appeal from Walla Walla County Superior Court  
The Honorable M. Scott Wolfram  
Superior Court Judge

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## I. INTRODUCTION

This appeal started out life as a motion for discretionary review that was later converted to an appeal by right. In the interim, the underlying matter before the Superior Court was transferred to the State of Oregon. Neither party is availing herself of the Washington Courts. Rather, the underlying matter was resolved by settlement on the eve of trial.

The Walla Walla County Superior Court has not entered an order in this matter since October 2016—the same month that Oregon asserted continuing legal jurisdiction, declared all of the Washington orders void, and ordered the parties to follow the existing Oregon parenting plan.

The crux of the Appellant's argument is that the Washington Court lacked subject matter jurisdiction and that this parenting plan dispute should have stayed in Oregon. The Respondent is no longer seeking relief in Washington Courts. There is no longer any dispute that Oregon has jurisdiction. Therefore, the primary underlying issues in this appeal are entirely moot.

To the extent that the Appellant seeks fees and costs, her motion should be denied or, in the alternative, presented to the

Oregon Court that is exercising jurisdiction in this matter. Should the Court entertain an award of fees based on financial need, then the Respondent should be awarded her fees based on the unequal financial resources of the parties.

## **II. ISSUES PRESENTED**

This appeal presents the following issues:

- 1.) Whether there is any longer a justiciable controversy when there is no longer a dispute as to jurisdiction?
- 2.) Whether the issue of recusal is moot when the subject Superior Court judge is no longer involved in the matter because another state is exercising exclusive jurisdiction?
- 3.) Whether attorney's fees and costs should be awarded based on the financial resources of the parties, or based on some other theory?

## **III. COUNTER STATEMENT OF MATERIAL FACTS**

The underlying facts relevant to this appeal are neither complex nor disputed. The parties were divorced in Oregon in

April 2014, and Sheila Peterson<sup>1</sup> was named the primary custodial parent of the parties' minor child. (CP 11-36) In November 2014, Sheila, who had moved to Washington before the dissolution was even filed in Oregon, filed a petition to modify the Oregon parenting plan. (CP 3-10)

Melissa Peterson, the Appellant here, did not raise the issue of subject matter jurisdiction. According to Melissa, the "case languished on the docket of the Walla Walla Superior Court." (Appellant's Brief at 4-5.) In fact, Melissa engaged substantively in the Washington action for eighteen (18) months, from the filing of the petition in November 2014, until she raised subject matter jurisdiction for the first time in May 2016. (CP 1051-1246)

During the eighteen (18) months that this matter was pending in Washington with no objection as to jurisdiction, Melissa sought to have restraints and restrictions placed upon her lifted, there were issues regarding psychological exams and evaluations, and a guardian ad litem was appointed. (See generally, CP 105-707)

After the issue of jurisdiction was raised, the Walla Walla Superior Court eventually had a phone conference with the

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<sup>1</sup> The parties are referred to by their first names for ease of reference. No disrespect is intended.

Umatilla County Circuit Court in September 2016. Following the same, the Walla Walla Superior Court entered an order transferring the case back to Oregon. (CP 1350). On October 3, 2016, the Umatilla Circuit Court entered an order retaining exclusive jurisdiction, holding the prior Washington orders were void, and ordering the parties to follow the Oregon parenting plan. (CP 1340-41)

No substantive order has since been entered in Washington. The underlying matter, the dispute over the terms of the parenting plan, was resolved by agreement on the eve of trial in Umatilla County.

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#### IV. LEGAL ARGUMENT

The issues raised in this appeal are either moot or should be addressed in the Circuit Court of Umatilla County, Oregon, where it is now undisputed that jurisdiction lies. As such, the Court should summarily dismiss this appeal.

A. **Appellant's claim of error based on denial of her motion to dismiss for lack of subject matter jurisdiction is moot and no longer presents a justiciable controversy.**

Melissa first argues that the Walla Walla Superior Court erred by not granting her motion to dismiss for lack of subject matter jurisdiction. (Appellant's Brief at 14) This would be a justiciable controversy if, in fact, Sheila continued to argue that Washington has proper subject matter jurisdiction under the Uniform Child Custody and Jurisdiction and Enforcement Act (UCCJEA). However, that is no longer her position. Following entry of the Umatilla Circuit Court order entered on October 3, 2016, the parties have jointly pursued this matter in Oregon.

A justiciable controversy is needed in order to maintain an action or appeal, and has been defined as:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Nw. Animal Rights Network v. State, 158 Wn. App. 237, 247, 242 P.3d 891 (2010).

Here, there is no justiciable controversy because there is no longer a dispute as to subject matter jurisdiction—Sheila concedes that Oregon has continuing jurisdiction under the UCCJEA. Moreover, even if the Washington Court were to issue a decision, it would fail the fourth element above, as it would not be final and conclusive.

Oregon has retained continuing, exclusive jurisdiction. The parties have Oregon legal counsel. There is no longer a dispute as to subject matter jurisdiction. As such, there is no justiciable controversy and this appeal should be dismissed.

**B. Appellant’s argument that the Walla Walla Superior Court erred by imposing restraints within the temporary parenting plan is moot.**

Melissa next argues in the alternative, stating: “If for some reason, this case is not dismissed in its entirety and all orders vacated pursuant to the UCCJEA, all of the protection orders and the temporary parenting plan should be vacated based on the court’s failure to follow the law.” (Appellant’s Brief at 19.) The argument is couched as an argument in the alternative.

Here, there is no basis to reach an argument in the alternative. As set forth above, Sheila no longer disputes that Oregon has jurisdiction. Moreover, the Washington Orders at issue have, in fact, already been voided. (CP 1340-41) Therefore, any argument as to the substance of the now voided orders are entirely moot.

A question is moot when it presents purely academic issues and the court can no longer provide effective relief. Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993); In re Marriage of Irwin, 64 Wn. App. 38, 59, 822 P.2d 797 (a case becomes moot if it is deprived of its practical significance). Moot cases include those in which no judgment rendered could be put into effect. Irwin, 64 Wn. App. at 59 (citing 5 Am.Jur.2d Appeal and Error sec. 762 (1962)).

When a case concerns only moot questions, the Court will ordinarily be required to dismiss it, unless it is a question of continuing public interest. Irwin, 64 Wn. App. at 59 (citing Zehring v. Bellevue, 103 Wn.2d 588, 590, P.2d 638 (1985)). In this case, the details of a specific parenting plan, there is no public interest. There is no reason for the Court to consider this argument in the alternative that is entirely moot. The appeal should be dismissed.

C. **The issue of recusal is moot and does not present a justiciable controversy.**

Melissa devotes nearly five (5) pages of her brief to attacking the Walla Walla County Superior Court judge who presided over this matter. In essence, Melissa's argument is that she presented such overwhelming evidence, that the judge must have been biased against her. (Appellant's Brief at 23-28)

Melissa's argument is that because the judge ruled against her and accepted the evidence presented from the opposing party over the evidence she presented, then the judge must have been biased. In fact, there is, and was, no evidence of any bias presented. If all courts who rule against a party are demonstrating bias, then every judge could be accused of demonstrating bias and asked to recuse him or herself.

This Court begins with the presumption that the trial judge performed her functions regularly and properly without bias or prejudice. Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 326 P.2d 459 (1967). However, as is the case with the arguments above, this issue is also moot.

The parties' family law matter is being resolved in Oregon, which has already voided all of the Washington orders. (CP 1340-41) Recognizing the apparent hypothetical posture of her argument, Melissa argues that it is possible she may have to enforce the Oregon orders

against Sheila in Washington, and would therefore need to register the Oregon order in Washington under RCW 26.27.441. (Appellant's Brief at 23-24)

In reality, if Melissa's hypothetical were to present itself in the future, it would require a new filing under RCW 26.27.441. At that point, there would be a new cause number in Walla Walla County Superior Court (assuming, of course, that Sheila continues to reside in Walla Walla County), and Melissa would be entitled to file an affidavit of prejudice pursuant to RCW 4.12.040 and RCW 4.12.050.

Accordingly, unless the Walla Walla County Superior Court Judge at issue resigns his position, moves to Umatilla County, Oregon, and is subsequently elected to be a Circuit Court Judge of Umatilla County, then this is entirely hypothetical and moot. Just as there is no real evidence of bias, there is also no real concern that the trial judge will ever consider the parties' matter again. As such, this issue is moot and the appeal should be dismissed.

**D. The Appellant's motion for attorney's fees should be denied.**

Melissa includes a motion for attorney's fees in her brief. (Appellant's brief at 28-30) However, it is somewhat unclear as to the

basis of her request. Melissa appears to seek fees on multiple different grounds.

To the extent that Melissa is seeking an award of fees based on disparity in financial resources (RCW 26.10.080) or under the UCCJEA (RCW 26.27.511(1)), it is Sheila's position that any such determination should be made in the Umatilla County Circuit Court of Oregon that has voided all Washington State orders and asserted continuing exclusive jurisdiction. (CP 1340-41) Indeed, Melissa notes in her own brief that Oregon has, like Washington, adopted the UCCJEA. (Appellant's Brief at 14-16) As such, any and all arguments concerning fees and costs should be addressed to the Umatilla County Circuit Court.

With regard to the UCCJEA, this Court has held that "fees are only proper when the party seeking to invoke jurisdiction has 'engaged in unjustifiable conduct.'" In re Ruff, 168 Wn. App. 109, 124, 275 P.3d 1175 (2012). In apparent recognition of that fact, Melissa then argues that Sheila has engaged in unjustifiable conduct. (Appellant's Brief at 29) She claims that Sheila engaged in forum shopping, delay, and refusal to "accept the law". (Id at 29-30)

In fact, there is no evidence of any misconduct. The lower court made no such finding. There is no evidence of forum shopping—it is undisputed that Sheila moved to Washington before the dissolution was

even filed in Oregon, and that she had resided with the minor child in Washington for more than six (6) months before the petition was filed. (See CP 3-10)

Melissa's claim of delay is rich. She argues that Sheila should be required to pay her attorney's fees because of the delay between May 2016 (when the jurisdictional issue was first raised by Melissa) and July 2016 (when Sheila pursued an action in Oregon to get a determination on the jurisdictional question). (Appellant's Brief at 29) Melissa does not, however, explain in any way the eighteen (18) month delay between the filing of this action in Washington in November 2014 and Melissa's motion in May 2016. Indeed, one is left to wonder whether a jurisdictional challenge would have been made if the Walla Walla County Superior Court's rulings had gone the other way. In reality, it was Melissa who sat on her hands and waited to see how things were going, including participating in the selection and appointment of a guardian ad litem, before raising the issue of jurisdiction.

While there is no challenge to the fact that subject matter jurisdiction may be raised at any time, the timing should not be used as a basis to seek fees and costs. Melissa has essentially invited this error by failing to raise the issue for 18 months and participating and engaging in the litigation in Washington during that time period. "The invited error

doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal.” Humbert/Birch Creek Const. v. Walla Walla Cty., 145 Wn. App. 185, 192, 185 P.3d 660 (2008). Here, Melissa should not be allowed to argue forum shopping and delay as a basis for fees, when she failed to raise the issue for 18 months and engaged in the litigation, including seeking appointment of a guardian ad litem.

The bottom line is that the attorney’s fees issue, like all other substantive issues, should be resolved not by this Court, but by the Umatilla County Circuit Court that is exercising continuing and exclusive jurisdiction over the parties’ matter. (CP 1340-41) Melissa’s motion for attorney’s fees should be denied.

E. **In the event that the Court considers an award of attorney’s fees and costs based on financial resources, then Sheila should be awarded her attorney’s fees and costs.**

If this Court is inclined to consider an award of attorney’s fees and costs based on the financial resources of the parties pursuant to RCW 26.10.080, then Sheila requests that she be awarded her fees and costs. Sheila will timely submit an affidavit of financial need pursuant to RAP 18.1.

## V. CONCLUSION

This appeal no longer presents a justiciable controversy. In light of the Umatilla County Circuit Court's continuing and exclusive jurisdiction over the parties' family law matter, all matters should be addressed to that Court. As such, this appeal should be dismissed in its entirety.

The claimed errors regarding jurisdiction and recusal are entirely moot and no longer at issue in Washington Courts. With regard to the claim for attorney's fees and costs, those issues should likewise be handled in the Oregon Courts. To the extent that this Court is inclined to consider fees and costs based on financial need, then Sheila should be awarded her attorney's fees and costs.

Respectfully submitted this 12<sup>th</sup> day of May, 2017 by:



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this **Brief of Respondent** to be delivered to Jill Mullins-Cannon, Attorney for Appellant, via U.S Postal Mail first class, postage prepaid, addressed as follows:

Jill Mullins-Cannon  
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A courtesy copy was also supplied by email to [jill@justiceandqualityls.com](mailto:jill@justiceandqualityls.com).

DATED this 15th day of May, 2017 in Walla Walla, Washington by:



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