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No. 35160-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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**IN RE THE CUSTODY OF  
R.S. AND E.S.,**  
Minor children.

JAMES AND REBECCA BANGARD,  
Appellants,

v.

BORIS AND OLGA SHVED,  
Respondents.

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Franklin County Superior Court Cause No. 16-3-50366-3

The Honorable Judge Jerri G. Potts

**Respondent's Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Respondent

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Boris and Olga Shved are the parents of R.S. and E.S. CP 3.

Appellants James and Rebecca Bangard served as the children's foster parents during a dependency proceeding. CP 2, 33, 36.

The children were returned to their parents in November of 2016. CP 37. The dependency court specifically found the Shveds to be fit parents. CP 37. While the dependency was pending, the Bangards filed a petition for nonparental custody or de facto parentage.<sup>1</sup> CP 1-8, 33.

The Bangards did not seek concurrent jurisdiction with the dependency court, and no order of concurrent jurisdiction was ever entered. CP 35-37, 40. Appellants also failed to personally appear at a mandatory status hearing, failed to abide by the court's scheduling order, and failed to provide proof of attendance at mandatory parenting seminars. CP 14, 40.

The Shveds were forced to hire an attorney and moved to dismiss the Bangards' petition while the dependency was still pending. CP 32-37.

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<sup>1</sup> The Bangards provided no facts to support their claim that the Shveds "consented to and fostered a parent like relationship between the Bangards [and the children]." CP 4. Instead, they asserted that the alleged consent was "[d]ue to the Shved's [sic] intentional and continuing conduct," which is apparently a reference to the facts underlying the dependency. CP 4.

Following a hearing on March 6, 2017, the trial court granted the Shveds' dismissal motion. RP 7-9; CP 40.

In addition to noting Appellants' failures to comply with court rules and orders, the judge found that the Bangards had not established the court's authority to hear the petition. This was because the dependency case was still pending and there was no order for concurrent jurisdiction. RP 7-9; CP 40. The court struck all of Appellants' pleadings. RP 7-9; CP 40.

The Bangards appealed. CP 43.

### **ARGUMENT**

**I. ABSENT AN ORDER GRANTING CONCURRENT JURISDICTION, THE SUPERIOR COURT LACKED AUTHORITY TO HEAR THE BANGARDS' PETITION.**

**A. The juvenile court has exclusive jurisdiction over all matters relating to dependent children.**

Juvenile courts have "exclusive original jurisdiction over all proceedings... [r]elating to children alleged or found to be dependent." RCW 13.04.030(1)(b). The statute reflects the legislature's "choice to 'distribute and assign a phase of the business of the superior court'" to the juvenile court. *In re Dependency of E.H.*, 158 Wn. App. 757, 765, 243 P.3d 160 (2010) (quoting *State v. Werner*, 129 Wn.2d 485, 492-493, 918 P.2d 916 (1996) (internal quotation marks and citation omitted)).

Before another division of the superior court may hear a custody matter “[r]elating to children alleged or found to be dependent,” the juvenile court must enter an order granting concurrent jurisdiction. RCW 13.04.030(1)(b); *see also* RCW 13.34.155(2)(g); *E.H.*, 158 Wn. App. at 765.<sup>2</sup>

The rationale for assigning exclusive jurisdiction to the juvenile court and requiring an order for concurrent jurisdiction is “to prevent multiple courts from entering inconsistent orders.” *In re Custody of M.S.*, 194 Wn. App. 1033 (2016) (unpublished), *review dismissed sub nom. Criswell v. Div. of Children & Family Servs.*, 187 Wn.2d 1010, 388 P.3d 760 (2017). Thus, in *E.H.*, for example, the dependency court “ordered a permanency plan of nonparental custody for EH and granted concurrent jurisdiction to the family court to hear the nonparental custody action.” *E.H.*, 158 Wn. App. at 760.<sup>3</sup> The Court of Appeals upheld the grant of concurrent jurisdiction. *Id.*, at 760, 765-767.<sup>4</sup>

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<sup>2</sup> Furthermore, in any nonparental custody proceeding, the superior court has a duty to first “determine if the child is the subject of a pending dependency action.” RCW 26.10.030(1). The need for an order granting concurrent jurisdiction is also reflected in the local juvenile court rules. *See* Benton and Franklin County LJuCr 3.10. There is no local court rule granting the family court general concurrent jurisdiction over proceedings involving children alleged or found to be dependent.

<sup>3</sup> The order in that case was later revised to grant the family court jurisdiction to hear and resolve “the dependency-related permanency planning issue of whether to return EH to one of the parents’ homes.” *Id.*

<sup>4</sup> Curiously, Appellants argue that a grant of concurrent jurisdiction, once requested, is mandatory, citing *E.H.* *See* Appellants’ Opening Brief, p. 7. This is incorrect: nothing in *E.H.*

(Continued)

In the absence of an order granting concurrent jurisdiction, the family court may not hear a nonparental custody petition relating to dependent children. *See M.S.*, 194 Wn. App. 1033 at \*3 (2016) (unpublished). In *M.S.*, the Court of Appeals found that the superior court “did not have authority to hear [a] nonparental custody petition” because the record contained no evidence “that the dependency court ever granted the superior court concurrent jurisdiction.” *Id.* The court affirmed dismissal of the petition. *Id.*, at \*1, 3.

This case presents the circumstances at issue in *M.S.* The trial court lacked authority to hear the Bangards’ petition, because they failed to obtain an order from the dependency court granting concurrent jurisdiction. *Id.*

B. The Bangards did not seek permission from the juvenile court to pursue custody of these children, who were “alleged or found to be dependent.”

Here, as in *M.S.*, the record does not contain an order granting concurrent jurisdiction. CP 40. Given the pending dependency proceeding and the lack of such an order, the Bangards failed to establish the trial court’s authority to hear their petition. CP 40. The trial court correctly dismissed the petition. CP 40; *Id.*

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suggests that a dependency court must grant concurrent jurisdiction. *E.H.*, 158 Wn. App. at 760.

Appellants' citation to Benton and Franklin County Local Court Rule 94.04W does not support their argument. See Appellant's Opening Brief, p. 7. That rule is captioned "Domestic Relations," and provides "[a]ll cases filed under Title 26 RCW shall be transferred to the Family Court for adjudication." LCR 94.04W(a)(1).

The rule does no more than assign Title 26 matters (including divorces, nonparental custody cases, and paternity issues) to family court. It does not purport to authorize concurrent jurisdiction over cases "[r]elating to children alleged or found to be dependent." RCW 13.04.030(1)(b). Nor does it divest the juvenile court of original exclusive jurisdiction in such cases.<sup>5</sup>

The absence of an order granting concurrent jurisdiction is fatal to the Bangards' petition. *Id.* The trial court properly exercised its discretion in dismissing their petition for nonparental custody or de facto parentage. *Id.*

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<sup>5</sup> Accordingly, it is not a rule granting the family court concurrent original jurisdiction. *See* RCW 13.04.030(2). Under that provision, "[t]he family court shall have concurrent original jurisdiction with the juvenile court over all proceedings under this section if the superior court judges of a county authorize concurrent jurisdiction as provided in RCW 26.12.010." RCW 13.04.030(2).

**II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DISMISSING THE PETITION.**

Apart from the jurisdictional issue, the trial court did not specify the legal basis for its order. CR 40; RP 7-8. However, “[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a). Here, the dismissal order is justified under both CR 41 (b) and the court’s inherent authority.

A. The trial court properly dismissed the action under CR 41(b).

CR 41(b) is captioned “Involuntary Dismissal; Effect.” It provides (in relevant part) as follows: “For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.” CR 41(b).<sup>6</sup>

Appellate courts review dismissals under CR 41(b) for an abuse of discretion. *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 636, 201 P.3d 346 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

A party’s willful refusal to comply with court rules or a court order justifies dismissal under CR 41(b) when it prejudices the other party and

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<sup>6</sup> CR 41(b)(1) also provides for mandatory dismissal for want of prosecution where the plaintiff fails to timely note a case for trial.

lesser sanctions would not suffice. *Id.*, at 638. Willfulness is established by disregard for a rule or order “without reasonable excuse or justification.” *Id.*

Here, the trial court found that the Bangards failed to comply with the court’s Domestic Case Scheduling Order and with several local court rules. RP 7-8; CP 14, 40. The Bangards offered no reasonable excuse or justification; accordingly, their failure to comply was willful. *Id.*

Specifically, the Bangards failed to personally appear for the status conference as required by the court’s scheduling order and LCR 94.04W(h).<sup>7</sup> RP 7-8; CP 14, 40. They also failed to show proof of attendance at a parenting seminar, as required by LCR 94.05W and the court’s scheduling order. RP 7-8; CP 14, 40. They further failed to establish adequate cause in a timely manner, as required by the court’s scheduling order. RP 7-8; CP 14, 40.

Without any excuse or justification, the Bangards failed to comply with the local court rules and the court’s scheduling order. RP 7-8; CP 14, 40. This failure was willful. *Id.* The trial court acted well within its discretion in dismissing the petition. *Id.*

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<sup>7</sup> Although the provision refers to dissolution actions, the rule applies to all proceedings under Title 26 RCW. See LCR 94.04W(a)(1).

B. The trial court properly dismissed the petition under its inherent authority to promote the effective administration of justice.

Superior Court judges have broad discretion in fashioning remedies to promote the effective administration of justice. *State v. Wadsworth*, 139 Wn.2d 724, 740, 991 P.2d 80 (2000). A court may resort to its inherent power “to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice.” *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, 280 P.3d 1133 (2012) (citing *Wadsworth*).

This inherent power stems from the general constitutional grant of judicial power. Wash. Const. art. IV, §1 *et seq.* To invoke its inherent power, the court must find some conduct that is “equivalent to bad faith.” *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012) (citing *State v. S.H.*, 102 Wn. App. 468, 474, 8 P.3d 1058 (2000)). The *S.H.* court indicated that “[a] party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation.” *S.H.*, 102 Wn. App. at 475.

A court’s inherent power includes the authority to impose appropriate sanctions. *S.H.*, 102 Wn. App. at 473. Where litigation is delayed, the court may take action necessary “to achieve the orderly and expeditious disposition of cases.” *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). A court may

also exercise its inherent power to discourage future abuses. *S.H.*, 102 Wn. App. at 473.

Here, the Bangards delayed or disrupted the litigation by ignoring the court's scheduling order and the local court rules. RP 7-8; CP 14, 40. This conduct is "equivalent to bad faith," and justifies use of the court's inherent power. *Gassman*, 175 Wn.2d at 211. This is especially true because their petition involved the custody of minor children. Such cases must be resolved expeditiously so that permanency is not delayed.

The trial court acted within its discretion in dismissing the Bangards' petition. *Id.*

### **CONCLUSION**

For the foregoing reasons, the Court of Appeals should affirm the trial court's dismissal of the Appellant's petition.

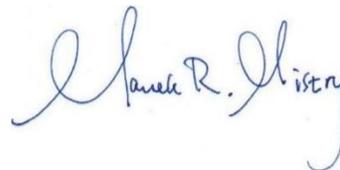
Respectfully submitted on December 1, 2017,

### **BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Respondent



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Respondent

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Opening Brief, postage prepaid, to:

Boris and Olga Shved (address confidential)

I delivered an electronic version of the brief, using the Court's filing portal, to:

James and Rebecca Bangard  
c/o Attorney Ken Kato, khkato@comcast.net

and to:

caitlino@atg.wa.gov and rsdkenfax@atg.wa.gov

I filed the Respondent's Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 1, 2017.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Respondent

# BACKLUND & MISTRY

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## Transmittal Information

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