
**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION THREE**

JILL FLECK, *Appellant*

v.

**DEPARTMENT OF SOCIAL & HEALTH SERVICES
CHARLES FLECK, *Respondents***

**ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Department of Social Health Services (hereinafter referred to as “the State”) has done little to support its contention that the ALJ didn’t really rule that Superior Court had exclusive jurisdiction to determine child support, and offered no evidence or meaningful argument as to why Jill Fleck should have been considered to have “wrongfully deprived” Charles of custody. The State argument was supported by findings of fact that had no basis in this record, and legal arguments that were not supported by authority.

I. ERRORS IN THE STATE’S FINDINGS OF FACT

1. On page 4 of its brief, the State mistakenly asserted that “the court had sanctioned Jill \$25 per day for each day she failed to return Bryson.” The order only indicated that “Jill shall be sanctioned”, but there is no evidence she actually was. There is no indication that the court intended to fine for conduct prior to the order, and according to Charles’ version, he had physical control of Bryson after that. Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. 'The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time.' *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

2. The state claimed a finding that “Bryson was returned to Charles” on page 6 of its brief. While there is evidence that Bryson was ordered returned to Charles the cited references to the record do not support its conclusion that he actually was. The ALJ never made such a finding Ex. 48-49, Findings 4.18-4.19.

3. Also, on page 6, the State claimed that Bryson “ran away again.” The ALJ never made such a finding. Ex. 48-49, Findings 4.18-4.19.

4. The State then claims that Bryson and Charles “reached an agreement.” The State’s citation to the court order Ex 125-7 does not support this. Bryson and his mother disputed this, (Ex. 29, FF 4.18) (Tr. III:21-23) (Tr. III:27-29) (Ex. 29, FF 4.19) and the ALJ never entered this as a finding. Ex. 48-49, Findings 4.18-4.19

5. On lines 8-12 of page 6 the State portrays certain allegations of Charles as fact such as Bryson staying or visiting with him, but both Jill (Tr. III:21-23) and Bryson (Tr. III:27-29), and the ALJ never adopted those allegations as findings. Ex. 48-49, Findings 4.18-4.19.

6. On the bottom of page 6, the State claims that Charles submitted three sets of documents; school records, social security records, and an insurance card, all of which purportedly lists Charles address for the address of Bryson. The school records did not show an address on the redacted exhibits which were allowed into evidence, and there is no testimony in the cited transcript that asserts the address was on them. The State refers to an insurance card, but the cited testimony only refers to Exhibit 129. There is no Exhibit 129 in the redacted exhibits. While the record does show some social security records, none shows Bryson’s address, or if it did, it has been redacted. There is no testimony showing that Charles submitted these records.

II. REPLY ARGUMENT

SUMMARY OF THE ARGUMENT

As argued in the opening brief, the central issue in this appeal is the Agency's mistaken conclusion of law 5.5 that a tribunal that has issued a child support order has and shall exercise continuing, *exclusive* jurisdiction to modify its child support order. It also ruled that has made a child custody determination has *exclusive*, continuing jurisdiction over the determination and any subsequent modifications to custody. (*emphasis added*).

In spite of this clear conclusion of law, the State argues that the ALJ didn't really mean what it had ruled and that the judge really meant something else. It could not explain the judges clear finding that only the Spokane Superior Court in Case #08-50-00087-2 had authority to change the child support order.

The State, like the ALJ then only gave lip service to WAC 388-14A-3370(3)(a), never once requiring the respondent to put on evidence of Bryson being "taken" or "enticed". It could not explain the absence of evidence that Charles attempted to have Bryson "returned", when Charles claimed all the while that Bryson never left to be with his mother during the time in question.

A. The Superior Court did not have exclusive jurisdiction to issue a support obligation.

The State ignores the department's reliance on RCW 26.21A.120 and RCW 26.27.211. and instead attempts to argue support for the department order by relying entirely on RCW 74.20A.055(1). The State points to a second division case *In re Marriage of Aldrich* 72 Wn.App. 132, where the court ruled that the "department must adhere to a court order where one exists."

As conceded by the State, *Aldrich id.* has been qualified in division III in the case *Brown v. State, Dep't of Social and Health Services*, 151 P.3d 235, 136 Wash.App. 895

(Wash.App.Div.3 01/30/2007). In that case, the court ruled that a parent could have an administrative child support issued against them even if they had a custody order, unless the order specifically had a provision that they could not be ordered to pay child support even if there was a change in circumstances such as a change in physical custody. In *Aldrich, supra* there was such a provision, but in *Brown, supra* there wasn't. The State offered nothing to controvert the testimony of McPerson's who claimed that there was no order relieving Charles' obligation to provide child support. I VRP 22, l. 19-23).

The state concluded that the ALJ considered the defense of wrongful deprivation and therefore never stated that it had exclusive jurisdiction over child support. However, the ALJ could never explain how the absence of any evidence involving taking or enticement could lead to a finding of wrongful deprivation, nor could the State explain the ALJ's ruling that child support remained under the docket of Spokane Superior court case #08-50-0087-2, which directly contradicted the ruling of *Brown supra*.

B. The father has not established a valid defense under WAC 388-14A-3370(3)(a).

In her opening brief Jill argued that wrongful deprivation had not been established under WAC 388-14A-3370(3). According to that regulation:

- (3) An NCP may be excused from providing support for a dependent child if the NCP is the legal custodian of the child and has been wrongfully deprived of physical custody of the child. The NCP may be excused only for any period during which the NCP was wrongfully deprived of custody. The NCP must establish that:
 - (a) A court of competent jurisdiction of any state, tribe or country has entered an order giving legal and physical custody of the child to the NCP;
 - (b) The custody order has not been modified, superseded, or dismissed;
 - (c) The child was taken or enticed from the NCP's physical custody and the NCP has not subsequently assented to deprivation. Proof of enticement requires more than a showing that the child is allowed to live without certain restrictions the NCP would impose; and

(d) Within a reasonable time after deprivation, the NCP exerted and continues to exert reasonable efforts to regain physical custody of the child.

As argued in her opening brief, sections (c) and (d) have not been established, which would require Charles to establish (c) he must show that he was “taken” or “enticed”.

According to Merriam Webster Dictionary “taken” is a past participle of “take” which is defined as .to get into one's hands or into one's possession, power, or control: such as to seize or capture physically. “Enticed” is a past participle of “entice” which is to attract artfully or adroitly or by arousing hope or desire. The RCW clearly indicates that enticement requires more than showing is allowed to live without certain restrictions the NCP would impose.

Charles has not produced one word of evidence that Bryson was “taken” or “enticed”. According to Charles’ own testimony Bryson “ran away” to “live with his mom.”(Tr. I:25, l. 14, 15). According to Hearing Exhibit Page 85 (Ex 130) Bryson was in tears because he was “getting booted from his home”

Even if Charles argues that allowing Bryson to live in her house against Charles’ wishes was done in “bad faith”, that does not establish being “taken” or “enticed”. At most, it means that Bryson was living under conditions which Charles did not approve, which under the rule is not enough to show enticement.

The State ignores all of this and instead makes an argument on page 14 of its brief that states “While it has never been suggested that Jill physically took Bryson against his will, years of interference can lead to a similar result.” The state offers no authority as to how a court can make such an extrapolation of past events to establish present conduct. In Washington, courts may assume that where no authority is cited, counsel has found none after search. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

The ninth circuit has made similar rulings: See *Acosta Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); see also *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Meehan v. County of L.A.*, 856 F.2d 102, 105 n.1 (9th Cir. 1988).

The States argument appears to contradict ER 404 which states in relevant part: (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

The State concedes on page 15 of its brief that “There is no evidence Jill physically took or enticed Brayson, who in 2017 and 2018 was nearly an adult.”

As for section (d), the father explained that he did not have to make efforts to regain physical custody, because Bryson was living with him. (Tr. I: 27, l.5-6;) and never returned to his mother’s house. (Tr. I:37, l. 9-10.). He later changed his story and conceded that Bryson was not living with him, he was living with some friends. (Tr. III:18, 21-24; 19: 1-16.). This allegation was denied by both Jill (Tr. III:21; 21, l. 12- 25) and Bryson (Tr. III:27, l. 25 to 28, l 15) with direct admissible testimony.

Charles’ only evidence that Bryson was living with friends was through hearsay testimony of what his son told him. (Tr. 19: 23-25 to 20:21).

The Administrative agency never made any finding of fact as to where Bryson was actually living in order to evaluate whether Charles efforts to regain custody were reasonable. It could not do so with the evidence in this record without making a finding that the use of hearsay would not abridge the rights to cross examine or rebut the evidence and would say so in the order:

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent

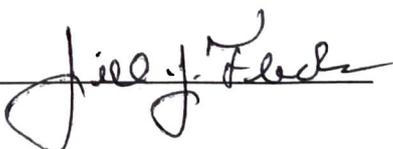
persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order. RCW 34.05.461.

To determine whether Charles explanation and response was reasonable, the ALJ had to do one of two things. If he believed that Bryson actually was living at a friends house, the Judge would have had to explain why he could make a finding based on such hearsay, especially since the hearsay testimony was not only controverted by both Jill and Bryson, but Charles own prior testimony where he claimed Bryson was living with Charles. In Washington, hearsay evidence must have a circumstantial guarantee of trustworthiness, *Chmela v. Department of Motor Vehicles* 88 Wn.2d 385, 393, 561 P.2d 1085 (1977), so based on this record the court could not have made a finding that Bryson was living with friends. The State offered nothing to contradict the findings of *Chmela*, which laid out what must be done in order to establish a circumstantial guarantee of trustworthiness. The self-contradicting testimony of Charles, who kept changing his story as to where Bryson actually lived, was not enough to meet this standard.

III. CONCLUSION

For the reasons given in this brief the decision of the ALJ and the Spokane County Superior Court should be reversed.

Dated this 19th day of August, 2020.

/s/ Jill Fleck
Jill Fleck 

JILL FLECK - FILING PRO SE

August 19, 2020 - 4:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36992-7
Appellate Court Case Title: Jill J. Fleck v. Charles Fleck & Dept. of Social & Health Services
Superior Court Case Number: 19-2-00280-2

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