

FILED
Court of Appeals
Division III
State of Washington
5/19/2020 8:00 AM

No. 369927

**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 OPENING BRIEF

Jill Fleck
pro se
12191 East Forrest Ave.
Spokane, WA., 99216
Tele: 509-714-2595

Table of Contents

	PAGE
TABLE OF AUTHORITIES	1
I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW	2
A. Assignments of error	2
B. Issues relating to the Assignment of error.	3
II. STATEMENT OF THE CASE	3
III. STANDARD OF REVIEW	6
IV. SUMMARY OF THE ARGUMENT	7
A. The Superior Court did not have exclusive jurisdiction to issue a support obligation.	7
B. The father has not established a valid defense under WAC 388-14A-3370(3)(a).	9
V. CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Becker v. Employment Security</i> , 63 Wn. App. 673, 676, 821 P.2d 81 (1991).....	6
<i>Franklin Cty. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 325, 646 P.2d 113 (1982)	6
<i>G-P Gypsum Corp. v. Dep't of Revenue</i> , 169 Wn.2d 304, 309, 237 P.3d 256 (2010).....	8
<i>Lacey Nursing Ctr. v. Dep't of Revenue</i> , 128 Wn.2d 40, 53, 905 P.2d 338 (1995).....	8
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).....	8
<i>Olmstead v. Dep't of Health</i> , 61 Wn. App. 888, 893, 812 P.2d 527 (1991).....	7
<i>Porter v. Dep't. of Retirement Sys.</i> 100 Wn. App. 898, 903, (2000).....	6
<i>State v. Card</i> , 48 Wn. App. 781, 784 (1987)	7
<i>TracFone Wireless, Inc. v. Dep't of Revenue</i> , 170 Wn.2d 273, 281, 242 P.3d 810 (2010)	8

Statutes

RCW 21.21A.120.....	9
RCW 26.18	2, 8
RCW 26.18.030	3
RCW 26.18.035	8
RCW 26.21	2, 3
RCW 26.21A.....	8
RCW 26.21A.120.....	2, 7, 8
RCW 26.27.211	7
RCW 34.05.570(1)(a)	6
RCW 34.05.570(3).....	6, 7
RCW 74.20A.010.....	9
RCW 74.20A.055.....	3, 8, 9
RCW 74.20A.055(1).....	3, 9

Other Authorities

Merriam Webster Dictionary	10
----------------------------------	----

Rules

RAP 2.5(a)	7
------------------	---

Regulations

WAC 388-14A-1020.....	7, 8
WAC 388-14A-3370(3).....	9
WAC 388-14A-3370(3)(a).....	3, 7, 9

I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW

A. Assignments of error

1. The Office of Administrative Hearings erred in concluding that Superior Court had exclusive jurisdiction in determining child support in this case.

2. The Office of Administrative Hearings erred in failing to find that Charles Fleck (Charles) made no effort to enforce the December 1, 2016 order.

3. The Office of Administrative Hearings erred in failing to conclude the physical residence of Bryson was with his mother during the relevant time period.

4. The Office of Administrative Hearings erred in concluding in finding 5.5 because it applied the Uniform Child Custody Act RCW 26.21 instead of RCW 26.18 which deals with enforcement of child support. It also misquoted RCW 26.21A.120 by leaving out the phrase “if the order is the controlling order” and made no effort determine what “controlling order” met.

5. The Office of Administrative Hearings erred in concluding that the court had “sanctioned” Jill, in Finding 5.7.

6. The Office of Administrative hearings erred because it made no finding that Jill had “taken” or “enticed” her son to leave her father nor was there any substantive evidence supporting such a conclusion. As a result, it erred in finding 5.8 when it concluded there was a wrongful deprivation of custody by Jill.

7. Thus, there is no basis for its order in Finding 6.1 that Jill had “wrongfully deprived” Charles of physical custody, or that the superior court retained exclusive jurisdiction over child support. Therefore, the Administrative Law Judge and the Superior Court erred in failing to award child support.

8. The Superior Court erred in not reversing the Office of Administrative Hearings for the aforementioned reasons.

B. Issues relating to the Assignment of error.

1. Does the Superior Court have exclusive jurisdiction of Child Support enforcement, when RCW 26.18.030 states that enforcement under that chapter is in “in addition to, and not in substitution for, any other remedies provided by law?”

2. Does the Uniform Child Custody Act (RCW 26.21) have any relevance at all, when it is designed to settle jurisdictional disputes between Washington and other states, not a jurisdictional question between a superior court and a state administrative agency?

3. When an action is brought under RCW 74.20A.055(1), is physical custody controlling rather than legal custody?

4. If so, did the ALJ make an error in not determining physical custody?

5. When an action is brought under RCW 74.20A.055 is legal custody even relevant?

6. Was there any substantial evidence that demonstrated that Jill had “taken” or “enticed” Bryson to leave his father?

7. Did Jill “wrongfully deprive” Charles of custody as that term is defined in WAC 388-14A-3370(3)(a)?

8. Did the ALJ err in failing to award child support?

9. Did the trial court err in not reversing the denial of child support?

II. STATEMENT OF THE CASE

1. The Parties and Child: Charles Fleck is the father and Jill Fleck is the mother of Bryson Fleck (“Bryson”). Bryson was born on January 18, 2000, and is 18 years old.

Charles and Jill Fleck have one other child in common, Abbey, born February 21, 2003, and is 15 years old. Abbey is not a subject of the NFFE and was not addressed in this case. (Ex. 25, FF 4.1).

2. Starting Date of Child Support Obligation: On July 18, 2017, Jill Fleck applied to DCS for non-assistance child support services. (Ex. 25 FF 4.2).

3. Service of NFFR: Charles Fleck was served with the Notice and Finding of Financial Responsibility (NFFR) on December 18, 2017. (Ex. 25 FF 4.3).

4. Terms of the NFFR: In the NFFR, DCS claims that Charles Fleck owes a monthly support obligation of \$392.00 for Bryson beginning January 1, 2018. DCS claims the support obligation should be based upon a monthly net income of \$3,236.00 for Charles Fleck and a monthly net income of \$892.00 for Jill Fleck. DCS also claims that Charles Fleck owes back child support in the amount of \$2,352.00 for the period of July 1, 2017 through December 31, 2017.

The Department noted that because Jill Fleck's application for non-assistance services was received on July 18, 2017, the start date of July 1, 2017, for the back child support is incorrect. The correct start date should be July 18, 2017. (Ex. 25 FF 4.4).

5. Request for Hearing: Charles Fleck requested a hearing on or about December 18, 2017. (Ex 25-6 FF 4.7)

6. In a prior court order entered on November 24, 2008, Charles was obligated to pay child support to Jill for Bryson. On or about May 28, 2010, the Department sent a full collection services closure letter to the parties informing them the Department was closing full enforcement services for Jill's case. A satisfaction of judgment in Spokane county was filed on March 4, 2011. (Ex. 51-52, 54).

7. On June 4, 2010, the Spokane County Superior Court entered an amended parenting plan designating Charles as the primary custodian. (Ex. 55-70).

8. On January 11, 2011, the Spokane County Superior Court entered an order declining to award Jill expanded visitation and ruling that future visitations will continue to be supervised. (Ex. 53)

9. On August 24th 2011, the Superior court entered an order of child support. Jill was obligated to pay \$40.00 per month in child support for the children Bryson and Abbey because she was paying \$60.00 per month toward visitation costs. (Ex. 34-50.)

10. On December 1, 2016 the Spokane County superior Court entered an order indicating that Jill had exercised bad faith in having unsupervised visitation with the children. It ordered her to return Bryson to the father. Although the order threatened sanctions, there was never any evidence submitted that indicated sanctions were actually awarded. (Ex. 28, 29).

11. Meanwhile, Charles and Bryson filed Youth at Risk petitions against each other. On January 20th, 2017 the court entered orders setting conditions pending fact finding. The order stated Charles was to begin family and individual counseling and that Bryson would continue to reside with Charles. There was no evidence submitted into the record that indicated that this order was complied with. (Ex. 30-31)

12. On March 29th, 2017, the court dismissed the at risk petitions. While Charles testified that the purpose of the dismissal was that he and Bryson agreed to live with each other (Tr. I: 37, l. 5-14), he provided no direct testimony that Bryson actually returned home other than a conclusory statement that he did. (Tr. I:37, l.14). He later testified that after the at risk petitions were dismissed, he and Bryson “went back and forth” and “came to an agreement he would stay at his friends’ house.” (Tr. III:30, l. 18-25”). He also testified that this went on for the months of

“July, August, September, October, November, December, and January” and he “came and went” until he was 18. (Tr. III: 19, l. 10-16). He also testified Bryson would come by a couple of days here and there, where they would discuss how things were going. (Tr. III:19, l. 20-23)

13. Until Bryson turned 18, the parties disagreed on where Bryson was physically residing. (Ex. 29, FF 4.18). While Charles claimed he gave permission to Bryson to stay with friends, he offered no direct testimony that Bryson actually lived with them. (Tr. I: 25-28;II:38-95;III:18-21, 41-42). Jill claims that Bryson has continually lived in her home since September 8, 2016 and she has been the sole source of support for Bryson. (Tr. III:21-23). Bryson also testified that he continually resided with his mother since September 2016. (Tr. III:27-29). Jill provided documentation from the Social Security Administration, the school district, and the Department of Motor Vehicles that showed Bryson was living at her house. (Ex. 29, FF 4.19)

III. STANDARD OF REVIEW

The reviewing court may reverse the decision of an administrative agency only as authorized by RCW 34.05.570(3). The decision of the administrative agency is deemed prima facie correct and the burden of demonstrating its invalidity is on the party asserting its invalidity. RCW 34.05.570(1)(a); see also *Becker v. Employment Security*, 63 Wn. App. 673, 676, 821 P.2d 81 (1991).

The court reviews questions of law *de novo* by independently determining the applicable law and its meaning, then applying that law to the facts found by the ALJ. *Franklin Cty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982); *Porter v. Dep't. of Retirement Sys.* 100 Wn. App. 898, 903, (2000).

Review of findings of fact are confined to whether they are supported by substantial evidence. RCW 34.05.570(3)(e). There is substantial evidence to support a finding of fact if a reasonable mind could have inferred the existence of the facts from evidence found in the record as a whole. *Olmstead v. Dep't of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)

RAP 2.5(a) is phrased to allow the court the discretion to refuse to hear arguments raised for the first time on appeal... Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires. *State v. Card*, 48 Wn. App. 781, 784 (1987).

IV. SUMMARY OF THE ARGUMENT

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)

As will be shown by the following arguments, this was a mistake in law as the department had clear jurisdiction to issue an NFFR even with a prior order having been made. 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".

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

The department cited in support of its findings RCW 26.21A.120 and RCW 26.27.211. The latter statute, RCW 26.27.211 has no bearing on this case because Jill did not ask the agency to modify legal custody, rightfully claiming that the existence of a prior custody will not automatically preclude the establishment of support obligations. WAC 388-14A-1020. This is

because the Department defines a custodial parent based purely on whom the dependent child resides the majority of the time period for which child support is sought and does not premise these decisions on custody orders. *Id.*

As for RCW 26.21A.120, it has no application in this case either. RCW 26.21A is the uniform interstate family support act which establishes the relationship between a tribunal in this state with respect to a tribunal in another state. RCW 26.21A.120 falls within Article two part 2 of the chapter which is specifically entitled “involving proceedings in two or more states.” In this context, RCW 26.21A.120 involves the exclusive jurisdiction of a tribunal in this state with respect to a tribunal in another state, not with respect to an administrative tribunal in the same state. That relationship is governed by RCW 26.18 which talks about enforcement of child support. RCW 26.18.035 states that nothing in this chapter precludes the attorney general or prosecutors from utilizing other civil remedies provided by law. One of those remedies as pointed out in Conclusion of Law 5.3, is RCW 74.20A.055(1), which conclusion of Law 5.3 stated was correctly initiated.

The fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We determine the intent of the legislature primarily from the statutory language. *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). In the absence of ambiguity, we will give effect to the plain meaning of the statutory language. See *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Further, we avoid an interpretation that renders any of the statutory language superfluous. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Here the statutory language in RCW 74.20A.010 clearly demonstrates that the procedure used in this case, namely RCW 74.20A.055(1) was intended to be in addition to other statutory remedies:

RCW 74.20A.010: Common law and statutory procedures governing the remedies for enforcement of support for financially dependent minor children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency. The increasing workload of courts, prosecuting attorneys, and the attorney general has made such remedies uncertain, slow and inadequate, thereby resulting in a growing burden on the financial resources of the state, which is constrained to provide public assistance grants for basic maintenance requirements when parents fail to meet their primary obligations. The state of Washington, therefore, exercising its police and sovereign power, declares that the common law and statutory remedies pertaining to family desertion and nonsupport of minor dependent children shall be augmented by additional remedies directed to the real and personal property resources of the responsible parents. In order to render resources more immediately available to meet the needs of minor children, it is the legislative intent that the remedies herein provided are in addition to, and not in lieu of, existing law. It is declared to be the public policy of this state that this chapter be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs.

This is in contradiction to the findings of the ALJ who claimed that RCW 74.20A.055 could not be used if any superior court issues a ruling. The intent of RCW 21.21A.120 was to govern relationships between the states and not between the court and an administrative agency. Thus the ALJ was without jurisdiction to deny her a remedy that was allowed under RCW 74.20A.055.

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

Next, the ALJ never made sufficient findings, nor could he, that there was a wrongful deprivation 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.

At issue here are sections (c) and (d). In order for 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.

. 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.

On the other hand, if the court concludes that Bryson tricked his father and was actually living with his mother it would then have had to evaluate whether Charles' response was reasonable. According to the record, Charles would have been notified that Jill was claiming that Bryson was living with his mother since July of 2016 (Hearing Exhibit Page 5, Ex.49.) According to Charles' own testimony, this was when Bryson started telling Charles that he was living with his friends. (Tr. III: 19, l. 1-3). The record then demonstrates that the only effort Charles made to determine whether Bryson was living with his mother was to ask him whether he was living with his friends. Charles apparently made no effort to contact the parents of Bryson's friends to determine if he was in fact living with friends. He made no effort to enforce the \$25 a day fine or seek a jail term that could have forced his son to be returned. Instead he decided to take advantage of the situation by not having to support his son at all. Under these circumstances it cannot be said that Charles made a reasonable effort to regain physical custody of his son as required by WAC 388-14A-3370(3)(d).

V. CONCLUSION

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

Dated this 18th day of May, 2020.

/s/ Jill Fleck

Jill Fleck

JILL FLECK - FILING PRO SE

May 18, 2020 - 7:28 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

The following documents have been uploaded:

- 369927_Briefs_20200518192513D3868025_9229.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Jill Fleck Appeal Div III.pdf

A copy of the uploaded files will be sent to:

- Katie.Christopherson@atg.wa.gov
- Marcie.Bergman@atg.wa.gov
- charlesjFleck@hotmail.com

Comments:

Appellant's Opening Brief

Sender Name: Jill Fleck - Email: jilljfleck@gmail.com

Address:

12919 E. Forrest Ave

Spokane, WA, 99216

Phone: (509) 714-2595

Note: The Filing Id is 20200518192513D3868025