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DIVISION II

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NO.  
43094-1-II

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COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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WASHINGTON STATE DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Appellant,

v.

JAMES HAMILTON,

Respondent.

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BRIEF OF RESPONDENT

---

Kris Zabriskie  
Olson & Zabriskie, Inc.  
104 West Marcy Avenue  
Montesano, WA 98563  
(360) 249-6174

pm 7/23/12

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENT OF ERROR ..... 4

III. STATEMENT OF THE CASE ..... 4

IV. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 10

V. ARGUMENT ..... 16

VI. CONCLUSION ..... 22

**TABLE OF AUTHORITIES**

**Cases**

*Alyska Pipeline Servs. Co. v. Wilderness Soc’y*,  
421 U.S. 240 (1975) . . . . . 20

*Costanich v. Washington State Dept. of Social and Health Services*  
164 Wash.2d 925, 194 P.3d 988 (2008) . . . . . 21

*Eller v. East Sprague Motors & R.V.'s, Inc.*  
159 Wash.App. 80, 244 P.3d 447 (2010) . . . . . 16

*Highland School Dist. No. 203 v. Racy*  
149 Wash. App. 307, 202 P.3d 1024, (2009) . . . . . 20

*Wagner v Foote*  
128 Wn.2d 408 (1996) . . . . . 20, 21

**Statutes**

RCW 26.26.140 . . . . . 10, 11, 13, 16

RCW 26.26 . . . . . 10

RCW 26.09 . . . . . 10

RCW 4.84.185 . . . . . 10, 11, 13, 16, 17, 20

RCW 26.23.035 (2) . . . . . 12

RCW 26.23.035 . . . . . 12, 17

RCW 26.23.035 (2) (a) . . . . . 18

RCW 4.84.350 . . . . . 12, 14

RCW 74.20.055 . . . . . 13

RCW 4.84.150 . . . . . 14

RCW 34.05.001 ..... 19  
RCW 34.05.060 ..... 19  
RCW 34.05.530 ..... 19

## **I. INTRODUCTION**

Appellant states that the sole issue on appeal is whether the Department of Social and Health Services (DSHS), Division of Child Support (DCS) should be required to pay James Hamilton's attorney's fees arising from a child support dispute. The law supports the Respondent's position that the court has authority to order the state to pay his reasonable attorney's fees and that the Pacific County Superior Court correctly did so in this case. The law provides that the court may order that a party's reasonable attorney's fees be paid by the State or its agencies if the State acted in a frivolous way or the State action was advanced without reasonable cause or upon a showing that the State should have realized it was not going to prevail.

The Respondent, acted in accordance with the way society would expect and want a reasonable parent to act in this case. The Department of Social and Health Services, Division of Child Support, henceforth referred to as DCS, acted in a manner that was unreasonable and further, in a way that obstructs a parent's ability to provide a structured environment for their child. DCS caused Mr. Hamilton to incur over \$12,000.00 in attorney's fees for simply trying to do the right thing as a parent. This case began when Mr. Hamilton's daughter left his home in July of 2010. She was sixteen years old and didn't want to abide by house rules so she ran away with a boyfriend. There was a child support order in place at the time she left providing that her mother, Michelle Johansen, pay the father, James Hamilton, \$376.00 per month child support, as he was the residential parent.

After staying at the boyfriend's family's home for a short time, Mr. Hamilton's daughter went to a shelter in Aberdeen. Mr. Hamilton had hoped that she would tire of this nonsense and come home, but the Shoots, who are not blood relatives to Brittney, took her into their residence and applied for public assistance on August 12, 2010. Mr. Shoot is Brittney's mother's brother-in-law.

Contrary to what the State alleges in its introduction and factual statements, Mr. Hamilton did ask that his daughter be returned home. He filed a runaway report and ultimately had to hire counsel to file a Youth at Risk Petition in order to get her home.

Despite the fact that the State was aware that Mr. Hamilton wanted his daughter home and was refusing to support his child in someone else's home or allow her to change schools, the State filed and continued to pursue an administrative action to establish child support against Mr. Hamilton. The law requires that the State obtain a statement from the person claiming public assistance that they have legal custody or permission from the legal custodian in order to collect support from the legal custodian.

Mr. Hamilton did not want to forcibly arrest his daughter in order to bring her home, but he emphatically refused to sign over custody to the Shoots, or allow her to enroll in school elsewhere or agree to payment of support to the Shoots.

The State was on notice that this was a contested custody matter from the numerous reports and records that were provided by the State social workers in this matter. Mr. Hamilton had to expend attorney's fees at the administrative level because the State first made a mistake in relying on a 1996 child support order that had been modified even after Mr.

Hamilton brought it to their attention. It took hiring a lawyer and having a lawyer bring it to the State's attention before the State dismissed that action. Then, there was even more evidence that the State definitely knew that Mr. Hamilton had requested the return of his daughter, they filed a second administrative petition asking to establish a child support obligation against Mr. Hamilton to reimburse the public assistance they had paid to the Shoots. They wrongfully proceeded to withhold child support from him that the mother was paying to him.

Mr. Hamilton filed the action for the return of his daughter in the Pacific County Superior Court and for a modification of child support and for post-secondary support against the mother. Through counsel, he asked repeatedly for the State to drop their administrative proceedings and have this matter handled by the Superior Court. The DCS refused to dismiss this matter until there was a ruling by the Superior Court on the back child support issue, so counsel for Mr. Hamilton had to prepare numerous memorandums, motions for continuance, and have counsel appear at telephonic proceedings while the Superior Court matter proceeded.

In early December 2010, the Pacific County Superior Court ordered that the child return to Mr. Hamilton's home after hearing a Youth at Risk Petition. After she returned to his home, she started following the house rules and graduated from high school. Had the State not vigorously supported an action by a person who was not even a relative to obtain child support from the State in violation of the custodial father's wishes, the child probably would have returned home and gone to school and none of this would have happened. As it was, the Shoots obtained public assistance for the child, and caused him to incur over \$12,000.00 in

attorney's fees to get his child back home and fight the State action for child support.

The State's actions in this case were against public policy and statutory authority allows for attorney's fees where the State acted in a frivolous manner and proceeded without reasonable cause.

## **II. ASSIGNMENT OF ERROR**

The Pacific County Superior Court did not err in entering the January 27, 2012 order awarding attorney's fees and judgment.

Our responses to the State's issues regarding assignment of error are set forth in the argument section of this brief.

## **III. STATEMENT OF THE CASE**

Mr. Hamilton is the Respondent in this appeal. His daughter, Brittney, left his home in July of 2010 when she was 16 years old because she did not want to abide by the house rules so she ran away with a boyfriend. Before she left, there was a child support order in place providing that her mother, Michelle Johansen, pay the father, Mr. Hamilton, \$376.00 per month child support as the residential parent.

After staying at the boyfriend's family's home for a short time, Brittney left for a shelter in Aberdeen. Mr. Hamilton had hoped that she would tire of this nonsense and come home. The Shoots, who are not blood related to Brittney, took her into their residence and applied for public assistance on August 12th, 2010. Mr. Shoot is Brittney's mother's brother-in-law. Mr. Hamilton asked that his daughter be returned home,



he filed a runaway report, and he ultimately had to hire counsel and file a Youth at Risk Petition to get her home. Mr. Shoot refused to allow him to talk to his child. Below is a time line of events:

8-6-10 Mr. Hamilton discusses filing a missing person report with local police.

8-10-10 Brittney emails the Shoots saying that her father won't sign over custody of her to them. See Exhibit A to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

8-12-10 Karen Shoot signs declaration saying she did not wrongfully deprive the legal physical custodian of custody. See Exhibit B to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

8-27-10 State sends first Notice of Support Debt and Demand for Payment to Mr. Hamilton. State later acknowledges that the order they relied on was superseded.

8-13-10 State makes narrative document showing that the social workers confirmed that Karen Shoot was not a blood relative of Brittney, but rather an aunt through marriage. Narrative documents that Father will not sign anything to authorize Karen Shoot to have custody. See Exhibit C to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

8-14-10 Brittney calls her father wanting to enroll in school up north, Mr. Hamilton told her he wanted her home. Sworn testimony of father at Youth at Risk proceeding, December 3, 2010.

9-5-10 Conference Board decision issued by DSHS stating that the State was withdrawing its Notice of Support Debt and Demand for Payment that was served on Mr. Hamilton because it was based on an order that was no longer in effect. See Exhibit D to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

9-6-10 Mr. Hamilton files a missing person report. See Exhibit E to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

10-13-10 Letter comes from State Child Support Officer Blankenfeld noting Mr. Hamilton's objections to child support being assessed against him when he has an order placing the child in his custody.

10-20-10 Mr. Hamilton called to talk to Brittney and Mr. Shoot admitted under oath that he would not allow it. Testimony at Youth at Risk Hearing, December 9, 2010.

10-27-10 Mr. Hamilton's lawyer sends letter to J. Blankenfeld at Division of Child Support stating that Mr. Hamilton had filed run away child report and contesting Ms. Shoot's claim to custody. See Exhibit F to Memorandum Supporting Award of Attorney's Fees CP at 116-214.

10-28-10 Letter from Hamilton's attorney to the Shoots advising that Mr. Hamilton believes they are committing the offense of harboring a run away.

11-18-10 State serves Mr. Hamilton with second Finding of Financial Responsibility. See Exhibit G to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

11-22-10 Hamilton files Youth at Risk Petition.

12-9-10 Court enters findings that the child was absent from the home without parental consent and the child was beyond parental control such that the child's behavior substantially endangered the health and safety and welfare of the child or another person. Order on Youth at Risk. See Exhibit H to Memorandum Supporting Award of Attorney's Fee. CP at 116-214.

1-13-11 Father faxes Petition to modify to DCS and sends documents to Pacific County for filing. Memo came from DCS indicating Ms. Shoot failed to send copy of her filings in the administrative proceeding to counsel for Mr. Hamilton. See Exhibit I to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

1-18-11 Administrative hearing takes place. Mr. Hamilton requests continuance. The Shoots oppose. Continuance granted.

Letters to Prosecutor advising of Administrative support issues and Shoots harboring a runaway. See Exhibit J to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

1-28-11 Pacific County Prosecutor files Notice of Appearance to represent the State of Washington. See Exhibit K to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

3-8-11 Father notes hearing in Superior Court requesting State's motion for back support be denied among other things. See Exhibit L to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

6-27-11 Administrative hearing continued. See Exhibit M to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

Father filed second motion for determination of back support.

7-27-11 Agreed Order of Continuance. See Exhibit N to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

7-29-11 State Prosecutor, David Burke, requests continuance. See Exhibit O to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

9-1-11 Letter to Pacific County Prosecutor with itemization advising amount of legal fees as directed by the Court. See Exhibit P to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

9-6-11 Administrative hearing continued awaiting State Prosecutor's approval of attorney's fees. See Exhibit Q to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

9-16-11 Father notes up hearing to determine attorney's fees. See Exhibit R to Memorandum Supporting Award of Attorney's Fees CP at 116-214.

10-13-11 Administrative hearing reset. See Exhibit S to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

The Shoots and Mr. Hamilton's daughter asked Mr. Hamilton for permission to enroll in school where they lived and he said no. The Shoots allowed her to do it anyway. It is the Respondent's position that the Shoots' actions met the statutory definition for the criminal act of

harboring a runaway. Mr. Hamilton filed a Youth at Risk Petition that was heard in the Pacific County Superior Court in December of 2010. The Superior Court ordered that Brittney return home. She has been in Mr. Hamilton's custody since December 2010. The Court decided that the child would be returned to her father's home as soon as school got out for the winter break so as not to disrupt the Brittney's accumulation of high school credit.

There was a Superior Court order that gave Mr. Hamilton custody & child support dated December 14, 2007. The State withheld the child support that the child's mother was ordered to pay to Mr. Hamilton to reimburse Shoot's public assistance grant for the child. This was in violation of the Superior Court order. The amount that was wrongfully withheld from Mr. Hamilton was \$1,692.00. The Pacific County Superior Court ordered that that amount be awarded to Mr. Hamilton in a judgment against the State of Washington, and that Mr. Hamilton be reimbursed for his attorney's fees in a reasonable amount as he had spent that amount and more trying to recover and to respond to administrative actions the State has taken.

The State filed its administrative action to establish child support against Mr. Hamilton in August 2011. By this time, Mr. Hamilton had reported to the authorities that his daughter was a run away and had gone to the police trying to get assistance in getting her back. He had called his daughter and the Shoots advising them that he wanted her home and that

she did not have his permission to enroll in another school. It is well documented that although Mr. Hamilton did not want to forcibly arrest his daughter to bring her home, he emphatically refused to sign over custody to the Shoots or to agree to payment of any support to the Shoots. See Exhibit A (Brittney's email) to Memorandum Supporting Award of Attorney's Fees. CP at 116-214 & see Exhibit C (State notes verifying father won't sign permission custody) to Memorandum Supporting Award of Attorney's Fees. CP at 116-214. Mr. Hamilton believed that Brittney's runaway adventure would come to a screeching halt before school started. Unfortunately, the Shoots interfered and gave her a place to escape her father's normal household rules.

#### **IV. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**State's Issue 1:** Did the Superior Court err by awarding attorney fees under RCW 26.26.140, which applies only to parentage actions under RCW 26.26 when Hamilton filed a child support modification action under RCW 26.09?

The Superior Court did not err by awarding attorney fees under RCW 26.26.140. RCW 26.26.140 provides that:

The court may order reasonable fees of experts and the child's guardian ad litem, and other costs of the action including blood or genetic test costs, to be paid by the parties in proportions and at times determined by the court. The court may order that all or a portion of a party's reasonable attorney's fees be paid by another party, except that an award of attorney's fees assessed against the state or any of its agencies or representatives shall be under RCW 4.84.185.

RCW 4.84.185 provides that:

in any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185

This matter is a parentage action. Mr. Hamilton was never married to Brittney's mother. It was originally filed as a parentage action under RCW 26.26.140 before this modification of support was filed. Even if the court found that RCW 26.26.140 did not apply, RCW 4.84.185 allows fees in any civil action where the defense was frivolous advanced without reasonable course.

**State's Issue 2:** Under those statutes, was it frivolous for DCS to argue that it was entitled to retain child support paid by Brittney's mother that was owed for time periods Brittney was supported by public assistance, and living with relatives, when Hamilton knew where Brittney was living, and repeatedly told state workers she could remain there?

RCW 4.84.185 allows attorney's fees if the action was frivolous and advanced without reasonable cause. The State did act in a frivolous

manner in pursuing this child support action against Mr. Hamilton. The State first relied upon an old order that had been modified in pursuing an administrative action against him and then pursued an action against him despite the fact that they had knowledge that he was opposing the Shoots' custody of the child. The State also failed to obtain the statutorily required information from the Shoots, the parties applying for public assistance that gives them authority to pursue administrative support against the legal custodian.

RCW 26.23.035 (2) provides that:

the State may only distribute support payment to the payee under a support order or to another person who has lawful physical custody or has custody with the payee's consent, but prior to distributing this money to anyone other than the payee, the Support Registry must obtain a written statement from the child's physical custodian that

1. the custodian has lawful custody of the child or
2. custody with the payee's consent.

Se RCW 26.23.035

DCS may distribute support payments to the payee under the support order or to another person who has lawful physical custody of the child or custody with the payee's consent.

The payee here, Hamilton, did not consent to the Shoots having lawful custody of the child.

**State's Issue 3:** Under those facts, is Hamilton entitled to fees under RCW 4.84.350, which authorized awards in judicial review of agency action, when he bypassed the administrative process by going directly to superior court, and no administrative record was ever filed or reviewed.



Hamilton is entitled to fees under RCW 26.26.140 and RCW 4.84.185 previously cited. RCW 4.84.185 provides that the court may award the attorney's fees in "any civil action" upon findings that the party pursuing the action acted frivolously and advanced without reasonable cause.

**State's Issue 4:** Even if Hamilton's complaint in Superior Court could be construed as a petition for judicial review of administrative action, did the Superior Court have subject matter jurisdiction to award fees when Hamilton failed to invoke the appellate jurisdiction of the Superior Court by serving DSHS and the Shoots?

The Superior Court had subject matter jurisdiction to award Hamilton fees. The State of Washington, Mr. Burke, did appear for the State of Washington DSHS. The Shoots did not have custody of the child under any legal order and did not have standing in this matter. Mr. Burke did not object to subject matter jurisdiction.

**State's Issue 5:** Even if Hamilton had satisfied the statutory requirements necessary to provide the court with subject matter jurisdiction over administrative actions by DSHS, were DCS's administrative actions to assess support substantially justified under RCW 74.20.055 when there was no court order setting Hamilton's support obligation or relieving him of this responsibility?

DCS's administrative actions to assess support were not substantially justified under RCW 74.20.055. The state appears to be

arguing that Mr. Hamilton had an obligation to get an order relieving him of a child support obligation. This argument is not reasonable. He had an order for child support and was trying to enforce it. He has no duty to get an order relieving him of responsibility when he has an enforceable child support order.

**State's Issue 6:** Even if attorney fees could be awarded under RCW 4.84.350, did the Superior Court err by failing to limit the award only to amounts incurred in judicial review of administrative action?

The attorney's fees awarded under RCW 4.84.350 were limited to the fees Mr. Hamilton incurred as a result of the State's actions. These fees included his responses to the administrative actions, his attempt to obtain his normal child support that had already been ordered but that the State was withholding. A declaration and itemized fee statement was filed as Exhibit P to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

**State's Issue 7:** Even if attorney fees could be awarded under RCW 4.84.150 or RCW 4.84.350, did the court calculate them correctly when it (1) continued the same hours twice; (2) included hours for litigation that did not involve DCS; and (3) failed to limit the fees to those authorized by statute?

The attorney's fees that Mr. Hamilton incurred were reasonable and the fees that he billed and requested of the court were related to his actions in responding to the administrative modification petitions of DCS

and the State's continuing actions to prohibit him from obtaining reasonable attorney's fees and in obtaining an order to release his rightful child support from the State.

It is Mr. Hamilton's position that even the Youth at Risk Petition had to be filed partially as a result of the State's actions in supporting the Shoots' action to falsely pursue public assistance claims and a reimbursement action against him. The State is only allowed to distribute support payments to a public assistance custodian if the person has custody with the payee's consent. The State knew this was a contested action and did not have a written statement from the Shoots stating they had consent for custody.

It is true that the Petitioner also filed a motion to obtain post-secondary support from Brittney's mother as part of the Superior Court Action against the State to obtain the child support that was withheld by the State, but that motion took little effort and time compared to the documents and letters that were sent to the State to try to stop the administrative support action against him. The mother hired an attorney and agreed to the post-secondary support. The State prosecutor, David Burke, opposed the Petitioner's motion to dismiss the administrative support action.

Case law has interpreted that a frivolous action by the state may be interpreted to mean more than simply the action in which the state was a direct party.

The term “action,” arguably encompassing a plaintiff's claims against all defendants, presents greater ambiguity where one of several defendants complains about frivolous claims asserted against it. Nonetheless, within the context of the statute and given the purpose of RCW 4.84.185, the only reasonable reading of the statute is that a defendant drawn into an action without reasonable cause and subjected to claims against it that, considered as a whole, are frivolous, may be awarded expenses under RCW 4.84.185, regardless of the merit of the plaintiff's claims against other defendants.

*Eller v. East Sprague Motors & R.V.'s, Inc*, 159 Wash.App. 180, 244 P.3d 447 (2010).

## **V. ARGUMENT**

The Pacific County Superior Court ordered that the State be ordered to pay reasonable attorney's fees to Mr. Hamilton.

RCW 26.26.140 provides that:

the court may order reasonable fee of experts and the child's guardian ad litem, and other cost of the action including blood or genetic test costs, to be paid by the parties in proportions and at times determined by the court. The court may order that all or a portion of a party's reasonable attorney's fees be paid by another party, except that an award of attorney's fees assessed against the state or any of its agencies or representatives shall be under RCW 4.84.185.

RCW 26.26.140

RCW 4.84.185 provides that:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim; third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final

judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185

The State acted in a frivolous manner and therefore the Court is authorized to award attorney's fees in this matter against the State. The State first sent Mr. Hamilton a determination of child support and wrongfully relied on an order that had been modified. Mr. Hamilton told the State's attorney this fact and they failed to dismiss the action. Mr. Hamilton had to hire an attorney to write a letter to the State to get them to get them to recognize this error. See Exhibit F to Memorandum Supporting Award of Attorney's Fees. CP at 116-214. Then the State served him with a second notice of financial responsibility after they had received numerous notifications from Mr. Hamilton's counsel that he was contesting the Shoot's custody and they had acknowledged his legal custody order by dismissing their initial action. See Exhibit G to Memorandum Supporting Award of Attorney's Fees. CP at 116-214.

RCW 26.23.035 provides that:

The State may only distribute support payment to the payee under a support order or to another person who has lawful physical custody or has custody with the payee's consent, but prior to distributing this money to anyone other than the payee, the Support Registry must obtain a written statement from the child's physical custodian that

1. the custodian has lawful custody of the child or
2. custody with the payee's consent.

RCW 26.23.035(2)(a).

In this case, the Division of Support knew that the Shoots did not have lawful custody of the child. Counsel for the Petitioner sent DCS a copy of the last custody order and sent letters to them prior to DCS filing their second notice of intent to establish child support. Counsel for Petitioner sent at least two letters (see Exhibit F to Memorandum Supporting Award of Attorney's Fees. CP at 116-214), to Mr. Blankenfeld from DCS. The State should not be allowed to claim ignorance and simply acknowledge Ms. Shoot's affidavit is a truthful statement about her having lawful custody when they knew that the father had legal custody orders and that the father was refusing to sign documents giving the Shoots custody nor pay child support (State's notes dated August 13, 2010, submitted at the Youth at Risk hearing). If this is not a blatant example of frivolous administrative action it would be hard to conceive of a situation which would be more blatant.

RCW 26.23.035(2)(a).

Court can also award attorney's fee under the Administrative Procedure Act.

The Petitioner is also entitled to request fees under the Administrative Procedure Act which allows review of administrative procedures to provide greater public and legislative access to administrative decision making. The intent of the Act is set forth below:

The legislature intends, by enacting this 1988 Administrative Procedure Act, to clarify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making.

RCW 34.05.001

The Agency has authority to informally settle matters in order to avoid more elaborate proceedings under the Administrative Procedure Act.

Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. This section does not require any party or other person to settle a matter.

RCW 34.05.060

Mr. Hamilton could bring a petition for judicial review under the Administrative Procedures Act as well.

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530

In some circumstances, the states action does not even have to be found to be frivolous to merit and award of attorney's fees to the prevailing party.

RCWA 4.84.185 does not require a party seeking attorney fees to show that the opposing party acted in bad faith. Attorney fees can be awarded simply upon a showing that the opposing should have realized that he or she had no chance of prevailing on the merits.

*Highland School Dist. No. 203 v. Racy*, 149 Wash. App. 307, 202 P.3d 1024, (2009)

The State cites *Alyska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) as authority for the claim that the prevailing party is not entitled to recover fees unless it is statutorily allowed. This case is outdated in that RCW 4.84.185 now expressly allows for recovery of fees.

Although the holding in *Alyska* was that attorney fees must be granted only when expressly and narrowly allowed by statute, the courts stated:

'We do not purport to assess the merits or demerits of the 'American Rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.

*Alyska* at 271

The State also cites *Wagner v Foote*, 128 Wn.2d 408 (1996) to further advance the position that attorney's fees should not be recovered by the prevailing party. *Wagner* is distinguishable because it discussed the



error of granting fees for expert witnesses, not the award of attorney's fees.

The state also argues that because the hearing of the action was de novo at the Superior Court, it is not an appeal of an agency decision. This argument is not successful in *Costanich v. Washington State Dept. of Social and Health Services*, 164 Wash.2d 925, 194 P.3d 988 (2008)

During oral argument, the Department argued our review is not included in the statutory language, which deems the attorney fee award applies to "review of an agency action" and because our review was conducted under the attorney fee statute only, Costanich should not receive attorney fees here. However, our review is necessitated only because of the initial agency action; the attorney fees in dispute are inseparable from that review. Often, a review has many interlinked pieces and an agency action may implicate possible remedies under multiple statutes. Each statute is encompassed in the review of the agency action; our review is only one part of the underlying dispute between the Department and Costanich. This does not bring the review outside the scope of the EAJA. Awarding Costanich attorney fees for our review is consistent with the statute's purpose to afford Costanich "a greater opportunity to defend [herself] from inappropriate state agency actions and to protect [her] rights." Laws of 1995, ch. 403, § 901. A denial of attorney fees to Costanich at this level would undermine the core purpose of the EAJA.

*Costanich* at 933

The public policy question that this case raises for the Courts is this:

Where a parent is willing to take a child home if the child abides by his rules but the child takes the position that she chooses to run away, do we want to encourage a policy whereby strangers can step in and take the child in and make the biological parent pay for the child even when the

child will not abide by normal family rules? Doesn't this policy encourage the child to act out, run away with a boyfriend when they are 16 and in this case, even get pregnant? Is that the message we want to send to our youth and hold society to? Shouldn't the burden be on the stranger who is asserting custody to show legal custody before the State grants them a judgment against the parent. A copy of the petitioner's itemized attorney's fees was attached as Exhibit P to Memorandum Supporting Award of Attorney's Fees. CP at 116-214. Petitioner is respectfully asking that the Court recognize that the fees were attributable to the State's frivolous administrative actions.

## **VI. CONCLUSION**

The Court was well aware of the effort that Mr. Hamilton had to go through to get his daughter returned to him when it ordered reasonable attorney's fees against the State. Mr. Hamilton had already expended attorney's fees at the administrative level because of the State's mistake in relying on the superseded support order, and because he had to respond to a second administrative petition served on him by the State on November 18th, 2010, after they were aware of the father's request that the child be returned home and his notification of the police and the authorities.

The Superior Court's decision should be upheld. Mr. Hamilton


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should be awarded his reasonable attorney's fees & costs, plus reasonable attorney's fees for having to respond to this appeal.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of July, 2012.

OLSON & ZABRISKIE, INC.  
Attorneys for Respondent


By:  \_\_\_\_\_  
KRIS ZABRISKIE, WSBA #17938

**PROOF OF SERVICE OF BRIEF OF RESPONDENT**

The undersigned, under penalty of perjury under the laws of the State of Washington, declares: I am regularly employed by the law firm of Olson & Zabriskie, Inc. On July 23, 2012, I duly served Lianne S. Malloy, Assistant Attorney General, Social & Health Services Division, attorney for Appellant, by placing a true and correct copy of the Brief of Respondent in the United States Postal Service, proper postage affixed thereto, to:

Lianne S. Malloy  
Assistant Attorney General  
Social & Health Services Division  
P.O. Box 40124  
Olympia, WA 98504-0124

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COURT OF APPEALS  
DIVISION II  
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JULIE BURKE