

NO. 43094-1-II

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

WASHINGTON STATE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES,

Appellant,

v.

JAMES HAMILTON,

Respondent.

APPELLANT'S REPLY BRIEF

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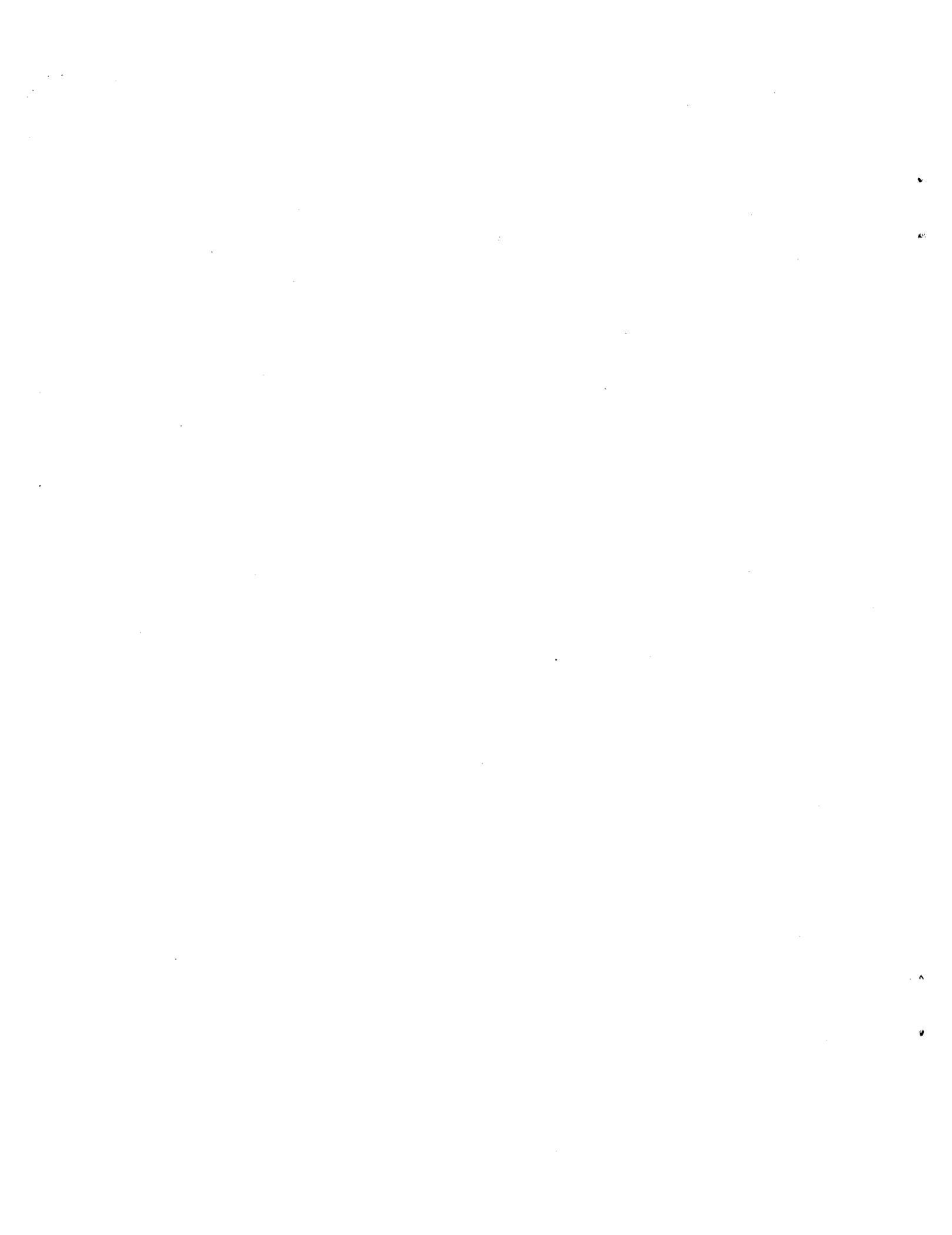


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I. INTRODUCTION

The Washington State Department of Social and Health Services, Division of Child Support (DCS) is not required to pay James Hamilton's attorney's fees under RCW 4.84.185 or RCW 4.84.350. Hamilton's attorney's fees arose from a child support dispute that started when his teenage daughter, B.H., ran away to live with relatives (the Shoots) and was supported by public assistance during her absence. In order to defend the trial court's erroneous awarding of attorney's fees, Hamilton makes the unsupported assumption that a custodian must have *legal* custody of the child in order to receive child support. However, legal custody does not automatically entitle a parent to child support and does not insulate a parent from owing child support.

DCS did not present a frivolous defense under RCW 4.84.185. Under the plain language of RCW 26.23.035(2), it was rational for DCS to retain B.H.'s mother's child support payments as reimbursement for public assistance provided for B.H.'s care—given that Hamilton consented to B.H.'s new living arrangement. The decision was also consistent with the policy that wherever possible, parents, rather than the taxpayers, assume financial responsibility for their children.

Similarly, DCS's administrative actions to require Hamilton to pay child support while his daughter was out of his home were substantially justified. DCS had administrative authority under RCW 74.20A.055 to assess a child support obligation. Moreover, Hamilton concedes that he failed to comply with the procedural requirements necessary to invoke the

superior court's subject matter jurisdiction under the Administrative Procedure Act. Because the superior court did not review any agency action, Hamilton cannot rely on RCW 4.84.350 for attorney's fees. Finally, Hamilton's purported policy arguments for attorney's fees cannot, by themselves, support an award. Absent a legal basis for attorney's fees, the award was improper as a matter of law.

II. ARGUMENT

A. **It Was Not Frivolous For DCS To Retain Child Support Paid By B.H.'s Mother When B.H. Was Not Living With Hamilton And Was Supported By Taxpayers Through Public Assistance**

Hamilton contends that he is entitled to attorney's fees under RCW 4.84.185 because it was frivolous for DCS to retain support paid by B.H.'s mother for times when B.H. was living with relatives and supported by public assistance. *See* Response Br. at 11-12, 17-18. But litigation is only frivolous under the statute when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235, 1241 (1997).¹

Hamilton does not provide authority showing that it was irrational for DCS to assert a right to the child support funds. Instead, he misreads RCW 26.23.035 when he argues that DCS was not entitled to keep the

¹ To the extent that Hamilton asserts RCW 4.84.185 does not necessitate a showing of frivolousness, Resp. Br. at 20, Hamilton confuses frivolousness with bad faith. While the Court of Appeals has recognized that bad faith is not a requirement to impose fees under RCW 4.84.185, the *Racy* court analyzed whether fees should be awarded by evaluating whether the claim was frivolous (advanced without reasonable cause). *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009).

support payments. Hamilton argues that RCW 26.23.035(2) requires the legal custodian to consent to another party having *legal* custody of the child, and that he never consented to the Shoots having legal custody of B.H. *See* Response Br. at 17-18. But contrary to Hamilton's construction of RCW 26.23.035, the statute does not condition the right to receive child support on "legal custody."

Per RCW 26.23.035(2), DCS is authorized to distribute support payments to "another person who has lawful physical custody of the child *or* custody with the payee's consent." RCW 26.23.035(2) (emphasis added).² The physical custodian is required to provide a written statement, under penalty of perjury, that the physical custodian has lawful custody of the child or custody with the payee's consent. RCW 26.23.035(2) (a). Thus, a child's physical custodian is not required to have legal custody to receive child support. The use of the term "or" evinces legislative intent to allow the physical custodian to receive child support by either: (1) having lawful custody or (2) having custody with the payee's consent. *See Childers v. Childers*, 89 Wn. 2d 592, 595, 575 P.2d 201, 204 (1978) (When the term "or" is used, it is presumed to be used as a disjunctive conjunction, unless legislative intent is plainly contrary.) *accord Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6 P.3d 583, 590 (2000) *aff'd*, 144 Wn. 2d 907, 32 P.3d 250 (2001).

² RCW 26.23.035(2) reads in pertinent part as follows: "The Division of Child Support 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 may file an application for an adjudicative proceeding to challenge the distribution to such other person."

Here, there is no dispute that B.H. lived with the Shoots for the four months that DCS retained child support paid by B.H.'s mother because B.H. was being supported by public assistance. Response Br. at 4, 9. There is substantial evidence that, while Hamilton did not agree to change legal custody of B.H. to the Shoots, he agreed she could live with them.

B.H. told the Shoots that her dad said she could live with them, so long as they were willing to support her. CP at 128. Also Karen Shoot reported that Hamilton gave her verbal permission to have physical custody of B.H., and, per the requirements of RCW 26.23.035(2)(a), declared under penalty of perjury that she did not wrongfully deprive the legal physical custodian of legal custody. CP at 130, 236. Shoot's declaration satisfies the statutory requirement for a written statement since it is substantially the same as saying she had Hamilton's permission. *See* CP at 130. Moreover, Child Protective Services case records document that Hamilton repeatedly informed the Department of Social and Health Services (DSHS) that B.H. could live with the Shoots, and at times he stated that he did not even want her to return home. CP at 236, 240-41. At the very least there was a significant, rational factual dispute as to whether Hamilton had granted his consent, making DCS's argument not frivolous. *Tiger Oil Corp.*, 88 Wn. App. at 938.

Moreover, it is neither frivolous, nor irrational, for DCS to litigate unsettled questions of law. *See Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 225, 829 P.2d 1099, 1107 (1992). There are no appellate

decisions construing when RCW 26.23.035(2) authorizes DCS to distribute child support payments to someone who is not a payee under the order. At a minimum, Hamilton and DCS dispute entitlement to the child support payments paid by B.H.'s mother, a dispute that presents debatable issues of law.

Finally, public policy underlying child support legislation informs application of the statute and supports the DCS's position. Construing RCW 26.23.035 to permit DCS to distribute child support to the child's physical custodian, provided that the legal custodian consents to the living arrangement, fulfills the important public policy objective of ensuring child support is used for the child and not to unjustly enrich the legal custodian. *See Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176, 178 (1984) (Child support is meant to assist in meeting the current expenses of the child); *Ditmar v. Ditmar*, 48 Wn.2d 373, 293 P.2d 759 (1956) (A child's custodian receives support money as a trustee and not in his or her own right).

In addition, if public assistance is being expended for a child, as happened here, it also fulfills the express public policy of this state that parents and not taxpayers be primarily responsible for their children's financial support. *See* RCW 74.20.010 (public assistance funds should be conserved when possible if parents have resources available to meet their children's needs); RCW 74.20A.010 (children shall be maintained from parental resources to relieve the financial burden borne by taxpayers). *See also State v. Booth*, 15 Wn. App. 804, 809, 551 P.2d 1403 (1976) (The

primary obligation of support is on parents who bring a child into the world rather than the taxpayers of the state.)

In sum, the trial court improperly applied the law to the facts when it concluded that DCS's argument that it was entitled to retain child support paid by B.H.'s mother was frivolous. DCS asserts a valid interpretation of RCW 26.23.035 when it contends that child support can be distributed to a physical custodian, without legal custody, so long as the legal custodian consents to the changed living arrangement. This statutory construction is based on strong public policies that protect children and make parents primarily financially responsible for their support. Therefore, this Court should reverse the trial court's award of attorney's fees to the extent it is based on RCW 4.84.185.

B. Attorney's Fees Were Not Warranted Under RCW 4.84.350 Or RCW 4.84.185 Because There Was No Judicial Review Of DCS Child Support Enforcement Efforts; And In Any Event, DCS's Child Support Enforcement Efforts Were Substantially Justified

1. Because Hamilton Never Sought Judicial Review Of An Agency Action, He Failed To Invoke The Subject Matter Jurisdiction Of The Superior Court Under The APA

Next, Hamilton argues that he is entitled to attorney's fees under RCW 4.84.185 and RCW 4.84.350 for having to defend against alleged frivolous administrative proceedings to establish and/or enforce his child support obligation for B.H. Response Br. at 17-18. Hamilton, however, concedes that he never sought judicial review or perfected a judicial

appeal under the Administrative Procedure Act (APA). *Id.* at 12-13. Therefore, Hamilton's superior court action does not come within the purview of the APA, and attorney's fees are unavailable under RCW 4.84.350 or RCW 4.84.185.

Instead of filing an administrative appeal, Hamilton elected to bypass the administrative hearing scheduled to establish his child support obligation by proceeding de novo in superior court.³ Because the superior court did not engage in judicial review of agency action, attorney's fees under RCW 4.84.350 or RCW 4.84.185 are unavailable. *See* Opening Br. at 28-31.

Hamilton offers no rebuttal to the DCS argument that: (1) he failed to file a petition for judicial review of agency action; (2) no administrative record was ever filed or reviewed by the superior court; (3) no final agency decision was entered or appealed; and (4) the primary purpose of Hamilton's superior court action was to increase and prolong Baldwin's child support obligation, which was a matter that did not involve the State. *See* Response Br. at 12, 18-21; Appellant's Opening Br. at 28-31.

Further, there is no dispute that Hamilton failed to perfect his alleged administrative appeal by filing and serving it within 30 days as required by statute. *See* RCW 34.05.542(2) (petition for review must be filed and served on all the parties within 30 days); *Union Bay Preservation*

³ Hamilton never even requested an administrative hearing to contest the distribution of child support payments made by B.H.'s mother (Michelle Baldwin—now Johansen) to the State. *See* RCW 26.23.035(2); WAC 388-14A-5050. Thus, the superior court litigation that occurred was not under the Administrative Procedure Act.

Coalition v. Cosmos Dev. & Admin Corp., 127 Wn.2d 614, 617-18, 902 P.2d 1247 (1995) (superior court does not obtain subject matter jurisdiction if administrative appeal is not filed and served on all the parties within 30 days); *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004) (a party must satisfy all statutory procedural requirements to invoke the superior court's subject matter jurisdiction when seeking judicial review of an administrative decision). *See also* Opening Br. at 31-34. Hamilton also concedes that he failed to serve DSHS and the Shoots with his alleged administrative appeal, even though both were parties to the administrative hearing. Response Br. at 13, 18-31. Further, he does not dispute that he failed to serve the Office of the Attorney General as required by RCW 34.05.542(2). *Id.*

Hamilton ignores these fatal deficiencies to invoking the superior court's subject matter jurisdiction under the APA and instead asserts that he served the Pacific County Prosecuting Attorney, who appeared and failed to raise a subject matter jurisdiction objection. Respondent's Br. at 13. But as explained in DCS's opening brief, subject matter jurisdiction cannot be waived and can be raised for the first time on appeal. *See Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cnty*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). *See also* Opening Br. at 33.

Moreover, the Prosecuting Attorney cannot be deemed to have waived subject matter jurisdiction when there was nothing to put the Prosecuting Attorney on notice that an administrative appeal had been

filed. Hamilton did not allege he filed an administrative appeal until all child support issues had been fully resolved and the Prosecuting Attorney was no longer active in the case. Hamilton first claimed he filed an administrative appeal after the Attorney General's Office appeared to represent DCS on the attorney's fees issue. CP at 230, SCP at 365-66. Even then, Hamilton did not request attorney's fees under RCW 4.84.350 in his trial court memorandum, but waited until the day of oral argument to do so. CP at 124-25; SCP at 502-04.

Hamilton rebuts the foregoing procedural roadblocks by relying on *Costanich v. DSHS*, 164 Wn.2d 925, 194 P.3d 988 (2008) to argue that RCW 4.84.350 authorizes attorney's fees awards in de novo superior court actions. Respondent's Br. at 21. This assertion mischaracterizes the *Costanich* Court's holding.

In *Costanich*, a foster mother sought judicial review of an administrative ruling revoking her foster care license. The superior court restored Costanich's foster care license and also awarded her attorney's fees under RCW 4.84.350. DSHS appealed to Division II, which conducted its review by applying the standards of the APA directly to the records before the agency. *See Costanich v. DSHS*, 138 Wn. App. 547, 156 P.3d 232 (2007), rev'd 164 Wn.2d 925, 194 P.3d 988 (2008). Division II affirmed the superior court on the merits but reversed the attorney's fees award. *Id.* Unlike this case, there was never any dispute that the matter was an administrative appeal.

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Costanich appealed to the Washington Supreme Court solely on the attorney's fees issue. Thus, the question before the Supreme Court was whether attorney's fees are available under RCW 4.84.350 when the merits of the underlying dispute have been fully adjudicated and only the issue of attorney's fees is appealed. The Supreme Court concluded that the attorney's fees dispute could not be separated from the underlying merits of the administrative appeal and ruled attorney's fees could be awarded at each level of review, including the Supreme Court. *Costanich*, 164 Wn.2d at 933-34. *Costanich* does not stand for the proposition that a de novo action in superior court can be deemed to be judicial review of agency action under the APA, especially where none of the APA's strict procedural requirements have been met.

Hamilton's failure to seek judicial review of an administrative decision setting his child support obligation or to comply with statutory requirements for doing so under the APA precludes an award of attorney's fees under RCW 4.84.150 or RCW 4.84.350. Thus, it was a misapplication of the law for the trial court to award any attorney's fees based on these statutes that pertain to representing Hamilton against administrative actions taken by DCS. The trial court should be reversed on this basis.

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2. Even If This Court Concludes That RCW 4.84.185 Or 4.84.350 Somehow Apply, DCS's Administrative Action To Obtain Support From Hamilton Was Rational And Substantially Justified

Even if RCW 4.84.350 and RCW 4.84.185 were to apply, DCS's administrative action was substantially justified, and not frivolous, such that attorney's fees are not available. "Substantially justified" means justified to a degree that would satisfy a reasonable person." *Puget Sound Harvesters Assoc. v. Wash. State Dep't of Fish and Wildlife*, 157 Wn. App. 935, 239 P.3d 1140 (2010) citing *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). This standard requires the State to show that agency action has a reasonable basis in law and fact. *Id.* If DCS shows that its position was substantially justified, it follows that its defense was not frivolous. Litigation is not frivolous unless it is irrational. *Goldmark v. McKenna*, 172 Wn.2d 568, 583, 259 P.3d 1095 (2011). Hamilton claims that, because he has legal custody of B.H., he is insulated from all financial responsibility for her care during times she was living with the Shoots. Response Br. at 13-14, 17-18. But Hamilton fails to cite any legal authority that supports this position, nor can he, because it is contrary to state law.

The parental obligation to provide a child with the necessities of life is so basic, it has been described as "a principle of natural law." *In re Hudson*, 13 Wn.2d 673, 683, 126 P.2d 765 (1942). See also *State v. Wood*, 89 Wn.2d 97, 100, 59 P.2d 1148 (1977) overruled on other grounds by *Sw. Wn. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce*

County, 100 Wn.2d 109, 667 P.2d 1092 (1983) (“A parent’s obligation for the care and support of his or her child is a basic tenet recognized in this state without reference to any particular statute.”) Here, B.H. qualified for and received temporary assistance to needy families (TANF).⁴ CP at 251. It is the public policy of this state that B.H.’s parents be primarily responsible for her support, rather than the general taxpayer. *See* RCW 74.20.010 (parents and not taxpayers have primary financial responsibility for children); *accord* RCW 74.20A.010; *Booth*, 15 Wn. App. at 809.

Therefore, DCS had a statutory obligation to take appropriate action to establish and/or enforce Hamilton’s child support obligation. *See* RCW 74.20.040(1) (DSHS must take appropriate action to enforce parental support obligations whenever public assistance is expended for a child). This statutory authority is to be liberally construed to ensure that parents are required to assume financial responsibility for their children. RCW 74.20.010.

Initially, DCS attempted to enforce Hamilton’s court-ordered child support obligation. Once Hamilton’s counsel informed DCS that the court order it was seeking to enforce had been superseded, DCS promptly stopped enforcement action on the order. CP at 135, 140, 233. Hamilton

⁴ *See* RCW 74.08.025 (public assistance may be awarded to any applicant who is in need); RCW 74.12.030 (an applicant for TANF must be a needy child who is a resident of the state of Washington); RCW 74.12.037 (Department authorized to adopt eligibility requirements when child lives with a non-parental caregiver); WAC 388-418-0005(3); WAC 388-450-0162(3) (establishes TANF eligibility income standards when child lives with non parental relative or unrelated caregiver).

contends it should have been unnecessary for his attorney to become involved as he had previously told DCS his court order had been superseded. Response Br. at 17. But there is no evidence in the record substantiating this claim. To the contrary, Hamilton's support enforcement officer declared that Hamilton never advised her that the court order DCS was relying on was no longer effective. CP at 233. Rather, Hamilton falsely complained that B.H. had lived with him in August, a claim he later admitted was untrue. *Id.*; Response Br. at 4-5.

After DCS realized that Hamilton did not have a court-ordered child support obligation, it took action to establish Hamilton's obligation administratively. CP at 142-53. Hamilton claims it was frivolous for DCS to continue administrative efforts to assess his child support obligation once he provided documentation proving he had legal custody. Response Br. at 17. But a parent cannot evade his financial obligation to support his child merely because he has legal custody. As explained in DCS's opening brief, DCS is authorized to establish child support administratively when "there is no [court] order that establishes the responsible parent's support obligation or specifically relieves the responsible parent of a support obligation" RCW 74.20A.055(1). A physical custodian's failure to obtain legal custody does not insulate a parent from being required to pay child support. *Powers v. State Dep't of Social and Health Servs.*, 32 Wn. App. 310, 316, 648 P.2d 439 (1982); *Brown v. DSHS*, 136 Wn. App. 895, 896, 151 P.3d 235 (2007). See also Opening Br. at 7. Hamilton cites no opposing authority.

Per RCW 74.20.065, the legal custodian can defend against owing child support by showing that he or she “has been wrongfully deprived of physical custody.” This statute authorizes DCS to “excuse the custodian” from support payments if “the legal custodian has been wrongly deprived of physical custody.” *Id.* The elements of “wrongful deprivation” are established by DSHS rule at WAC 388-14A-3370. The rule provides that a legal custodian will be relieved from having to pay child support if he can show that:

(a) A court of competent jurisdiction of any state has entered an order giving legal and physical custody of the child to the NCP [noncustodial parent];

(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.

WAC 388-14A-3370(3).

Although there is no question that Hamilton had legal custody of B.H., it was appropriate for DSHS to schedule an administrative hearing to determine if all the elements of Hamilton’s defense of wrongful deprivation had been satisfied. There was substantial evidence that B.H. was not enticed to leave Hamilton’s home and that he assented to her changed living arrangement. CP at 128, 236, 240-43. The parties agree

that Hamilton did not report his daughter as a runaway until September 6, 2010, even though she left his home in late July. *See* Response Br. at 6.⁵ Hamilton also repeatedly informed DSHS workers that B.H. could live with the Shoots and continued to do so even after he reported his daughter as a runaway. CP at 236, 240-43. Hamilton eventually filed an at-risk youth action in late November, but only after DCS served him notice that it was taking administrative action to establish his support obligation. CP at 243; Response Br. at 6-7. Therefore, there was a question of fact as to whether B.H. was taken or enticed from Hamilton's custody, or whether he subsequently assented to B.H. living with the Shoots. These questions could be appropriately resolved through DCS's administrative process.

Moreover, there were three parties to the administrative hearing to establish Hamilton's child support obligation: the State, the Shoots, and Mr. Hamilton. CP at 214. Even if DCS were to agree that Hamilton satisfied the elements of wrongful deprivation, which it does not, the Shoots vigorously contested Hamilton's claim of wrongful deprivation and had a right to present their case. CP at 233, 236-47. WAC 388-14A-3105-15, WAC 388-14A-3130-40.

Hamilton complains that he was required to expend significant resources defending himself in administrative proceedings. Response Br. at 17, 22; CP at 125. Yet, he fails to explain why he did not obtain a

⁵ Hamilton alleges that he first discussed filing a missing person's report with the local police on August 6, 2010. Response Br. at 5. There is no evidence in the record supporting this allegation.

superior court order relieving him from having a child support obligation until October 28, 2011, even though he had been served with notice his obligation would be established administratively almost one year earlier. CP at 111, 142. Hamilton's administrative notice advised him he could proceed in court instead and that he would need a court order to stop the administrative action. CP at 149. Hamilton's administrative legal expenses continued to mount only because of his prolonged delay in obtaining a court order. His delay cannot be attributed to the State, when the prosecuting attorney never opposed the entry of a court order that relieved Hamilton from paying child support. VRP at 2 (August 19, 2011).

Hamilton also complains that the Prosecuting Attorney opposed his motion to dismiss the administrative action. Response Br. at 15. It is not clear what Hamilton is referring to, as he never filed a motion in superior court to dismiss the administrative proceedings, and the Prosecuting Attorney did not represent DCS in the administrative hearing (DCS was represented by one of its employees). CP at 250. Regardless, there is substantial evidence that Hamilton was not unlawfully deprived of custody. Furthermore, DCS's representative lacked the ability to unilaterally dismiss the administrative hearing because the Shoots as physical custodians were also parties. WAC 388-14A-3105-135⁶.

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⁶ The term custodial parent also includes physical custodians. WAC 388-14A-3115.

In summary, even if this Court were to somehow determine that RCW 4.84.185 or RCW 4.84.350 apply, DCS's administrative efforts to collect child support from Hamilton were not only rational under the law and facts, they were substantially justified. An attorney's fees award under either statute was an improper application of the law to the facts. DCS's actions are supported by statute, case law, and public policy that place primary responsibility for the support of a child on parents rather than taxpayers. Hamilton has cited no legal authority supporting his position that legal custody absolved him from his financial responsibility to support his daughter when she received public assistance.

C. Public Policy Does Not Support Hamilton's Claim For Attorney's Fees

To the extent that Hamilton attempts to ground the awarded attorney's fees in equity, rather than in statute or contract, he has not shown an established equitable ground that overcomes the Legislature's sound determinations regarding parental child support obligations. *See Nicuum v. Enquist*, __ Wn.2d __, __ P.3d __ (*slip op.* Sept. 20, 2012) (Washington follows the American rule, which precludes an award of attorney's fees absent specific statutory authority, contractual provision, or recognized ground in equity.) *Accord Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996) *Building Indus. Ass'n of Wash v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009). *See also* Opening Br. At 18-19.

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Hamilton claims that this case raises the public policy question of whether the legal custodian should be required to pay child support when his child runs away from home because she does not want to follow the rules. Response Br. at 21-22. He suggests that requiring the legal custodian to pay child support in this circumstance encourages youthful misbehavior. *Id.* But questions of public policy should be addressed to the legislature rather than the court. In *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn. 2d 494, 506, 198 P.3d 1021, 1027 (2009), the court opined that it is the legislature's role is to set policy and enact laws, and the judicial branch violates the separation of powers doctrine "when it assumes tasks that are more properly accomplished by other branches." *Accord Gronquist v. Dep't of Corrections*, 159 Wn. App. 576, 587, 247 P.3d 436 (2011). *See also Am Jur. 2nd Constitutional Law* § 284 (2012).

Even if this Court were to consider Hamilton's public policy argument, it should be rejected. As explained in the preceding section, the Washington State Legislature has already answered the question of whether a legal custodian should pay child support. It has enacted statutes that authorize DCS to establish child support against a legal custodian, so long as the legal custodian has not been wrongfully deprived of physical custody. *See* RCW 74.20A.055; RCW 74.20.065. It is the express public policy of this state that a legal custodian can be required to provide financial support when he consents to his child living with a relative. *Id.*

Further, Hamilton's assertion that the State's actions delayed B.H.'s return to his household is dubious when it was his decision to let his daughter remain with the Shoots. The record shows that B.H. left home because of a stormy relationship with her stepmother. C.P. at 238-39, 244-46. The record is replete with evidence that Hamilton consented to B.H. living with the Shoots, and at times did not want her to return home. C.P. at 128, 236-46. Hamilton was adamantly opposed to paying child support and expressed this sentiment numerous times. C.P. at 128, 236, 240, 243-44, 246. Hamilton changed his mind about whether B.H. could stay with the Shoots only after learning he would be required to assist with her financial support. *Id.* The record therefore shows a clear factual dispute existed, and Hamilton's public policy concerns cannot overcome the legal limitations of the statutory bases for his attorney's fees claims or that it was reasonable for DCS to seek resolution of the factual dispute.

Hamilton also asserts that DCS should pay his attorney's fees because he acted the way society expects and wants a parent to act. Response Br. at 1. But he fails to cite any legislative policy that authorizes an award of attorney's fees based on how well a parent conforms to societal expectations. *Id.* Further, the matter before the court was child support, not the propriety of Hamilton's behavior toward his daughter. The quality of Hamilton's parenting was not under review, and the trial court made no findings about what society expected or how well Hamilton fulfilled these expectations.

Not only has Hamilton failed to provide statutory authority for an attorney's fees award based on public policy, but he relies on testimony at the at-risk youth proceeding, which is outside the record. The only portion of the at-risk youth action that is part of this record is the order entered on December 10, 2010. CP at 155-58. Walter Shoot's alleged testimony at the at-risk youth proceeding (*See* Response Br. at 5, 6) cannot be considered. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (reviewing court will not consider matters outside trial court record). In short, public policy does not authorize awarding Hamilton attorney's fees against DCS, especially in the face of the plain language of the statutes he relies upon and the facts of this case, neither of which support an award.

D. Even If Hamilton Is Awarded Attorney's Fees Under RCW 4.84.185 Or RCW 4.84.350, The Attorney's fees Award Was Calculated Incorrectly And Should Be Reduced

Hamilton is not entitled to an attorney's fees award under RCW 4.84.185 or RCW 4.84.350. But even if Hamilton were to be awarded fees under either statute, the \$12,000 attorney's fees award was improperly calculated. Hamilton's own calculations provided to the trial court show his \$12,000 award should be reduced by almost half.

As discussed in the State's opening brief, Hamilton's attorney's fees award was overstated by \$6,451.86 because it includes \$3,753.56 which was assessed against DCS twice, and it includes \$2,698.30 that Hamilton's counsel admitted did not relate to Hamilton's litigation against

DCS. *See* Opening Br. at 38-40; SCP at 503. These two amounts (\$3,753.56 + \$2,698.30) combine to total the amount of over-assessed attorney's fees (\$6,451.86). Hence, even if Hamilton were to prevail under either attorney's fees statute, his attorney's fees award should be limited to \$6,316.06 (\$3,753.56 for child support litigation plus \$2,562.50 for attorney's fees litigation).

Moreover, attorney's fees awards under RCW 4.84.350 are limited to those incurred during *judicial* review. *See Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99-100, 135 P.3d 913 (2006) (attorney's fees awards under RCW 4.84.350 are unavailable for administrative proceedings). *See* Opening Br. at 37-38. Hamilton provides no contrary authority supporting an attorney's fees award for administrative proceedings. Thus, the \$6,316.06 amount Hamilton would have been awarded based on a corrected attorney's fees calculation must be further reduced by eliminating attorney's fees attributable to any administrative level representation.

Hamilton's assertion that he devoted little effort to the child support modification action because he and Baldwin eventually were able to reach an agreement is belied by the court filings. *See* Response Br. at 15. Once attorney's fees litigation is excluded, the vast bulk of the pleadings filed by Hamilton in superior court relate to increasing and prolonging Baldwin's support obligation. At a minimum, this Court should remand this case for a proper accounting so the correct figure can be ascertained.

Hamilton counters, however, that the actions of DCS caused him to incur over \$12,000 in attorney's fees and made it necessary for him to file the at-risk youth action to regain physical custody of B.H. Response Br. at 1, 15. But the trial court expressly declined to award fees for the at-risk youth action, which was litigated under a separate cause number and to which DCS was not a party. VRP at 27; CP at 155. Therefore, Hamilton did not even include these fees in the calculations he presented to the court. CP at 125, 195, 197-204.

Hamilton's failure to cross-appeal precludes him from seeking to have this Court include attorney's fees that were not awarded below. In *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 646-47, 151 P.3d 211 (2007), the court declined to hear an attorney's fees dispute raised by the respondent since it was not an issue designated for review by the appellant. And in *Hoel v. Rose*, 125 Wn.App. 14, 105 P.3d 395 (2004), the respondent's failure to cross-appeal prevented the court from reviewing whether the award of attorney's fees was inadequate. *See also* Karl B. Tegland, Douglas J. Ende, 15A Wash. Prac., Handbook Civil Procedure § 85.16 (2011-12). Therefore, this Court should decline to hear Hamilton's claim that RCW 4.84.150 and RCW 4.84.350 authorize an attorney's fees award for all costs allegedly incurred as a result of State actions. *See* Response Br. at 15.

Even if this Court were to reach the issue of whether Hamilton is entitled to attorney's fees incurred in the at-risk youth action, Hamilton has failed to provide sound legal authority supporting an attorney's fees

award. Hamilton relies only on *Eller v. East Sprague Motors & R.V.'s, Inc.* 159 Wn. App. 180, 194, 244 P.3d 447 (2010) to argue that attorney's fees can be awarded against DCS, even though DCS was not a party in the at-risk youth action. Response Br. at 15-16.

In *Eller*, the court reviewed a case with multiple defendants; one of those defendants claimed the action against it was frivolous. The court concluded that RCW 4.84.185 required it to examine whether the plaintiff's claims against that individual defendant, considered as a whole, were frivolous, and not whether the plaintiff's claims against all the defendants, as a whole, had merit. *Eller*, 159 Wn. App. at 194. The *Eller* Court did not consider the issue Hamilton presents, which is whether attorney's fees can be awarded against DCS in an action where DCS is not a party. Further, no appeal has been filed in the at-risk youth action, and that case is not in front of this Court. Any attorney's fees award should be limited to litigation currently before this Court, in which DCS was directly involved.

E. Hamilton Has Failed To Satisfy RAP 18.1(b) And Should Be Denied Attorney's Fees Incurred On Appeal

Hamilton's request for attorney's fees in this forum should be denied because he has failed to comply with RAP 18.1(b). This rule mandates that a separate section of the brief be devoted to attorney's fees and that it contain both argument and citation to authority. See *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998); *Philips Building Co. v. An*, 81 Wn.App. 696, 704-05, 915 P.2d

1146 (1996). The rule requires more than a bald request for attorney's fees. *Wilson Court Ltd. Partnership*, 134 Wn.2d at 711 n.4; *Whidbey General Hosp. v. State*, 143 Wn.App. 620, 637, 180 P.3d 796 (2008); *Deveny v. Hadaller*, 139 Wn.App. 605, 623, 161 P.3d 1059 (2007). Hamilton's single sentence request for attorney's fees at the very end of his brief fails to satisfy either requirement. Response Br. at 22-23. Therefore, Hamilton's request for attorney's fees for appellate level litigation should be denied.

III. CONCLUSION

The superior court is award of attorney's fees should be reversed in its entirety. Alternatively, attorney's fees should be recalculated after this Court clarifies the basis for and scope of the award.

RESPECTFULLY SUBMITTED this 24 day of September, 2012.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 24 day of September, 2012 at Olympia, WA.



Loetta Ibabao

WASHINGTON STATE ATTORNEY GENERAL

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